# THE LAW OF EVIDENCE.

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# Principles and Practice

OF THE

# LAW OF EVIDENCE.

BY

W. BLAKE ODGERS,
M.A., LL.D., K.C.,

DIRECTOR OF LEGAL STUDIES AT THE INNS OF COURT;
GRESHAM PROFESSOR OF LAW, AND RECORDER
OF PLYMOUTH.

WITH

## CANADIAN NOTES:

BY

THE HON. MR. JUSTICE RUSSELL.

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# PREFACE.

THE time had come for the well-known work, Powell on Evidence, on which this volume is founded, to be entirely re-cast and re-written. It has, accordingly, been thoroughly revised and brought up to date. It has been re-arranged under the four main heads of Relevancy, Proof, Cogency, and Procedure; the greater portion of the Books on Relevancy and Cogency is entirely new matter. The principles and rules of the Law of Evidence under each head are stated in large type; the decisions which illustrate these principles and rules follow immediately in smaller type —a method which it is hoped the reader will find both clear and convenient. More than eight hundred and fifty new cases have been added to those cited in the last edition: every decision of any importance on the subject reported since the last edition was published down to and including March 1st, 1910, has, it is believed, been referred to in this volume. In the Appendix are collected the principal Statutes and Rules, which affect the Law of Evidence.

I wish to acknowledge the valuable assistance

which I have received from Mr. Ernest Cockle, of Gray's Inn, and Mr. Roland Burrows, M.A., LL.D., of the Inner Temple, in the preparation of this edition and the perusal of the proof sheets.

A new and enlarged Index concludes the volume. It has been considerably enlarged and carefully revised throughout.

W. B. O.

15, OLD SQUARE,
LINCOLN'S INN, W.C.,
*Dec. 6th*, 1910.

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THE

# Principles and Practice

OF THE

# LAW OF EVIDENCE.

## INTRODUCTION.

### GENERAL PRINCIPLES OF EVIDENCE.

THE term "evidence," in its widest sense, includes everything which makes a fact evident. But lawyers use the word in a more restricted sense. In their phraseology it is employed to denote, and to denote only, all legal means, exclusive of mere argument, which tend to prove or disprove any alleged matter of fact, the existence of which is submitted to judicial investigation.

Such legal means do not necessarily include many means of arriving at the truth which would naturally present themselves to the mind of a layman. The law selects, sometimes rather arbitrarily, certain matters which it accepts as *relevant*, that is, legally admissible in evidence; it rejects many others which an ordinary citizen might deem material. In a law court the "best" evidence only is admissible.

Thus a copy of a document will not be accepted if the original is procurable; an eye-witness, if still alive, must himself be called before the Court, not a person to whom the eye-witness told what he saw. Even then it will often be difficult, owing to the absence of eye-witnesses, or conflicting statements made by eye-witnesses, or loss of original documents, to arrive satisfactorily at the truth. Owing to the exigencies of public and private business, there can seldom be absolute certainty as to the facts. Hence Courts of justice, like ordinary individuals, must act upon probabilities.

The general principles of the law of evidence are the same in civil and in criminal proceedings. At a trial the burden of proof lies generally on the plaintiff or prosecutor, who therefore begins; it is his duty to establish the case against the defendant or the accused, and this he must do by evidence. As soon as he tenders any matter in evidence, two questions at once arise: Is the matter which is sought to be proved admissible in evidence at all, and, if so, is the proof offered to the Court legitimate evidence of that fact? A third question will subsequently arise: What is the value or cogency of the evidence when admitted?

In court one constantly hears the objection taken, "That is not evidence," which may mean one or other of two very different things, either—

(i.) "That matter is not admissible in evidence at all; it is not relevant to the issue under trial;" or

(ii.) "That is not the proper way of proving a relevant fact."

Shortly, then, the substantive law of evidence may be divided into three parts:—

RELEVANCY, which defines what facts a party will be allowed to prove at the trial of any legal proceeding.

PROOF, which tells him in what way he will be allowed to prove an admissible statement or fact.

COGENCY, which determines what value the tribunal should attach to such statement or fact when admitted and proved.

And we must further describe the PROCEDURE of our Courts, which assists litigants to ascertain the truth.

We will deal with these four heads separately.

## I. RELEVANCY.

First, then, we have to ascertain the rules which determine what facts a party will be allowed to prove in any given legal proceeding.

In the first place, this will be determined by the pleadings, if there are any; for the pleadings define what matters the parties wish to have decided by the judge or jury. These matters are called "the issues." The Court will not enter upon any matters of controversy which are not set out or necessarily implied in the pleadings.

Again, it needs no evidence on any matter as to which the contention of one party has been admitted by the other.

As soon as the matters in dispute are thus ascertained, the rule is that every fact which directly tends to prove or disprove any of them is relevant

and admissible. So, within certain limits, is any fact which indirectly and circumstantially tends to prove or disprove any fact in issue.

In a civil action any fact which tends to affect the amount of damages is also relevant and admissible. In a criminal proceeding, facts which tend to reduce the amount of the sentence may be given in evidence before verdict; facts which tend to aggravate the sentence, such as a previous conviction, can, as a rule, only be proved after the jury has found the prisoner guilty. To these *prima facie* rules there are, however, many exceptions.

We may lay down here five elementary propositions:—

(i.) A witness must only state facts; his mere personal opinion is not evidence. Hence what anybody thinks about the matter in issue is as a rule inadmissible, except where special experience or special training is necessary to enable the tribunal to form a true opinion; in such cases expert witnesses are permitted to state their views (*a*).

The object and effect of the rule which excludes evidence of opinion is to keep the witness, as much as possible, from trespassing on the functions of either judge or jury, whose province it is to draw all inferences from the facts.

In some cases, however, the Court is compelled to obtain the assistance of expert evidence; and there are many cases also in which witnesses who are not experts are allowed to state their belief as to the identity of persons, or as to their state and condition at a material time, or

(*a*) See Book I., Chap. II.

as to the condition, value, or identity of property, provided such belief is based on what the witness has himself observed. Thus, he may state that a person appeared to him drunk or sober, agitated or confused, or may give his opinion as to the age of a child whom he has seen.

(ii.) What third persons said or did behind the back of a party is as a rule inadmissible against that party. It would clearly be unfair to admit such evidence, as the party had no opportunity of contradicting the third person's statement or of protesting against his act. In some cases, however, it is necessary to admit such evidence, as leading up to or explaining the matter in issue. And evidence of what a third person did in the absence of a party will be more freely admitted than evidence of what he said or wrote (*b*).

If A. is indicted for the murder or manslaughter of B. any statement as to the cause of his death made by B. when he was in settled hopeless expectation of death will be admissible against A., although he was not present when B. made the statement (*c*). So a deposition duly taken under the provisions of the statute 30 & 31 Vict. c. 35, s. 6, is, in certain cases, admissible against a prisoner who was not present when it was made, provided he had had served upon him reasonable notice in writing of the intention to take such deposition and had full opportunity of being present and cross-examining the deponent (*cc*).

Again, anything said or done by a third person at the moment that a material act was done, or so shortly before or so shortly after it that it may fairly be said to form part of the same transaction, is admissible even though it

(*b*) See Book I., Chap. III.
(*c*) See *post*, p. 81.
(*cc*) See *post*, p. 88.

was not said or done in the hearing or presence of the party against whom it is tendered in evidence (*d*). Such matters are said to be part of the *res gestæ*.

(iii.) What third persons said or did in the presence or hearing of any party is only admissible in evidence against such party so far as it throws light upon that party's subsequent conduct, or tends in any other way to explain his statements or acts. Such evidence is of little or no value in itself, but it may occasion or elicit something from the party to which the Court will attach importance (*e*).

(iv.) Anything that either party said in the transaction in issue is admissible against that party, but not as a rule in his favour. Anything that either party did in the transaction in issue is admissible both for and against him (*f*).

(v.) Anything which either party said or did in some other transaction is as a rule inadmissible, unless it leads up to or explains the transaction in issue. But whenever the state of mind in which a party did an act is material, anything which that party said or did in some other transaction, previous or subsequent, may become admissible, if it throws light on the state of his mind when he did the act (*g*).

## II. PROOF.

As soon as a party has ascertained what facts he may endeavour to establish in any given

(*d*) See *post*, pp. 62, 68.
(*e*) See Book I., Chap. IV.
(*f*) See Book I., Chap. V.
(*g*) See Book I., Chap. VI.

litigation, the next question which naturally arises in his mind is this: By what method or methods shall I be allowed to prove these relevant facts? There are a few facts which can only be proved in a law court in one way; most facts may legitimately be proved in more ways than one. The litigant naturally selects whichever way is cheapest and easiest, unless indeed he feels that a more expensive or less obvious way would be more cogent. Let us, then, consider the different ways in which a party is allowed to prove at the trial the facts upon which he relies.

In the first place, every relevant fact can be, and indeed must be, proved by either direct or circumstantial evidence, or by both.

Direct evidence is that which goes straight to establish the *factum probandum*, or fact in issue.

Circumstantial evidence (sometimes called indirect or inferential evidence) is that which establishes certain minor facts (*facta probantia*), the effect of which is to establish the fact in issue.

When direct evidence is given in court, the only question is, "Can I believe the witness?"

When circumstantial evidence is given there are two questions:—

(i.) Can I believe the witness? and

(ii.) What ought I to infer from his evidence? Does his evidence, taken in conjunction with that of other witnesses, establish the fact in issue?

Circumstantial evidence must fit in together; it must raise a violent presumption of the existence of the fact in issue; and then it will be as cogent as direct evidence.

Both direct and circumstantial evidence are equally admissible. Neither is technically "better" than the other; neither excludes the other.

If a prisoner is charged with murdering X. by shooting him in a wood, it is possible that the evidence may be forthcoming of someone who was in the wood at the time and saw the murder committed. This is direct evidence. Most frequently, however, in such a case the prosecution has to rely on circumstantial evidence. Thus A. will say that the prisoner and X. quarrelled and were on bad terms; B. that the prisoner borrowed his gun on the day before the murder; C. that he saw the prisoner, carrying a gun, enter the wood at 7.50 on the morning of the murder, at 7.55 he saw X. enter it, and at 8 he heard a shot fired: he had noticed no one else about at the time; D. will depose that at 8.15 he saw the prisoner, without a gun, running away on the other side of the wood, looking agitated; E. that he found the body of X. lying in the wood with a gunshot wound in his head, and in the bushes ten yards away a gun, which B. swears is his; F., a gunsmith, states his opinion that the gun was recently discharged, and fired a bullet exactly similar to that found in the skull of the deceased; and G., a surgeon, pronounces that the wound was the cause of death. None of these witnesses has given direct evidence of the fact in issue—that is, Did the prisoner murder X.? The jury has to consider whether all these circumstances taken together establish the guilt of the prisoner. If there was any eye-witness of the deed, he can of course be called in addition to A. and the others who give only circumstantial evidence.

Whether it is sought to prove a relevant fact by either direct or circumstantial evidence, the evidence must be that of

(i.) Witnesses (oral evidence),

(ii.) Documents (documentary evidence), or

(iii.) Things (real evidence).

The testimony of a witness is wholly independent of the assistance of any other evidence, documentary or real, although, in certain cases, he may refer to documents to refresh his memory. But both documentary and real evidence generally require some oral evidence to make them admissible.

Again, if we look at the nature of such oral, documentary, or real evidence, we shall find that each piece of it must be either—

(i.) Primary, or

(ii.) Secondary,

that is, either the original witness, document, or thing is produced in court (this is primary evidence), or only some report, copy, or model (this is secondary evidence).

Primary evidence is that which its own production shows to be the best obtainable, *e.g.*, the original of a material document or the direct evidence of an eye-witness, who can say, "I saw it with my own eyes."

Secondary evidence is such evidence as from its production implies the existence of evidence superior to itself, such as one man's recollection of what another said or a copy of a material document. In other words, secondary evidence does not pretend to be original; it confesses that it is not the best evidence conceivable, but in certain circumstances it is admitted either for the sake of convenience, or for reasons of public policy, or because it is the best evidence obtainable.

Secondary or second-hand evidence is generally inadmissible, and it is always inadmissible until the absence of primary evidence has been explained to the satisfaction of the Court. Thus, if an action be brought on a contract which is contained in a writing, the writing itself is primary evidence and should be produced to show the terms of the contract. As long as it exists and can be obtained by reasonable diligence, no other written or oral evidence of its contents will be received; but if it be destroyed, or if it cannot be found after proper search, or if an adverse party, holding it, refuses to produce it after due notice, then either written or oral evidence may be given by anyone who is acquainted with the contents of the written instrument.

It will be observed that all these divisions are cross-divisions. There can be primary oral evidence (*e.g.*, the evidence given on oath of a bystander who saw what happened) and secondary oral evidence (*e.g.*, the deposition or official report of what that bystander said when he was examined before the magistrates—which is admissible only if at the date of the trial he be dead, insane, too ill to travel, or kept out of the way by the opposite party). Again, there may be primary documentary evidence (*e.g.*, the original letter itself) and secondary documentary evidence (*e.g.*, a copy of that letter, which will become admissible if the other party who holds the original refuses, after due notice, to produce it at the trial). A house which is alleged to be out of repair is the best primary real evidence of its own condition; a model of the house would be secondary real evidence. Any of these may be tendered in evidence, either as direct evidence of the fact in issue, or merely to prove some

evidentiary fact from which the truth of the fact in issue may be circumstantially inferred.

Note, also, that the presence of direct evidence does not exclude circumstantial, nor will circumstantial evidence exclude direct. The presence of oral evidence will not exclude either documentary or real, nor will the existence of real evidence exclude either oral or documentary. But the existence of documentary evidence does in some cases exclude oral; and the existence of primary evidence does, as a general rule, exclude secondary. Secondary oral evidence, which is usually called "hearsay," will not, as a rule, be admitted even where there is no primary oral evidence available. Secondary documentary evidence, on the other hand, is generally admitted, if the corresponding primary evidence cannot be produced (*h*).

The law, however, does not require that all facts should be strictly proved, or proved up to the hilt. The burden of proof is often lightened by—

(a) Presumptions,

(b) Admissions, and

(c) Estoppels.

(a) *Presumptions.*—On proof of certain facts the law will sometimes infer the existence of another fact, which then need not be expressly proved. This is called a presumption. It is rebuttable; that is, the other side may try to disprove it. But if they cannot do this, the law treats the fact presumed as proved. The presumption is not conclusive, but it shifts the burden of proof. No man

(*h*) See Book II., Chaps. VIII. and IX.

need either plead or prove that which the law already presumes in his favour (*i*). A presumption must be made: it is made by the Court; and it stands good till the contrary is proved (*k*).

(b) *Admissions* (*l*) are of two kinds: formal, which are made intentionally with a view to the litigation; informal, which are made without reference to any litigation.

In civil actions, statements made "without prejudice" cannot be given in evidence without the express consent of the person against whom they are tendered. In criminal proceedings, an admission is generally called a "confession," and if a confession is made under the inducement of any threat or promise from a person in authority, it is inadmissible.

(c) *Estoppels.*—In some cases the law will not allow a litigant to plead, or attempt to prove at the trial, allegations which are directly contrary to that which has already been decided against him, or to that which he has himself represented to be the fact. He is said to be estopped (*m*) from pleading or proving such matters.

An estoppel is not a cause of action. It simply prevents a party from raising a particular contention in an action when to raise it would be inequitable or contrary to the policy of the law.

A presumption one may always try to rebut; an admission one will often be allowed to withdraw.

(*i*) Order XIX., r. 25.

(*k*) Note that throughout this volume the word "presumption" is used to indicate what other writers have termed "a rebuttable presumption of law." And see Book II., Chap. XI.

(*l*) See Book II., Chap. XII.

(*m*) See Book II., Chap. XIII.

But an estoppel is an absolute bar to the raising of a particular contention; and it binds not only the original parties, but also all persons who claim under them.

## III. COGENCY.

A certain number of relevant facts have been brought before the Court and established by legitimate evidence. The question now arises, What do these facts prove? What weight should be attached to them? What is the proper inference which the tribunal should draw from them?

The answer to this question is afforded by that branch of the law of evidence which we call "cogency."

If the facts so proved appear to be conflicting, the Court must either reconcile them or decide between them. And then the question arises, as it does when the facts stand uncontradicted, Are they sufficient for the Court to act upon? Do they establish either the affirmative or the negative of the question in issue?

This brings us at once to another question: What is the standard of proof required? What degree of certainty (or rather of probability) must be reached to enable the Court to finally decide the rights of the parties before it? Civil cases may be decided on a preponderance of probability, but in criminal cases there must exist no "reasonable doubt" (*n*).

(*n*) See Book III., "Cogency."

Absolute certainty is unattainable in any of the affairs of daily life. Hence Courts of justice, like individuals, are compelled to be satisfied with that inferior kind of certainty which is often miscalled "moral."

Proof can only be attained by means of evidence, but it is not always easy to say how much evidence or what kind of evidence will amount to proof. Hence we must now discuss the relative weight which should be given to each kind of evidence mentioned in the foregoing section (*o*).

The question often arises, Which is the more cogent, direct or circumstantial evidence? The direct evidence of a bystander who saw the thing done with his own eyes is *primâ facie* the more reliable, unless there is any reason for doubting either his veracity or his powers of observation. Yet a jury is often loath to convict a prisoner on the uncorroborated evidence of one man. On the other hand, when circumstantial evidence fits in together without a flaw it is as cogent as direct evidence.

A good witness must have—

(a) The opportunity to observe;

(b) The faculty of observation;

(c) Judgment to discriminate facts from inferences;

(d) A good memory;

(e) Power to express clearly and accurately what he does remember.

The best mode of testing the veracity of a witness is to watch his demeanour in the box. If he

(*o*) See Book III., Chap. I.

gives prompt, frank answers to all questions, whichever way they tell, he is probably speaking the truth. But if he is sometimes precipitate in answering questions which tell in favour of one side, and at other times affects not to hear or not to understand questions, so as to gain time to prepare his answer, if he is now eager, now affecting indifference, now evasive, now exaggerating, then he is probably lying. As a rule, a witness of truth is equally ready to answer and equally copious in his answers on all points ; he will give details freely on matters which he knows are within the knowledge of the other side, and as to which therefore any inaccuracy would be at once seized upon.

There are certain cases in which the law requires a witness to be corroborated, and in which therefore the case will fail if no corroboration be forthcoming. There are other cases in which it is the duty of the judge to warn the jury that it is very unsafe for them to act upon the uncorroborated testimony of a single witness. In the latter class of cases, it is still open to the jury, if they think fit, to disregard the warning of the learned judge, and find the facts according to their honest belief, but a verdict given in such circumstances is not viewed with favour by the Court (*p*). Corroboration need not always be afforded by the evidence of a second witness. Thus on a charge of perjury a document written by the prisoner or an admission made by him may be sufficient corroboration.

(*p*) *R.* v. *Tate*, [1908] 2 K. B. 680.

When both documentary and oral evidence are before the Court, the question frequently arises, Which is entitled to more weight? A judge as a rule regards a document as of higher authority than the treacherous memory of man. A jury likes to see the witnesses. But both would agree that documentary evidence is of great use in checking and explaining oral. It is extremely valuable when the oral evidence is conflicting. Great weight should be attached to the correspondence that passed before the quarrel began. The parties at that time did not contemplate the possibility of litigation; and what they then wrote stands and cannot be altered. *Litera scripta manet.*

Again, documentary evidence is useful to refresh the memory of a witness. Documents not otherwise admissible may be used for this purpose. But they must be documents which were written or dictated by that witness shortly after the event which they record, or which, if written by someone else, he read and approved shortly after the event.

It is the jury which decides what is the true meaning and effect of the evidence of a witness. But it is for the judge, except in cases of libel, to decide what is the construction that should be put on a document, though it is for the jury to decide whether any particular word contained in it is used in a special or unusual meaning in the trade or locality, and, if so, what that meaning is. The judge always starts with the assumption that the writer meant what he wrote. He will give to ordinary English words their ordinary English meaning, unless there is evidence to go to the jury

that the words in this particular case bear some unusual and peculiar meaning. He will give to technical words their technical meaning. To a word which has both a strict and proper meaning, and also a loose popular meaning (*e.g.*, "lands," which may include leaseholds; "children," which may include illegitimate children), he will give the strict and proper meaning, unless it be clear that the writer used the word in its loose popular meaning. Above all, he will construe the document *as a whole*, not divorcing isolated passages from their context, but giving due weight to every part.

Real evidence carries great weight as soon as it has been properly proved what it is and where it was found. But there is danger attaching to the production in court of a piece of such evidence without proper explanation; it is apt to make too great an impression on the minds of inexperienced jurymen. As soon as a bullet and a gun are produced, they jump to the conclusion that the accused is the man who committed the murder, before the gun has been proved to be his or the bullet has been shown to be the cause of death. We have an instance of this in the well-known stanza in Macaulay's poem "Horatius"—

> "They made a molten statue,
> And set it up on high;
> And there it stands unto this day
> To witness if I lie."

Such a statue is no proof that the incident which it portrays ever actually occurred; it is, at best, some evidence that there was a tradition to this effect

current in the locality at the time when the statue was erected.

Primary evidence is of course of far greater value than secondary. Oral evidence of the contents of documents which are lost or destroyed, or not produced after due notice, is, it is true, admitted. But this kind of secondary evidence cannot well be tested, and therefore, unless it is very clear, it cannot be relied upon, whereas a copy of a document, if properly proved, is almost as good as the original document itself, except for the fact that there may be some erasures or other peculiarities in the original document which may not appear in the copy.

The evidence given in our law courts, be it oral or documentary, direct or circumstantial, is seldom, if ever, conclusive; it creates, as a rule, only a probability more or less strong; it falls short of positive proof. This is inevitable. The press of business, the shortness of the time available, the fallibility of human memory, all combine to prevent the tribunal from arriving at any conclusion with absolute certainty. Yet when the acumen of trained lawyers is combined with the common sense of practical jurymen, and the whole investigation is presided over and regulated by a calm and impartial judge, there rarely occurs a miscarriage of justice.

## IV. Procedure.

The procedure of our Courts affords material assistance to a party in preparing his case as soon as legal proceedings are started. But there is very little

machinery provided by our law for procuring or recording evidence before the proceedings are commenced. It would be well if more could be done in this direction. A prosecutor or plaintiff has often to start somewhat in the dark. He must act on suspicion; he has to rely on hearsay evidence. It is necessary, however, to discriminate between criminal and civil proceedings.

(a) *Criminal Proceedings.*

It is in theory the duty of every good citizen to assist the police and the prosecutor by giving them all relevant information and calling their attention to any fact which may throw light on the identity of the criminal or the manner in which the crime was committed. To suppress such information in the case of treason or felony is technically a crime, which is termed "misprision;" but prosecutions for misprision are extremely rare, if not obsolete. As a matter of fact, however, in serious criminal cases information is readily afforded to the police. In this way sufficient materials are as a rule obtained to justify a complaint or information being laid against a definite person.

Criminal proceedings are usually commenced with a Summons, bidding the accused appear in court before the magistrates on a certain day; in some cases a Warrant will be issued at once for his arrest. There are many cases, too, in which a policeman may arrest without a warrant a person reasonably suspected of crime. It is the duty of the policeman as soon as he has effected an arrest to caution his prisoner that anything which he may say will be

written down and used in evidence against him at his trial. But the policeman ought not to cross-examine the prisoner with the object of inducing him to confess his guilt (*q*). Nevertheless the fact that a prisoner's statement is made by him in reply to a question put to him by a police constable after he is in custody does not of itself render the statement inadmissible in evidence (*r*).

The prisoner may give evidence, if he chooses, both before the magistrates and on the subsequent trial, if any. But he cannot be compelled to do so, if unwilling. Nor, as a rule, can his wife be compelled to give evidence without his consent.

The magistrate can compel anyone likely to give material evidence to attend before him at the preliminary hearing of a criminal charge and state all that he knows. If the magistrate deems this statement of any value, he can bind him over to attend at the Assizes or Quarter Sessions and repeat his evidence there at the trial before the jury. The rules of evidence are the same at both stages of the proceedings.

So much for witnesses. As to documents and things, the police have no general power to search for evidence in the house either of the accused or of a third person. No doubt, on making an arrest, the police are entitled to search for and seize any document or thing which was used in the perpetration of the crime, such as a pistol or knife, or which throws any light on the identity of the criminal, such as a bloodstained shirt with his name on it.

(*q*) *R.* v. *Knight*, 20 Cox, C. C. 711.
(*r*) *R.* v. *Best*, [1909] 1 K. B. 692.

So in a case of forgery the police would be justified in impounding the forged document. But they have no general power to examine or seize the books, papers or other property of the accused. Not even a Secretary of State can issue a general warrant authorising the police to seize all the papers of a person who is suspected of high treason or sedition (*s*).

A wider power, however, exists in the case of stolen property. A justice of the peace may make an order authorising certain persons to enter a building to search for stolen goods, and to seize them if found. Such an order is called a search warrant; it must name or describe the persons authorised to search, the building to be searched, and the goods for which search is to be made. At common law a search warrant could only be issued in cases of larceny; but now by s. 103 of the Larceny Act, 1861 (*t*), the power is extended to cases in which any property has been obtained by embezzlement, robbery, false pretences or any other crime punishable under that Act. Moreover, in certain cases specified in s. 16 of the Prevention of Crimes Act, 1871 (*u*), a chief officer of police may give authority in writing to any police constable to enter any house, shop, yard or other premises, and to search for and seize any property which he believes to have been stolen.

In every other case search without a warrant is illegal.

(*s*) *Wilkes* v. *Wood*, 19 How. St. Tr. 1153; *Entick* v. *Carrington*, 19 How. St. Tr. 1030.
(*t*) 24 & 25 Vict. c. 96.
(*u*) 34 & 35 Vict. c. 112.

Simple cases are summarily disposed of by the magistrates on the return of the summons. Grave criminal charges they send to the Assizes or Quarter Sessions to be tried by a jury. In this case the prosecution states in detail the precise charge against the prisoner in a pleading which is called an indictment. An indictment may be defined as an accusation in writing presented by a grand jury charging a definite person with the commission of a definite crime. It is the duty of the grand jury not to try the case, but to see if there is a case fit to be tried in open court. The proceedings before them are not controlled by the ordinary rules of evidence. If the grand jury comes to a conclusion that the circumstances are such that the accused ought to be put upon his trial, they return the indictment into court marked "True bill." The prisoner is then arraigned (*r*). In some few cases the prisoner must state his defence in a written plea, but as a rule he merely pleads "Guilty" or "Not guilty" orally from the dock. If he pleads "Guilty," the judge proceeds to pass sentence. If, however, he pleads "Not guilty," then a petty jury is sworn to try him on the charge set out in the indictment.

The prosecuting counsel in his opening speech states the facts on which the prosecution relies, and then calls evidence in support of his case. The witnesses are examined, cross-examined and some-

(*r*) A prisoner is not always tried on an indictment; he may also be arraigned on a criminal information, or a coroner's inquisition. But it is impossible in this Introduction to set out the details of criminal procedure; we can only give the barest outline of the practice in the most ordinary cases.

times re-examined. The prisoner may give evidence and call witnesses or not as he pleases. If he elects to give evidence, he is liable to be cross-examined. The examination and cross-examination of witnesses in open court is undoubtedly the best method of arriving at the truth.

At the end of the closing speeches of counsel, the judge directs the jury as to all points of law, but leaves them to decide all questions of fact. It is his duty to declare the common law and to construe the written law. He must state to the jury in general terms the law applicable to the case before them, accompanying this statement by any observations or explanations he deems desirable. He also advises them as to the bearing and value of the evidence brought forward by either side. But it is the jury, and not the judge, who must decide the case. It is they who have to say, on the facts proved before them and on the law as laid down by the judge, whether the prisoner is "guilty" or "not guilty" of the crime with which he stands charged. If the jury find him guilty, he will be sentenced to fine, imprisonment, penal servitude or death, according to the nature of his offence.

### (b) *Civil Proceedings.*

Civil proceedings commence with a writ, summons or plaint, which is served on the defendant, so that he may know that he is being sued. This document also tells him in general terms the nature of the claim which is made against him. But it is usually followed by particulars or some other pleading

which gives him the details of the plaintiff's cause of action. The defendant must then, as a rule—in the High Court of Justice, at all events (*w*)—state in a second pleading what his defence is. It is from these pleadings that we learn what really are the matters in controversy between the parties. As soon as the pleadings are closed these are called "the matters in issue." An issue is a definite proposition of law or fact, asserted by one party and denied by the other, which both agree to be the point which they wish to have decided in the action (*x*).

In cases of any intricacy, the Court will often assist each party to obtain valuable information from his opponent before the trial. Thus it will, whenever it is fair to do so, allow one party to administer questions in writing (called interrogatories) to the other, and compel the latter to answer them on oath within ten days. So in a proper case the Court will compel either party to disclose all material documents in his possession or power, and to permit his opponent to inspect and take copies of them. But such steps will only be taken when the Court considers them necessary either for disposing fairly of the action or for saving costs (*y*). A party can also obtain leave to inspect any property, real or personal, in the possession of his opponent, if it is the subject-matter of the action (*z*).

(*w*) In most cases in the County Court the defendant need not disclose what his case is until the trial.
(*x*) Odgers on Pleading and Practice, 6th ed., p. 71.
(*y*) Order XXXI., rr. 2 and 12.
(*z*) Order L., r. 3.

There is no duty whatever on third persons to assist either party to an action by tendering information or producing to him documents or things before the trial (*a*). But any third person within jurisdiction may be compelled by the Court, on payment of his reasonable expenses, to attend at the trial and give evidence under a *subpœna ad testificandum*, and also to bring with him any document specified in a formal notice previously served on him, which is called a *subpœna duces tecum*.

Civil proceedings are tried by a judge either with or without a jury. In most cases either party, if he applies in time, can obtain a jury, special or common. But no trial with a jury takes place in the Chancery Division of the High Court.

The trial generally begins with the opening speech of the plaintiff's counsel, in which he states in chronological order the facts on which the plaintiff relies. He then calls his witnesses, who are cross-examined by the counsel for the defendant. At the close of this evidence, if the defendant calls no witnesses, the plaintiff's counsel sums up his case. If, however, the defendant wishes to call witnesses, his counsel now addresses the Court and examines his witnesses, who are in turn cross-examined by the counsel for the plaintiff. The general rules of evidence in civil proceedings are substantially the same as in criminal prosecutions. Objections have frequently to be taken by counsel to questions put by his opponent or to something which the witness is endeavouring

(*a*) See, however, the Bankers' Books Evidence Act, 1879 (42 Vict. c. 11).

to say. An objection to the admissibility of any evidence should be taken as soon as it is tendered, otherwise it will be too late. All such objections will at once be decided by the judge. The counsel for the defendant then sums up his case, and counsel for the plaintiff replies.

Now is the time for the learned judge to sum up the case to the jury, if there be one. If there be conflicting evidence on which the jury might reasonably find a verdict for either party, the judge must leave the issue to them; he cannot decide it himself. He may, if he thinks fit, state to them his opinion on the matter. But the jury is not bound to adopt his lordship's view as to any question of fact. They are bound to accept the law as laid down by him; but it is for them to determine the issues of fact according to their own opinion of the evidence given before them, even though it may be contrary to the opinion which the judge has just expressed.

The jury then gives its verdict, or if the trial is before a judge alone, he announces his decision. Judgment is entered accordingly; and this the successful party may enforce by execution against the property of his opponent.

The law of evidence is part of the *lex fori;* that is to say, it is determined by the law of the place in which the tribunal is situated. To quote the words of Lord BROUGHAM,—

"The law of evidence is the *lex fori* which governs the Courts. Whether a witness is competent or not, whether a certain matter requires to be proved by writing or not, whether certain evidence proves a certain fact or not, that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the Court sits to enforce it" (*b*).

(*b*) *Bain* v. *Whitehaven Rail. Co.*, 3 H. L. Cas. 1.

The technical rules of evidence can (when all parties are competent) be dispensed with by consent (*c*). But this does not apply in criminal proceedings, and it may be doubted whether it applies to actions *in rem*.

By s. 3 of the Judicature Act, 1894 (*d*), power was given to the Rule Committee of the Judges of the High Court to make rules for regulating the means by which particular facts may be proved, and the mode in which evidence thereof may be given (a) on applications in matters relating to the distribution of any fund or property, and (b) on any application upon summons for directions pursuant to the rules. The only rule which has been made under this power is Rule 7 of Order XXX., which is that on the hearing of a summons for directions "the Court or a judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries, or otherwise as the Court or judge may direct."

This rule, which applies to the Chancery Division as well as to the King's Bench Division, embodies the only existing power enabling judges of the High Court to dispense with the technical rules of evidence otherwise than by consent (*e*). It is unfortunate that so little use has been made of the valuable power conferred on the Rule Committee by the Act of 1894. When the Commercial Court was established it was at first supposed that this Court would be allowed greater laxity in construing the ordinary rules of evidence; but in *Baerlein* v. *Chartered Mercantile Bank*, LINDLEY, L.J., said (*e*): "The Commercial Court has no more power to dispense with strict evidence, or to depart from the administration of the law in the ordinary way than any other judge or Court. The

(*c*) *Baerlein* v. *Chartered Mercantile Bank*, [1895] 2 Ch. 488.
(*d*) 57 & 58 Vict. c. 16.
(*e*) [1895] 2 Ch. at p. 491.

power to dispense with strict evidence depends entirely upon the Judicature Act of 1894."

Courts-martial must adopt the same rules of evidence as those followed in the Courts of ordinary criminal jurisdiction in England; and therefore no witness before a court-martial can be compelled to answer any question or produce any document which he could not be required to answer or produce in similar proceedings in a criminal Court (*f*). A revising barrister is also bound to follow the legal rules as to the admissibility of evidence (*g*). So is an arbitrator (*h*).

In this Introduction we have endeavoured to state the general principles which underlie the law of evidence without any reference to technical details. Such general principles must be stated broadly; and the reader will understand that to many of them there may be exceptions. All important exceptions will be found stated in the following pages.

(*f*) Army Act, 1881, s. 128, and r. 73 of the rules of procedure under that Act. The Criminal Evidence Act, 1898, applies to courts-martial, r. 73B.

(*g*) *Storey* v. *Town Clerk of Bermondsey*, [1910] 1 K. B. 203.

(*h*) *In re Enoch and Zaretzky, Bock & Co.'s Arbitration*, [1910] 1 K. B. 327.

# BOOK I.

# RELEVANCY.

## CHAPTER I.

### GENERAL PRINCIPLES.

THE term "evidence," as we have seen, includes all legitimate means, exclusive of mere argument, which tend to prove or disprove any alleged matter of fact, the existence of which is submitted to judicial investigation.

It will be observed that the definition restricts "evidence" in its legal sense to legitimate means of proof, for the law, sometimes rather arbitrarily, selects certain matters as relevant, and therefore admissible, and rejects many others which an ordinary citizen would deem material.

The first question, therefore, which a litigant must consider, is—What facts shall I be allowed to lay before the Court on the day of trial? As soon as that is determined, another question will undoubtedly arise—In what way will the Court allow me to prove those facts? These questions are quite distinct, and must not be confused with one another. No one can understand the English law of evidence, unless he always keeps before him the distinction between relevancy and proof.

In this Book, then, we will endeavour to answer the first question: What facts may a party to any given litigation bring before the Court?

The litigant must remember that his case at the trial will be restricted to evidence which bears directly on the matters in issue, and to matters which lead up to and explain that evidence. What are the points in issue can be ascertained from the pleadings, or whatever process takes the place of pleadings. No evidence can be received to prove facts alleged by a party to be material, but not stated or referred to in his pleading (*a*). It is an "absolute necessity that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case made thereby" (*b*). Unless, therefore, a fact tendered in evidence has a direct connection with the facts in issue it is irrelevant and will be excluded.

Every fact then is relevant which directly tends to prove or disprove any fact in issue, and also, within certain limits, every fact which indirectly and circumstantially tends to prove or disprove any such fact.

In civil actions, damages, if claimed, are always in issue and consequently every fact is relevant which tends to affect the measure of damage to be applied or the amount of the damages to be awarded. In criminal proceedings, facts which tend to reduce the seriousness of the offence, and therefore affect

(*a*) See *per* MATHEW, J., in *Scott* v. *Sampson*, 8 Q. B. D. at p. 495.
(*b*) *Eshenchunder Singh* v. *Shamachurn Bhutto*, 11 Moo. Ind. App. 20.

the sentence, may be given in evidence before a verdict is taken; but, on the other hand, facts tending to aggravate the sentence, such as a previous conviction (*c*), can, as a rule, only be proved after the jury has found the prisoner guilty.

The evidence must be confined to the points in issue. The law will not permit the parties to wander off into collateral issues; they must keep to the matters in dispute. Anything that either party said or did in the transaction which has caused the dispute is admissible against him, but what he said or did in some other transaction is, as a rule, inadmissible, and the word "transaction" has been defined as "a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong, or any other subject-matter of inquiry which may be in issue" (*d*).

Thus the fact that A. gave his friend B. permission to walk across A.'s field is no proof that A. gave C. a similar permission. The fact that D. agreed to allow one of his customers a discount of 10 per cent. on certain goods is no evidence that he agreed to allow another customer a similar discount. The fact that A. once committed a battery is no justification for a libel which accuses him of burglary. It would be "like pleading to a statement of claim, alleging that the defendant had said the plaintiff stole a pair of boots, that what the defendant said was that the plaintiff's footman stole the boots, and that was true" (*e*). The fact that A. supplied bad beer to B. is no evidence that the beer which he supplied to C. was also bad, unless both samples of beer were of the same

(*c*) See *post*, p. 135.
(*d*) Stephen, Dig. Law Ev., art. 3.
(*e*) *Per* A. L. SMITH, L.J., in *Rassam* v. *Budge*, [1893] 1 Q. B. at p. 577.

brewing (*f*). And where after much discussion two persons ultimately come to an agreement which they reduce into writing, and an action is subsequently brought for the breach of the written agreement, no evidence will be admitted as to the details of the preliminary negotiation; the Court will look solely at the writing, for that contains the only agreement between the parties. If, however, it is alleged that the writing does not correctly state the effect of the oral agreement at which the parties arrived, and an action is therefore brought for its rectification, in that action details as to the preliminary negotiation would be relevant and admissible. "The terms of an antecedent agreement made by parol may be very material in a case where it is a question of the rectification of a written contract on the ground that it does not give effect to the real agreement between the parties, but it is only in such a case that the Court can take such an agreement into consideration" (*g*).

Evidence of other transactions may, however, always be given when its reception will assist the Court by throwing material light upon the transaction in issue.

Thus on an indictment for the forgery of a cheque signed "William Smith," any pieces of paper on which the prisoner has practised writing the words "William Smith," in imitation of the handwriting of the real William Smith, will be admissible as evidence of preparation for the crime. And facts showing a motive for an alleged crime will also be admissible.

So, too, if the question in issue in an action be whether A., who ordered the goods for the price of which the plaintiff is suing, was or was not the agent of B. in that

(*f*) *Holcombe* v. *Hewson*, 2 Camp. 391; see *post*, p. 61.
(*g*) *Per* COZENS-HARDY, L.J., in *Henderson* v. *Arthur*, [1907] 1 K. B. at p. 13.

behalf, evidence that the defendant had received and used and paid for other goods ordered by A., either from the plaintiff or from other tradesmen, will be admissible in evidence to show that A. was the defendant's agent. The same rule would apply where A. is the defendant's wife.

Again, acts of ownership by a plaintiff over one portion of a roadside strip (*h*), or of a river bank (*i*), or of a belt of trees (*k*) may be admissible in evidence to show that the plaintiff is also owner of another portion of the same roadside strip, river bank, or belt of trees, if the circumstances of the case be such as closely to connect the two portions.

And where the question in issue was whether at the time when land was purchased the vendor knew that the purchaser was a lunatic, evidence of the conduct of the purchaser in other transactions, both before and after the purchase in question, was held to be admissible to show that his lunacy was obvious and apparent to all with whom he dealt (*l*).

Again, evidence of other transactions will be taken into consideration when it assists the tribunal to judge of the credibility of a witness called before it.

A witness is always liable to be cross-examined, not only as to the facts of the case, but also as "to credit," that is, as to matters not material to the issue, with a view of impugning his credibility and thus shaking his whole testimony. But, in order to prevent the case from thus branching out into irrelevant issues, it is wisely provided that on such matters the answer of the witness must be accepted as final; no evidence can, as a rule, be called to contradict it.

Thus where the prosecutrix on an indictment for

(*h*) *Doe* v. *Kemp*, 2 Bing. N. C. 102; cf. *Dendy* v. *Simpson*, 18 C. B. 831.
(*i*) *Jones* v. *Williams*, 2 M. & W. 326.
(*k*) *Stanley* v. *White*, 14 East, 332.
(*l*) *Beaven* v. *M'Donnell*, 10 Ex. 184.

indecent assault, which on the facts alleged amounted in substance to an attempt at rape, denied in cross-examination that she had previously had connection with a man other than the prisoner, it was held that her denial could not be contradicted by other witnesses (*m*).

There is, however, an exception. A witness (*n*) can always be asked whether he has not been convicted of a crime and if he either denies the fact, or refuses to answer, the opposite party may prove such conviction, however irrelevant to the issue the fact may be (*o*).

Further, it is a general rule that, whenever the state of mind in which a party did an act is material, anything which that party said or did in any other transaction previous or subsequent is admissible if it throws light on the state of his mind when he did the act in question. For example, evidence of other transactions is admissible to show guilty knowledge (*p*); to show malice (*q*); to show fraudulent intent (*r*); to show that the act was done designedly, and not accidentally or by mistake. This applies even in criminal cases, thus creating an exception to the rule already stated that no evidence will be admitted of the prisoner's bad character, or of other offences alleged to be committed by him, or of other offences of which he has been convicted, until he has been found guilty of the crime for which he is now charged.

(*m*) *R.* v. *Holmes*, L. R. 1 C. C. R. 334; *R.* v. *Gibbons*, 31 L. J. M. C. 98; but see *R.* v. *Riley*, 18 Q. B. D. 481.

(*n*) As to restrictions on cross-examination of a prisoner who has elected to give evidence on oath, see *post*, p. 204.

(*o*) Common Law Procedure Act, 1854, s. 25.

(*p*) See *R.* v. *Rhodes*, [1899] 1 Q. B. 77.

(*q*) See *Praed* v. *Graham*, 24 Q. B. D. 53.

(*r*) See *R.* v. *Cooper*, 1 Q. B. D. 19.

Thus on indictments for coining or uttering false coins the fact that other bad coins were found on the prisoner or that he had on previous occasions passed other bad coins is admissible to show guilty knowledge. Where a clerk or servant is indicted for embezzling certain specific sums of money from his employer, the fact that constant errors, all in his own favour, appear in the accounts which he delivered has been admitted to show that his omission to hand over to his employer the sums charged in the indictment was intentional, and not accidental (*s*). On a charge of murder by poisoning, evidence that other persons living in the house have also died of or suffered from poisoning is admissible to show that the poison was not administered accidentally (*t*). And in cases of receiving goods knowing them to have been stolen evidence has by statute (*u*) been made admissible that, at the time the proceedings were taken, there was found in the possession of the prisoner other property which had been stolen (*x*) within the previous twelve months, and even, on certain conditions, that the prisoner had within the previous five years been found guilty of any offence involving fraud or dishonesty (*y*). But evidence can never be given that the prisoner had a tendency to commit such a crime or that "the accused is a person likely from his criminal character to have committed the offence for which he is being tried" (*z*).

There are other matters which the Court ordinarily excludes as irrelevant. Anything said or done by third persons in the absence of A. cannot

(*s*) See *R.* v. *Cooper*, 1 Q. B. D. 19.

(*t*) *R.* v. *Geering*, 18 L. J. M. C. 215; and see *Makin* v. *Attorney-General*, [1894] A. C. 57.

(*u*) 34 & 35 Vict. c. 112, s. 19.

(*x*) *R.* v. *Carter*, 12 Q. B. D. 522; *R.* v. *Girod*, 22 T. L. R. 720.

(*y*) *R.* v. *Bromhead*, 71 J. P. 103.

(*z*) *Per* Lord Herschell, L.C., in *Makin* v. *Attorney-General*, [1894] A. C. 57; and see *R.* v. *Fisher*, [1910] 1 K. B. 149. For further illustrations, see Book I., Chap. VI., *post*, p. 117.

be put in evidence against him, unless it is necessary to explain the transaction in issue.

A man must not be prejudiced by the words or acts of a third person which he had no opportunity of contradicting or resenting. But the case is different when the act or words which are tendered in evidence were done or spoken in the presence or hearing of the party against whom they are tendered. Such evidence is admissible, not indeed because it is of any great value in itself, but because it leads up to and explains what the party did or did not do thereupon (*a*).

Lastly, evidence of opinion is, as a rule, excluded, for the tribunal should form its own opinion for itself from the facts alleged and proved before it. Nevertheless the tribunal must in some cases call for the assistance of experts where the question before it is one as to which special training or special experience is necessary to enable anyone to form an opinion. The cases falling under this principle are discussed in the following chapter.

(*a*) See Book I., Chaps. III. and IV.

## CANADIAN NOTES.

### RELEVANCY.

The prisoner Brown being indicted for the murder of one Hogan, the principal witness for the Crown stated that the crime was committed on December 1st, 1859, on a bridge over the river Don, and that the prisoner and one Sherrick, who had been previously tried and acquitted, threw Hogan over the parapet of the bridge into the river. The counsel for the prisoner then proposed to prove by a witness named Dolan that Sherrick was at his place, fifty miles off, on that evening, but the judge rejected the evidence, saying that Sherrick might be called, and, if contradicted, might be confirmed by other testimony. Sherrick was called, and swore that he was not present at the time, but he not being contradicted, Dolan was not examined. It was held that the presence of Sherrick was a fact material to the enquiry, and that Dolan's evidence should have been admitted when tendered.

*Per* Robinson, C.J.: "I think Dolan should have been received upon the broad principle that he was called to speak to a matter that was directly connected with the matter, and the very fact under investigation, namely, in what manner a deceased person came to his death. The witness McGillock had given a very positive and circumstantial account of his being thrown over the bridge of the river Don. The parapet of the bridge was high, and it was, according to her account, at an early hour in the evening, when many persons are about, and the place was a very public thoroughfare. If she had

stated that Brown alone had murdered Hogan, and so disposed of his body, it might have seemed a less probable statement. She swore that Sherrick assisted him, and her statement was positive. . . . If Brown and Sherrick had been on their trial at the same time, the evidence of Dolan must have been admitted, without hesitation, on account of its application to the prisoner Sherrick, and if it had led the jury to the conclusion that as regarded Sherrick the witness had endeavoured to impose upon them by a false story, they could not but have thought that an important matter to be considered in weighing the credibility of the evidence as it applied to Brown. It appears to me that any fact so closely connected with the alleged offence as to be a part of what was transacted or said to be transacted at the very moment cannot be treated as irrelevant in investigating the truth of the charge." *Reg.* v. *Brown*, 21 U. C. Q. B. 330.

In an action for unlawfully and maliciously and without warrant arresting plaintiff it appeared that the plaintiff had been arrested for committing an assault. Evidence was tendered to show that the plaintiff had wounded the person so assaulted, but was rejected by the trial judge. It was held that this rejection was improper, that it was a necessary element in the defendant's case to prove the nature of the assault, and the extent of the injury to the constable, and the evidence of that witness had direct reference to that subject, and should therefore have been received. *Jordan* v. *McDonald*, 31 N. S. R. 129.

## CHAPTER II.

### WHAT THIRD PERSONS THINK.

### *Evidence of Opinion.*

WHAT a party thinks or believes at the time he does a material act is often a matter in issue both in civil and criminal proceedings. But what a third person (*i.e.*, someone who is neither a plaintiff, a defendant, nor a prisoner) thinks or believes about any matter in question is generally irrelevant, and therefore inadmissible. If such a third person be called as a witness, he must, as a rule, only state facts; his personal opinion is not evidence. He should be *un oyant et veyant*, a hearer and seer, as the Year Books say.

The object and effect of this general principle is to keep the witness, as far as possible, from trespassing upon the functions of the judge and jury; it is the province of either the judge or the jury to draw all inferences from facts. Cases, however, occur in which special experience or special training is necessary before a true opinion can be formed. In such cases it is necessary that the opinion of those who have had special experience or special training should be laid before the tribunal to enable it to arrive at a correct decision.

In the leading case of *Carter* v. *Boehm* (*a*), it was a question whether a policy of insurance was vitiated by

(*a*) 3 Burr. 1905; 1 Sm. L. C. 491; Cockle, L. C. 77.

the concealment of facts which had not been communicated to the underwriters. A broker gave evidence of the materiality of the facts, and stated his opinion that if they had been disclosed the policy would not have been underwritten; but the Court held his statement to be inadmissible, Lord MANSFIELD saying:—

"Great stress was laid upon the opinion of the broker; but we all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence; it is opinion after an event; it is opinion without the least foundation from any previous precedent or usage; it is an opinion which, if rightly formed, could be drawn only from the same premises from which the Court and jury were to determine the cause, and therefore it is improper and irrelevant in the mouth of a witness."

This judgment of Lord MANSFIELD contains the principles on which mere opinion is not received as evidence; but it is right to state that his view of the law, as applied to this particular case, has been much controverted, and that it has been considered by other learned authorities (*b*) to come within an exception to the general rule.

In cases where the insanity of a person is in issue, a medical witness, whose knowledge of that person is derived solely from hearing the evidence in the case, cannot be asked whether he considers that the patient was insane, for that is the issue for the Court and jury; but he may be asked whether certain symptoms are indications of insanity, and his answers are evidence for the guidance of the Court and jury (*c*). Where, however, a medical witness has examined or attended such a person, he may give his opinion as to the state of mind of the person (*d*). Where the sanity of a testator was in issue, a letter purporting to be from the testator was proposed to be shown to a medical witness, and such witness asked whether the writer of such a letter could be of sound mind; MARTIN, B., held that this could not

(*b*) See note to *Carter* v. *Boehm*, 1 Sm. L. C. 504; Arnould, Marine Insurance, I. 626; Taylor, Ev. 1025.
(*c*) *R.* v. *M'Naghten*, 10 Cl. & F. 200.
(*d*) *R.* v. *Richards*, 1 F. & F. 87.

be done, but that when the letter had been proved to be in the testator's handwriting the witness might be asked if it were a rational letter.

In *Campbell* v. *Rickards* (*e*), Lord DENMAN said that witnesses conversant with a particular trade were allowed to speak to a prevailing practice in that trade; scientific persons might give their opinions on matters of science; but witnesses were not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced if the parties had acted in one way rather than another. The same doctrine was laid down in a case of *Durrell* v. *Bederley* (*f*) by GIBBS, C.J., though he received the evidence on great pressure. He said:—

"The evidence of the underwriters who were called to give their opinion on the materiality of the rumours and of the effect they would have had upon the premium is not admissible evidence. Lord MANSFIELD and Lord KENYON discountenanced this evidence of opinion, and I think it ought not to be received. It is the province of a jury, and not of individual underwriters, to decide what facts ought to be communicated. It is not a question of science, in which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless. Such evidence leads to nothing satisfactory, and ought on that ground to be rejected."

Again, the question whether the terms of a covenant in restraint of trade are reasonable is for the judge to decide (*ff*); the opinion of persons in the trade is inadmissible (*g*).

It will appear from this judgment that the principles, as stated above, are generally recognised and acted on, and that the only practical difficulty in applying them exists in the question as to what is and what is not a subject of scientific inquiry. The inclination of modern authorities appears to be to enlarge the definition; and it is possible that if *Carter* v. *Boehm* and *Campbell* v.

(*e*) 5 B. & Ad. 846.
(*f*) Holt, 283.
(*ff*) *Dowden* v. *Pook*, [1904] 1 K. B. 45.
(*g*) *Hynes* v. *Doman*, [1899] 2 Ch. 13.

*Rickards* were to be decided again, it would be held that the nature of mercantile transactions, and the principles of insurance in particular, are sufficiently recondite to entitle them to the privilege which was disallowed in those cases (*gg*). In *Greville* v. *Chapman* (*h*), which was an action for libel arising out of a racehorse transaction, it was held by Lord DENMAN that a member of the Jockey Club might be asked as a witness whether he did not consider a certain course of conduct to be dishonourable. A skilled witness may not only say that he formed an opinion, but that he acted on that opinion, and his acting upon it is a strong corroboration of the truth (*i*).

The general rule which excludes evidence of opinion is based upon the assumption that the Court can, and should, form its own opinion on the facts; hence it does not apply in those cases where the Court itself is not in a position, or in such a good position as the witness is, to form an opinion, and naturally therefore must rely upon the opinion of the witness.

The matters on which the Court itself is thus unable to properly form an opinion may be grouped under two heads. First, there are matters on which an opinion cannot properly be formed without special study or experience, matters involving questions of science, art, or skill. Upon such matters the opinion of "experts" is necessarily admitted as evidence. Secondly, there are certain cases where it is naturally impossible for any witness to give direct or positive evidence of

(*gg*) 1 Sm. L. C. 508; *Rickards* v. *Murdock*, 10 B. & C. 527.
(*h*) 5 Q. B. 731.
(*i*) *Stephenson* v. *River Tyne Commissioners*, 17 W. R. 590.

facts, cases where he must speak, if at all, as to his opinion or belief, the matters to which he deposes being so essentially matters of opinion, or else so complex or indefinite that the Court is compelled to accept his opinion for what it may be worth. Upon such matters the opinion of non-experts may be admitted (*k*).

## I. *Evidence of Experts.*

An expert witness is one who has devoted time and study to a special branch of learning, and thus is specially skilled on those points on which he is asked to state his opinion. His evidence on such points is admissible to enable the tribunal to come to a satisfactory conclusion. An expert may be called to answer questions on any matters of science, art, medicine, architecture, handwriting, valuations, or foreign law — indeed, any matter on which special skill or learning is necessary in order that a reliable opinion may be formed. He need not be a paid professional expert who makes a living by giving such evidence, but he must have devoted sufficient time and study to the subject to make his evidence trustworthy (*l*). The judge decides on the competency of an expert witness; the jury decides the weight of his evidence (*m*).

The evidence of an expert witness differs from

(*k*) See Taylor, Ev. 1021; Starkie, Ev. 273; Phipson, Ev. 367.

(*l*) *R.* v. *Silverlock*, [1894] 2 Q. B. 766.

(*m*) *Bristow* v. *Secqueville*, 19 L. J. Ex. 289; 5 Ex. 275; Cockle, 79; *In the Goods of Dost Aly Khan*, 6 P. D. 6; *R.* v. *Silverlock*, *supra*.

that of an ordinary witness in the following respects:—

(a) He can give his opinion, not merely state what took place (*n*).

(b) He can detail experiments he made even behind the back of the other party (*o*).

(c) He can cite books of admitted authority (*p*).

(d) He can cite other cases and reports of other transactions throwing light on the fact in issue, *e.g.*, for the purpose of showing similarity in symptoms or in results from certain causes (*q*). From anyone else such statements would be inadmissible.

A medical expert may repeat what a patient said as to his symptoms (*r*), but not what he said as to the facts of the case. An expert is fallible, like all other witnesses, and the real value of his evidence consists in the logical inferences which he draws from what he has himself observed, not from what he merely surmises or has been told by others. Therefore, in cross-examining him, it is advisable to get at the grounds on which he bases his opinion. Moreover, the evidence of experts must be received with caution, because they are sometimes apt to make themselves partisans and thus diminish the value of their testimony. This matter will be found more fully discussed in Book III. under the head of Cogency (*s*).

In *Palmer's Case* (*t*), where a man named Cook had

(*n*) *Folkes* v. *Chadd*, 3 Doug. 157; Cockle, 78.
(*o*) *R.* v. *Heseltine*, 12 Cox, 404.
(*p*) *Nelson* v. *Bridport*, 8 Beav. 527; 10 Jur. 871; *Sussex Peerage Case*, 11 Cl. & F. at pp. 114, 117; 8 Jur. 793.
(*q*) *R.* v. *Palmer*, Stephen, Hist. Cr. L., III. 389; Report of Trial of William Palmer (Ward & Lock), 1856.
(*r*) *Aveson* v. *Lord Kinnaird*, 6 East, 188; Cockle, 42.
(*s*) See *post*, p. 501.
(*t*) Stephen, Hist. Cr. L., III. 389; Report of Trial of William Palmer (Ward & Lock), 1856.

died suddenly, and, as was alleged, from poison administered to him by Palmer, expert medical men gave evidence that the circumstances of Cook's decease pointed to poisoning by strychnia. They were not present at the death, and could find few traces in the dead man's corpse of that poison; they based their opinion on the circumstances attending the deaths of three other persons proved to have been poisoned by strychnia, which resembled the circumstances attending Cook's death in almost every particular. The Court admitted the evidence as to the circumstances attending the death of these three other persons; such evidence, though otherwise irrelevant, being admitted to support the opinions of the experts, just as it would have been admitted to contradict them; and Palmer was convicted. The experts in *Palmer's Case* relied on proved facts, not on mere surmises. But where an expert bases his opinion upon conjectural hypotheses, and not upon facts either observed by himself or proved by other witnesses, his evidence would in all probability be rejected; as it would raise collateral issues, upon which the Court could not itself decide unaided (*u*).

The following are the chief matters of "science, art, or skill," upon which the opinion evidence of experts has been allowed:—

(a) *Medical Questions.*

Medical men are constantly allowed to give their opinions on such medical questions as the causes of disease and death (*x*), the effect of poisons (*x*), the nature of wounds, the conditions of gestation (*y*), the proper treatment of complaints, the effect of hospitals

(*u*) *Metropolitan Asylum District* v. *Hill*, 47 L. T. 29; *Attorney-General* v. *Nottingham Corporation*, [1904] 1 Ch. 673.
(*x*) *R.* v. *Palmer*, Stephen, Hist. Cr. L., III. 389.
(*y*) *Gardner Peerage Case*, Le Marchant's Report, 169—176.

upon the healthy condition of a neighbourhood (*z*), and upon the sanity or condition of mind of persons (*a*), etc.

### (b) *Mercantile, Commercial, and Professional Questions.*

The evidence of commercial and professional men is frequently allowed on matters with which they are peculiarly acquainted and able to inform the Court. Thus a stockbroker has been allowed to give evidence as to the course of business of bankers (*b*); a grocer's assistant, as to the cause of losses in the grocery trade (*c*); shipowners and merchants, as to the meaning of words in charterparties (*d*); an architect, as to depreciation of property by a nuisance (*e*); an engineer, as to the cause of the choking of a harbour (*f*) or strength and construction of vessels (*g*); an insurance broker, as to the proper method of drawing a policy (*h*); an accountant, as to the manner in which a company should deal with depreciation and profits (*i*); business men, experienced in steel and iron companies, on the same question (*i*); underwriters, as to the materiality of facts in marine insurance (*k*); a person experienced in the business of life insurance, as to the average duration of lives and the value of annuities (*l*); an engineer, as to the effect of a personal injury on the fitness for duty of an engineer (*m*); a builder, as to the safe construction

(*z*) *Metropolitan Asylum District* v. *Hill*, *suprà*; *Attorney-General* v. *Nottingham Corporation*, *suprà*.
(*a*) *R.* v. *M'Naghten*, 10 Cl. & F. 200.
(*b*) *Adams* v. *Peters*, 2 Car. & K. 723.
(*c*) *M'Fadden* v. *Murdock*, 15 W. R. 1079.
(*d*) *Robertson* v. *Jackson*, 15 L. J. C. P. 28.
(*e*) *Gauntlett* v. *Whitworth*, 2 Car. & K. 720.
(*f*) *Folkes* v. *Chadd*, 3 Doug. 157; Cockle, 78.
(*g*) *The Robin*, [1892] P. 95.
(*h*) *Chapman* v. *Walton*, 10 Bing. 57.
(*i*) *Bond* v. *Barrow Hæmatite Steel Co.*, [1902] 1 Ch. 353.
(*k*) *Rickards* v. *Murdock*, 10 B. & C. 527; but see *Carter* v. *Boehm*, *ante*, p. 37.
(*l*) *Rowley* v. *London and North Western Rail. Co.*, L. R. 8 Ex. 221.
(*m*) *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K. B. 250.

of a staircase (*n*); a surveyor, as to the value of an estate (*o*) or as to the amount of money necessary to put a house into a proper state of repair; a farm valuer, as to the value of crops, stacks, ricks, etc.; an expert in forestry, as to the object with which trees had been planted (*p*); artists, as to the genuineness of pictures or other works of art (*q*); engravers and sealmakers, as to forgery (*r*) or as to the impression of a seal (*s*); nautical men and Brethren of Trinity House, as to the proper navigation of vessels (*s*); military officers, as to military practice (*t*); antiquaries, as to ancient handwriting (*u*); and post-office clerks (*x*), and even persons in the habit of receiving letters (*y*), as to post-marks.

The evidence of experts is much resorted to in patent cases, and is undoubtedly of great value and assistance to the Court, but the judges protest against expert evidence being given on matters which are for the Court and not for any witness, *e.g.*, whether defendant's article is an infringement (*z*) and what is the construction to be placed on a specification. On this SMITH, L.J., said (*a*):

"I say that this evidence of experts as to the construction of the specification is inadmissible, and that, except as to the meaning of scientific terms when they occur, or as to the working of mechanical appliances, or as to what such working will bring about, expert evidence should not be admitted. It is the practice of admitting this evidence which gives rise to much of the excessive length to which patent cases run."

(*n*) *Crafter* v. *Metropolitan Rail. Co.*, L. R. 1 C. P. 300.
(*o*) *Attorney-General* v. *Cross*, 3 Mer. 524.
(*p*) *Weld-Blundell* v. *Wolseley*, [1903] 2 Ch. 664.
(*q*) *Whistler* v. *Ruskin*, Times newspaper, November 26th and 27th, 1878; *Belt* v. *Lawes*, Times newspaper, December 12th and 16th, 1882.
(*r*) *R.* v. *Williams*, 8 C. & P. 434.
(*s*) *Folkes* v. *Chadd*, 3 Doug. at p. 159.
(*t*) *Bradley* v. *Arthur*, 4 B. & C. 295—311.
(*u*) *Tracy Peerage Case*, 10 Cl. & F. 191.
(*x*) *Abbey* v. *Lill*, 5 Bing. 299.
(*y*) *Woodcock* v. *Houldsworth*, 16 M. & W. 124.
(*z*) *Per* Lord RUSSELL, C.J., in *Brooks* v. *Steele and Currie*, 14 R. P. C. 73; cf. *Seed* v. *Higgins*, 8 H. L. Cas. 550.
(*a*) In *Gadd* v. *Mayor of Manchester*, 9 R. P. C. 530.

In trade mark and passing off cases, the rules governing the admissibility of evidence of experts as to whether the thing in question was or was not likely to deceive purchasers have not always been the same.

At first such evidence was freely admitted (*b*), but after the decisions in *North Cheshire, etc., Brewery Co.* v. *Manchester Brewery Co.* (*c*) and *Payton* v. *Snelling* (*d*) it was rejected on the ground that it usurped the functions of the judge, because in effect it decided the question which he had to decide. Latterly, however, the practice has been altered (*e*); and it now seems settled that the evidence of experts on the point is admissible, in order to aid the judge in coming to a decision on the issue which it is for him, and not the witness, to decide.

### (c) *Handwriting.*

We now proceed to discuss the proof of handwriting, though this is a matter which is not confined to the evidence of experts, but one on which non-experts who are acquainted with the handwriting are allowed to testify. The proof of signatures, or handwriting, is, except in the case of deeds, the essential part of the proof of private writings. There are various admissible ways of proving handwriting. Thus it may be proved—

1. By the party who wrote or signed. This is the most satisfactory evidence.

2. By a witness who actually saw the party write or sign the document in question.

3. By a witness who has seen the party write on other occasions, or even on one occasion only (*f*), and who can

(*b*) *Orr-Ewing* v. *Johnson*, 7 App. Cas. 219.
(*c*) [1899] A. C. 83.
(*d*) 17 R. P. C. 635; and see *Hennessy* v. *Dompè*, 19 R. P. C. at p. 339; *Lambert* v. *Goodbody*, 19 R. P. C. 377.
(*e*) *Birmingham S. A. Co.* v. *Webb*, 24 R. P. C. 27; *Hennessy* v. *Keating*, 25 R. P. C. 125; and see *L. G. O. Co.* v. *Lavell*, [1901] 1 Ch. 135; and *In re Joseph Crosfield & Sons, Ltd.*, [1910] 1 Ch. 118 (affirmed at p. 130).
(*f*) *Garrells* v. *Alexander*, 4 Esp. 37.

swear to his *belief* or opinion that the writing produced was written by that person. It is not sufficient for him to swear merely that he *thinks* that it is (*g*).

4. By a witness who has seen documents, purporting to be written by the party, which, by subsequent communications with such party, he has reason to believe to be written by him (*h*).

5. By a witness who gives his opinion as to the authenticity of a disputed document by comparing the handwriting with any document which has been proved to the satisfaction of the judge to be the genuine writing of the party (*i*). The witness must be skilled in comparing handwritings, but he need not be a professional expert. Thus in *R.* v. *Silverlock* (*k*) a solicitor who had given considerable study and attention to handwriting was held a competent witness.

Evidence given under the first two heads above is, of course, not evidence of opinion at all; evidence under the other three heads is opinion merely. But it is convenient to treat the whole matter together. The usual method in cases which fall under the third and fourth heads is for the party calling the witness, or his counsel, merely to ask the witness, "Are you acquainted with the handwriting of ——?" (the person in question), leaving the other side to cross-examine as to the extent of his acquaintance with it. Such cross-examination can only weaken the force of his evidence, not destroy its admissibility (*l*).

Where it is desired to prove the handwriting of an ancient document, it may be proved by the evidence of a

(*g*) *Eagleton* v. *Kingston*, 8 Ves. 473.

(*h*) *R.* v. *Slaney*, 5 C. & P. 213: "A clerk in a merchant's office who has corresponded with the defendant on his master's behalf may be called to prove the defendant's handwriting;" and see *R.* v. *Turner*, [1910] 1 K. B. 346; and *In re Clarence Hotel*, 54 Sol. Jo. 117.

(*i*) 28 Vict. c. 18, s. 8.

(*k*) [1894] 2 Q. B. 766.

(*l*) *Eagleton* v. *Kingston*, *supra*; *R.* v. *Horne Tooke*, 25 How. St. Tr. 71.

witness who has, in the course of business, examined documents admitted to be written by the same party, but not by a witness who has merely inspected such documents for the purpose of giving evidence (*m*).

The principles which guide the Courts in this matter are well illustrated by the remarks of PATTESON, J., in *Doe* v. *Suckermore* (*n*). He said :—

"All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge. That knowledge may have been acquired either by seeing the party write, in which case it will be stronger or weaker according to the number of times and the periods and other circumstances under which the witness has seen the party write; but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases) even if he has seen him write but once, and then merely signing his surname; or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards personally communicated with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate, or by any other mode of communication between the party and the witness, which, in the ordinary course of transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party; evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him. These are the only modes of acquiring a knowledge of handwriting which have hitherto, as far as I have been able to discover in our law, been considered sufficient to entitle a witness to speak as to his belief in a question of handwriting. In both the witness acquires his knowledge by his own observation upon facts coming under his own eye, and as to which he does not rely on the information of others; and the knowledge is usually, and especially in the latter mode, acquired incidentally, and, if I may say so, unintentionally, without reference to any particular object, person, or document."

The above passage accurately states the common law; but statutory provisions have been engrafted upon it of which the following is the one now in force :—

"Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be

(*m*) *Fitzwalter Peerage Case*, 10 Cl. & F. 193; but see 28 Vict. c. 18, s. 8, *post*, p. 49.

(*n*) 5 A. & E. 703; Cockle, 165.

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" (*o*).

Before any writing is admissible as a standard of comparison, its genuineness must be proved to the satisfaction of the judge (*p*); it need not be relevant to the issue (*q*). Letters, written by the defendant, not otherwise evidence in the cause, were held admissible as evidence that the libel, which contained the plaintiff's name spelt with the same peculiarity, was written by the defendant (*r*). So it was held that, in order to prove by comparison that the defendant was the writer of a libellous letter, he might be interrogated as to whether he was the writer of another letter to a third person, as "the plaintiff would clearly have a right to put another document into the defendant's hand, and ask him if that was in his handwriting" (*s*).

So, where an attesting witness swore clearly and distinctly that a deed was executed in his presence by R. and his wife, both of whom he knew, this evidence was held not to be counterbalanced by the evidence of experts who expressed an opinion that the signature purporting to be that of R. was not in the character of his handwriting (*t*). The fact that a document is, under a particular statute, provable by a copy, does not exempt the person tendering it from proving that the original is in the proper handwriting (*u*).

If a person, whose handwriting is in question, be

(*o*) 28 Vict. c. 18, s. 8. This Act applies the provision to both civil and criminal cases. The provision in the same words in the Common Law Procedure Act, 1854, s. 27, applied only to civil cases; and it is now repealed by the Statute Law Revision Act, 1892.

(*p*) *Hughes* v. *Lady Dinorben*, 32 L. T. 271.

(*q*) *Birch* v. *Ridgway*, 1 F. & F. 270.

(*r*) *Brookes* v. *Titchborne*, 5 Ex. 929.

(*s*) *Jones* v. *Richards*, 15 Q. B. D. 439, 440; Odgers on Libel and Slander, 4th ed., 610.

(*t*) *Newton* v. *Ricketts*, 9 H. L. Cas. 262.

(*u*) *Auriol* v. *Smith*, 18 Ves. 198.

present in court, he may, it seems, be then and there required to write something which the Court and the jury may compare with the document in dispute (*x*).

The evidence of handwriting experts must, like all evidence of experts, be received with caution, perhaps with greater caution than evidence of experts on other matters (*xx*).

### (d) *Foreign Law.*

The Court will not take judicial notice of the laws or customs of foreign States, but such laws must be proved by skilled witnesses in the same way as any other facts (*y*).

In England, Scotch law and the laws of the colonies are regarded as foreign; but the House of Lords takes judicial notice of the former (*z*) and the Privy Council of the latter (*a*).

BLACKBURN, J., in advising the House of Lords in *Castrique* v. *Imrie* (*b*), said:—

> "We think . . . that all that can be required of the tribunal that has to decide on a question of foreign law is that it should receive and consider all the evidence as to what the foreign law is and *bonâ fide* determine on that as well as it can."

No witness will be competent to prove foreign law unless he appear to have filled an official position, or to be a practising member of the legal profession, or to have been in some position in which it is probable that he would have acquired a practical acquaintance with

(*x*) *Doe* d. *Devine* v. *Wilson*, 10 Moo. P. C. 502, 530; *Cobbett* v. *Kilminster*, 4 F. & F. 490.

(*xx*) See *post*, Book III., "Cogency."

(*y*) By 24 & 25 Vict. c. 11, s. 1, the Courts are empowered to remit a case to a Court of any foreign State to ascertain the law of such State, if a convention has been entered into with such State. See also *post*, pp. 147—149.

(*z*) *Cooper* v. *Cooper*, 13 App. Cas. 88; *Lyell* v. *Kennedy*, 14 App. Cas. 437.

(*a*) *Mostyn* v. *Fabrigas*, 1 Cowper, 161; Cockle, 10. As to Judicial Notice, see *post*, p. 145.

(*b*) L. R. 4 H. L. 434.

the law in question (*c*). In *The Sussex Peerage Case* (*d*), a Roman Catholic bishop in England was called to give evidence as to the law of marriage at Rome. It appeared that it was part of his official duties to decide for spiritual purposes questions as to the validity of marriages between Roman Catholics, and that for this purpose he had to apply the law of Rome. It was held that his evidence was admissible, as he was engaged in the performance of important and responsible public duties, and that in order to discharge them properly he was bound to make himself acquainted with the law in question. A London hotel-keeper who formerly carried on business as a merchant and commissioner of stocks at Brussels was allowed to prove what the usage in Belgium is as to the presentment of promissory notes there (*e*). And the certificate of a foreign ambassador, under the seal of the legation, has been held evidence of the law of the country by which he was accredited (*f*). A person who has acquired, by study in one country, a merely theoretical knowledge of the laws of another country is not competent to prove the laws of such other country (*g*). Thus, in *In re Turner* (*h*), KEKEWICH, J., expressed "a strong opinion, which he thought was shared by JOYCE, J., that a man who acquired knowledge of the law of a particular country merely by study was not competent to give evidence as an expert on that law; it was essential that he should be a professional man, or should hold some official position, in the State in question. Certainly he thought that study alone was no sufficient qualification." A legal practitioner, practising before the Privy Council, is not an expert qualified to give evidence in the laws of those countries for which

(*c*) *Vander Donckt* v. *Thellusson*, 8 C. B. 812.
(*d*) 11 Cl. & F. 134.
(*e*) *Vander Donckt* v. *Thellusson*, *supra*.
(*f*) *In the Goods of Klingeman*, 3 S. & T. 18.
(*g*) *Bristow* v. *Sequeville*, 5 Ex. 275; Cockle, 79; *In the Goods of Bonelli*, 1 P. D. 69.
(*h*) [1906] W. N. at p. 27.

the Privy Council is the ultimate Court of Appeal (*i*). But in one case the affidavit of an English solicitor and notary, practising in London, who stated that he had for many years had practice and experience in the laws of Chili, was accepted as evidence of the laws of that country in a probate action (*k*).

Foreign law cannot be proved in England (*l*), as it can in some countries, by books printed or published under the authority of the Government of a foreign country, and purporting to contain the statutes, code, or other law of such country, nor by printed or published books of reports of decisions of the Courts of such country, nor by books proved to be commonly admitted in such Courts as evidence of the law of such country. A witness called to prove foreign law may, however, refer to laws or treatises to aid his memory (*m*); and, if the witness states that any text-book, decision, code, or other legal document truly represents the foreign law which he is called to prove, the Court may look at the treatise and treat it and give effect to it as part of the testimony of the witness (*n*). A question of foreign law, being one of fact, must in every action be decided on evidence adduced in that action, and not by a previous decision, or on evidence adduced in another action (*o*).

The law has been stated very succinctly in the two following cases.

In *Baron de Bode's Case* (*p*) Lord DENMAN, C.J., said:—

"The witness, upon being questioned as to the state of law in France in 1789, refers to a decree of that date. The form of the

(*i*) *Cartwright* v. *Cartwright*, 26 W. R. 684.
(*k*) *In the Goods of Whitelegg*, [1899] P. 267; and see *Wilson* v. *Wilson*, [1903] P. 157.
(*l*) *Sussex Peerage Case*, 11 Cl. & F. at p. 134.
(*m*) See *Nelson* v. *Lord Bridport*, 8 Beav. 538, and *Sussex Peerage Case*, 11 Cl. & F. at p. 116.
(*n*) *Concha* v. *Murrietta*, 40 Ch. D. at p. 554; but see the judgment of FARWELL, J., in *In re Johnson*, [1903] 1 Ch. at p. 831.
(*o*) *M'Cormick* v. *Garnett*, 5 De G. M. & G. 278.
(*p*) 8 Q. B. 208, at p. 250.

question is, I think, immaterial; in effect the witness is asked to speak to the decree. It is objected that this is a violation of the general principle that the contents of a written instrument can be shown only by producing the instrument or accounting for the non-production. But there is another general rule: that the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men; and I think it is not confined to unwritten law, but extends also to the written laws which such men are bound to know. Properly speaking, the nature of such evidence is not to set forth the contents of the written law, but its effect and the state of law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law; the witness is called upon to state what law does result from the instrument."

And in *Di Sora* v. *Phillipps and others* (*q*) Lord CHELMSFORD said:—

"This case . . . turns upon the construction of one short clause in a written contract executed in a foreign country. Hence has arisen the necessity of having recourse to witnesses skilled in the law of that country, in order to assist the English judge in his duty of construing the clause in question. . . . The limits within which experts in foreign law (always assuming their credibility) are to be authoritative in cases in which their aid is required seem never to have been exactly defined. There is no doubt that where the knowledge of the law of a foreign country is necessary for the determination of a case by an English judge or jury, the only way in which it can be made known to them is by having it proved as a fact by persons competent to inform them of its existence."

And again (*r*)—

"The office of construction of a written instrument, whether foreign or domestic, brought into controversy before our tribunals, properly belongs to the judge. In the case of a foreign instrument he necessarily requires some person's assistance. In the first place, he must have a translation of the instrument, a translator being . . . a witness as to the meaning and also the grammatical construction of the words. He must then have the way cleared for him by explanatory evidence of any words which are of a technical description, or which have a peculiar meaning, different from that which, literally translated into our language, they would bear; and, if there is any established principle of construction of the particular instrument by the foreign tribunal, proof of it must be given. But, the witnesses having supplied the judge with all these facts, they must retire and leave his sufficiently informed mind to his own proper office—that of ascertaining for himself the intention of the parties, or, in other words, of construing the language of the instrument in question."

(*q*) 10 H. L. Cas. 624, at p. 636.
(*r*) *Ibid.*, p. 639.

## II. *Opinion Evidence of Non-experts.*

The second class of cases in which evidence of opinion may be given (as already stated, *ante*, pp. 40, 41) comprises those in which direct or positive evidence of facts is practically unattainable, and in which witnesses must speak, if at all, as to their opinion or belief.

Thus, on questions of identity (*s*), appearance or age (*t*), condition or resemblance (*u*), of persons or things, and the like, evidence of opinion or belief is generally admitted, as such matters are essentially matters of opinion, and as a rule no witness can swear positively as to them.

For instance, in the case of *Fryer* v. *Gathercole* (*x*), a witness was called to identify a certain pamphlet. She swore that she "believed" the document produced to be that in question, but she could not swear positively that it was so. It was held that this was proper evidence of identification of the pamphlet. POLLOCK, C.B., said:—

"The witness could say no more than this: 'I believe the copy of the pamphlet produced to be the same with that which I received from the defendant, because when I lent that copy to other persons it was returned to me, and I had no reason to believe it otherwise when I last got it back. I then for certainty put my name to it.' If the name had been written in the first instance, no doubt could have arisen. . . . As has been truly argued, there are many cases of identification where the law would be rendered ridiculous if positive certainty were required from witnesses. . . . The evidence in this case was therefore properly received; any objection to it goes merely to its value."

And PARKE, B., said:—

"In the identification of a person you compare in your mind the man you have seen with the man you see at the trial (*y*). The same rule belongs to every species of identification."

(*s*) *Fryer* v. *Gathercole*, 13 Jur. 542; Cockle, 80.
(*t*) *R.* v. *Cox*, [1898] 1 Q. B. 179.
(*u*) *Lucas* v. *Williams*, [1892] 2 Q. B. 113.
(*x*) 13 Jur. 542; Cockle, 80.
(*y*) As to evidence of the identity of the prisoner, see *R.* v. *Betridge*, 73 J. P. 71.

Although this rule is clear, there appear to be few decisions on the subject. But the necessity and reason for the admission of such evidence seem so plain that it is constantly acted on without objection.

It should be observed that the proof of handwriting by persons who are acquainted merely with the handwriting and are not experts (dealt with on p. 46, *ante*) strictly comes under this head. They only speak as to their opinion.

## CANADIAN NOTES.

### EVIDENCE OF EXPERTS.

A physician may strengthen his memory by referring to works which he considers good authority, and counsel may read extracts therefrom to him, and obtain his judgment thereon. An illustration is for this purpose as much a part of the book as the text, and it may, when thus referred to, be shown to the jury. *Brownell* v. *Black*, 31 N. B. 594.

It is not admissible to ask medical witnesses on cross-examination what books they consider the best upon the subject in question and then to read such books to the jury, but they may be asked whether such books have influenced their opinion. *Brown* v. *Shepherd*, 13 U. C. Q. B. 178.

In an action against a surgeon for malpractice in operating on a patient's eyes, medical witnesses were called who, having heard the evidence, stated that the disease was not such as defendant described it to be, but of a different character. A witness skilled in diseases of the eye who had heard the testimony of the defendant and the other witnesses was asked the following question: "Is the statement of the medical case, as given by the defendant in evidence, reconcilable with the facts, assuming them to be true, as given by the other witnesses?" It was held that the question was improper as the answer to it would involve an opinion by the witness, not only as to the truth of what the other witnesses had sworn to, but also the meaning of the words they had used.

The matter is thus stated in the head-note. But KING, J., said he agreed, although he hardly thought that the question complained of required that the witnesses should pass upon the truth of the testimony referred to them ; but apart from this the question referred to seemed objectionable. Facts and scientific inferences from known or assumed facts were matters of proof, but the comparing and distinguishing, or reconciling of testimony was not a matter of proof at all, but was the proper work and office of the jury. *Diffin* v. *Dow*, 22 N. B. 107.

Where the plaintiff was suing for malpractice, and a medical man was called for the defence who said that from the evidence given by the defendant and the evidence throughout the case he could not say that the defendant's treatment was bad surgery, the plaintiff proposed to call a witness in reply to show that from what the defendant stated at the trial, the treatment was bad surgery.

*Per* CAMERON, J., concurred in by the other members of the Court, "I am not prepared to say that if the defendant had, by his evidence, shown a course of treatment different from that indicated by the evidence for the plaintiff and not covered by that evidence the plaintiff would not have had in reply the right to show that such new treatment would have been objectionable. But here the alleged malpractice was the use of the primary bandage and applying it too tightly. The use of the primary bandage was admitted and justified as proper; that it was applied too tightly was asserted on the one hand and denied on the other, and it was admitted that if the bandage had been too tightly applied or allowed to remain too long after becoming tight by the swelling of the arm, it would have been bad surgery. The issue was one, therefore, rather upon the facts as to what the treatment had been, and there was no room for medical

opinion by way of reply to the defence." *Van Meer* v. *Farewell*, 12 O. R. 285.

The fact that sparks of a large size escaped from the smoke-stack of a steamboat was held to be admissible as evidence of the defective construction of the smoke-stack, but the opinion of witnesses was rejected to the effect that, having regard to the force and direction of the wind, sparks of the size actually emitted could be carried so as to ignite the building for the destruction of which the action was brought. It was considered that evidence of this character was too conjectural. *Peacock* v. *Cooper*, 27 O. A. R. 128.

*Foreign Law.*

"Where the opinions of experts on foreign law are conflicting, the Court will examine for itself the decisions and text books of the foreign country, in order to arrive at a satisfactory conclusion." This extract from a head-note embodies a dictum of HAGARTY, C.J., founded on the Privy Council case of *Bremer* v. *Freeman*, 10 Moo. P. C. 306, in which, as HAGARTY, C.J., remarks, "Lord WENSLEYDALE's judgment very fully analyses the reports and text writer's views." *Rice et al.* v. *Gunn et al.*, 4 O. R. 579.

*Is Expert obliged to Testify?*

A witness refused to testify until paid the proper fee as an expert. It was held by MEREDITH, C.J., and the Divisional Court of Ontario that he could not refuse. No English case was cited at the argument, but a Scotch case was referred to in the judgment, deciding that an expert was not a compellable witness and that he could refuse to attend unless he got what he considered an adequate fee. This authority was not followed. The weight of authority in the United States was said to be to the effect that no such exemption exists as that recognized by Lord MCLAREN in the Scotch case referred

to, and the law is stated by MEREDITH, C.J., to be that an expert cannot refuse to give his evidence even though it may require the use of technical knowledge or skill to answer the questions asked: "But it would be quite another matter to require an expert witness to qualify himself to give an opinion by an examination of the person or thing as to which his opinion is asked, or by doing anything else that would require study or preparation, and I am not to be understood as referring to such a case, but to cases where the witness is able, from the knowledge or skill he possesses, to give an answer to the question propounded to him." *Butler* v. *Toronto Mutoscope Co.*, 11 O. L. R. 12.

*Number of Experts Allowed, etc.*

In the case of *Dodge* v. *The King*, 38 S. C. R. 149, the referee under the Exchequer Court Act entirely disregarded the statute, Edward VII., c. 9, amending the Canada Evidence Act, 1893, allowing only five expert witnesses to be called without leave by either side on the trial of such a case. It was questioned whether the testimony of the extra witness, no objection having been made, was under the circumstances valid, but the point does not seem to have been decided.

It was held in *Bryce et al.* v. *Canadian Pacific Rail. Co.*, 13 B. C. 96, that when the Court is assisted by nautical assessors whose duty it is to advise on matters of nautical skill and knowledge, the evidence of witnesses tendered for expert testimony will not be received, following *The Kestrel* (1881), 6 P. D. 182.

*Opinion Evidence Rejected.*

In *Corporation of Stafford* v. *Bell*, 6 O. A. R. 273, PATTERSON, J. A., made some very strong observations on the impropriety of evidence consisting of opinions given by surveyors, as experts, as to the proper way to make a

survey, as to which the statute lays down the method of doing the work. His observations are as follows: "Such opinions cannot assist, and may mislead. When given on a trial by jury, they are most objectionable. It is the duty of the judge to declare the law as to a survey made under the statutes, just as it is his duty to rule upon the law on any other subject. When such evidence is given to the jury, the impropriety of its reception is apparent from the consideration that the judge may have to lay down the law as very different from that stated by the witness."

In an action of libel it is not proper to ask a witness whether in his opinion, the alleged libel is likely to cause injury to the plaintiff's business. The answer objected to in the case below cited was that, in the opinion of the witness, allegations that a newspaper can be bought must injure its dignity. HAGARTY, C.J.O., having expressed some doubt whether some such question might not under some circumstances be relevant, BURTON, J.A., said, "I cannot say that I have the slightest doubt that the evidence was properly objected to and was improperly received. It was not evidence. It was the expression of a witness upon a point on which the jury alone were the proper parties to decide, and it is unfortunate that it was admitted, because it imposes upon the Court the difficulty of deciding whether some substantial wrong or damage may not have been occasioned by the admission of the evidence." *Journal Printing Co.* v. *Maclean*, 23 O. A. R. 324.

In an action for negligent driving, the defendant was asked by his counsel whether anything more could have been done than was done to prevent the collision which occurred. This was held improper, as being the point which the jury had to decide; and that the defendant should have stated the facts—without giving his opinion—and left it to the jury to determine whether he could

have done anything more than he did to avoid the collision. *Courser* v. *Kirkbride*, 23 N. B. 404.

On the question whether a trustee has acted honestly and reasonably, within the meaning of the provisions relating to the relief of trustees who have so acted, the opinions of bankers and others, that the trustee has so acted in the course he has taken, is not admissible. The general rule applies, that mere personal belief or opinion is not evidence. *Semble*, that such kind of opinion evidence may be given where the opinion is shown to have been prevalent in the neighbourhood, and to be concurrent with the transaction. *Smith* v. *Mason*, 1 O. L. R. 594.

In an action for the loss of a scow used in conveying deals to a ship, it was held that a witness could not be asked for the purpose of proving negligence, whether it was good or bad management for the defendant to have three scows passing to the ship at the same time, the question not being a matter of science, art or trade. *McNair* v. *Stewart*, 24 N. B. 471.

*Opinion as to Literary Style.*

In the case of *Scott* v. *Crerar*, which was an action for libel, the plaintiff tendered evidence as to the defendant's style of composition.

CAMERON, C.J., said, "There remains the further question, was the evidence of the defendant's style, tendered by the plaintiff, properly rejected? . . . The plaintiff wished to prove not merely that the defendant spoke or wrote in a way to resemble the style of the circulars, but that in fact he had a style peculiar to himself, from which those familiar with it would, after the manner of experts, be able to say, as far as their belief and opinion went, that they could identify the plaintiff's composition, no matter by what pen the composition was made visible."

The learned judge then referred to *Brooks* v. *Tichbourne*, 5 Ex. 929, where letters written by the plaintiff were held admissible to establish the fact that plaintiff spelt the name T i t c h b o r n e, and proceeded: "The distinction between admitting evidence of the way in which a man spells a word, and evidence of his style of writing was drawn by Baron PARKE, in *Brooks* v. *Tichbourne*. He said, at page 921, 'But we think this is not like the case of the general style and character of handwriting. The object is not to show similarity of the forms of the letters and mode of writing a particular word or words, but to prove a peculiar mode of spelling a word which might be evidenced by the plaintiff having orally spelt in a different way, or written it in that way, once or oftener in any sort of characters, the more frequently, the greater value of the evidence.' That the defendant in the present case had used all or any of the expressions used in the circular, it was competent for the plaintiff to prove, and this he was permitted to prove, and the time and manner of their use. . . . But the evidence was, I think, properly rejected of the opinion of witnesses that the circulars were written by the defendant." In the Appeal Court, among other rulings, it was held, reversing the judgment of the Common Pleas Division, that evidence of the defendant being in the habit of using certain uncommon expressions, and which occurred in the letter, was improperly rejected, but *semble*, that a witness could not be asked his opinion as to the authorship of the letter, and *per* BURTON and OSLER, JJ.A., evidence of literary style, on which to found a comparison, if admissible at all, is not so otherwise than as expert evidence. *Scott* v. *Crerar*, 11 O. R. 541, 14 O. A. R. 152.

*Handwriting.*

In an action for libel, the only evidence of publication was that of the publisher of the paper in which the

libel written by a correspondent to the paper had appeared. The publisher swore that he had received the manuscript with the letter accompanying it, written by the defendant, and after publishing the correspondence, had thrown it into the waste-basket, from which in the usual course of things it would be thrown into the fire. After this, the witness had received a letter from the defendant in reference to the article, and on the strength of this letter, and his recollection of the writing in the alleged libel, he was able to say that the defendant was the writer. The case is treated as a novel one by GWYNNE, J., who dissented from the judgment of the Court, but PATTERSON, J., said: "In ordinary cases the witness has to compare two things, one existing only in his mind and the other being before him. . . . He finds that they correspond and therefore concludes that the writing before him is by the same person whose handwriting is the exemplar in his mind. The present case is nearly the converse. There are two things, one mental, being the recollection of the writing the witness threw into the waste-basket after reading the proof, the other before him in the letter from which he became acquainted with the defendant's handwriting. He compares them and finds that they correspond, concluding therefrom that the same person wrote both manuscripts."

Defendant was asked, in cross-examination, having denied that he wrote the libel, whether he had not changed his signature since the publication in an effort to baffle the plaintiff in his proof of the case. PATTERSON, J., held that while he could be cross-examined to this effect, his answers were final, and the fact that he had so changed his signature could not be affirmatively proved by the plaintiff, but the majority of the Court held, GWYNNE and PATTERSON, JJ., dissenting, that there was no error in counsel for the plaintiff showing to the jury specimens of the defendant's handwriting, and then putting them in evidence, and that the jury had no right

to see them unless the plaintiff did put them in. *Alexander* v. *Vye*, 16 S. C. R. 501.

A letter signed Henry Lye, as secretary of a defendant insurance company, received by the plaintiffs from the head office of the company, was admitted in evidence for the purpose of proving, by comparison, Mr. Lye's signature to other letters on the same subject. The policy of insurance which the plaintiff had received from the defendant company, and upon which plaintiff had paid and the company received the premium, purported to be signed by Henry Lye, secretary. The policy had been destroyed by fire.

It was held that the letter written from the company's office was properly used to prove the handwriting by comparison. *Bowes* v. *National Insurance Co.*, 20 N. B. 437.

The action being on a promissory note, plaintiff swore that the deceased had signed it. A mortgage purporting to be signed by the defendant was produced, but no evidence given of any comparison of the signatures. The mortgage bore an endorsement by the registrar which was made by statute *primâ facie* evidence of the due execution thereof. The judge looked at the signature and made the comparison for himself between it and the signature to the note.

It was held that he could do this and that the evidence so afforded was sufficient corroboration of the evidence as to the signature on the note. *Thompson* v. *Thompson*, 4 O. L. R. 442.

In an action on a note, the plaintiff put in a bond admitted to have been signed by the defendant and called no witness, contending that the jury might compare the two writings and find their verdict thereon. GALT, J., at the trial held that this could not be done and nonsuited the plaintiff. *Per* MORRISON, J., the nonsuit

was right. *Per* WILSON, J., it was wrong. *King* v. *King*, 30 U. C. Q. B. 26.

*Identification of Seal.*

Where a witness stated that he had had good opportunities, which he described, of observing and knowing the seal of a corporation, and that he believed the seal to be their seal, both from the impression itself and from seeing the signature of the party whose name was attached to it, with whose handwriting he was acquainted *Held*, that this evidence, though not conclusive, was sufficient to go to the jury to authenticate the seal. *Doe* e.d. *King's College* v. *Kennedy*, 5 U. C. Q. B. 577.

## CHAPTER III.

### WHAT THIRD PERSONS DID OR SAID BEHIND THE BACK OF A PARTY.

WHAT other persons did or said behind the back of either party to an action is, as a rule, inadmissible as evidence against that party. By "a party" here is meant in a civil case either the plaintiff or the defendant; in a criminal case, the prisoner but not the prosecutor.

What a person did, however, will always be received more readily than what he wrote or said, provided that it directly leads up to or explains the matter in issue, or is otherwise sufficiently connected therewith. The Court regards rather a man's acts than his words (*a*). Hence this chapter is divided into two sections, which deal respectively with what third persons did and with what third persons said; and in the word "said" is included anything printed or written.

#### I. *What other Persons did.*

Events that occurred behind the back of a party cannot, as a rule, be given in evidence against him, unless they clearly lead up to or explain some matter in issue, or are otherwise so connected with it that an inference can reasonably be drawn from them respecting the matter in issue. As

(*a*) *Re Steer*, 3 H. & N. 594.

BLACKBURN, J., says in *Castrique* v. *Imrie* (*aa*), "a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged." But where a man is arraigned for stealing goods, the fact that the prosecutor left the goods safe and sound in their proper place an hour before they were stolen would be admissible. So also would the fact that the prosecutor marked certain coins behind the back of his shopman, in whose pocket they were subsequently found.

Many instances can be found in the books which illustrate this general proposition. Thus, on a prosecution for receiving goods knowing them to be stolen, the original theft must be proved against the receiver just as strictly as if the thief were being tried for larceny, but by such evidence only as is admissible against the receiver. Anything which the thief said behind the back of the receiver is inadmissible against the latter. Any confession of guilt made by the thief when charged with the crime will be excluded (*b*); and the jury must disregard the fact that, as sometimes happens, they have just heard the thief plead guilty to the larceny. It is, however, open to the prosecution to call the thief as a witness on this issue, as on all others. If under examination on the trial of the receiver he admits his guilt in the witness-box, this is some evidence to go to the jury; but, if uncorroborated, it is entitled to little weight; and it is the duty of the judge to warn the

(*aa*) L. R. 4 H. L. at p. 434.
(*b*) *R.* v. *Smith*, 18 Cox, 470.

jury that it is unsafe to convict the receiver on the uncorroborated evidence of the thief (*c*).

In an action for false imprisonment on a charge of receiving stolen goods (*d*), where the defence was that the defendant *bonâ fide* believed that the plaintiff knew that they were stolen, a new trial was moved for in the following circumstances:—The defendant had made an oyster bed in the Menai Strait; the local fishermen disputed his right to do so, and dredged for oysters there. The plaintiff bought oysters from one of them, and took them to Liverpool. The defendant, having been informed that the oysters were taken from his bed, caused the plaintiff to be taken into custody. At the trial of the action the defendant tendered the record of the conviction of one Owen at the previous Carnarvon assizes for taking oysters from the same bed for the purpose of showing that the defendant acted *bonâ fide* and under the belief that the plaintiff had in his possession stolen oysters. The judge rejected the document, and the Court upheld the rejection. POLLOCK, C.B. (*e*), said:—

"The only ground on which the defendant could have used it as evidence of *bona fides* would have been to show the impression which it might have made on his own mind, and not as proof of the fact of the conviction itself. For that purpose it was perfectly competent for him to prove any communication made to him on which he might form an opinion. But the conviction itself never had been placed before him, neither did it appear that he was present at the trial; if he had been, he might himself have given evidence of all that passed, but the conviction itself as a document never could have produced any effect on his mind, for he never saw it."

In *Spargo* v. *Brown* (*f*), the question was, whether the plaintiff was tenant to the defendant, Hugh Brown, who had levied a distress for rent alleged to be owing, or to his brother John Brown. The plaintiff had paid rent

(*c*) *R.* v. *Robinson*, 4 F. & F. 43; and see *R.* v. *Tate*, [1908] 2 K. B. 680.
(*d*) *Thomas* v. *Russell*, 9 Ex. 764.
(*e*) *Ibid.* at p. 765.
(*f*) 9 B. & C. 935, cited in *In re Holland*, [1902] 2 Ch. 379.

to John, but the defendant, to show that the money had been paid to John as his (the defendant's) agent, offered in evidence accounts rendered to him in that capacity by John. It was objected that John Brown, not being dead, ought to have been called as a witness. The judge rejected the evidence on this ground, and the full Court upheld his ruling. Littledale, J., said:—

"The general rule is, that where a person is living, and can be called as a witness, his declaration, made at another time, cannot be received in evidence."

And Bayley, J., said:—

"The general rule is, that every material fact must be proved on oath. There is an exception to that rule, viz., that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence; but, generally speaking, mere declarations not upon oath are not evidence. The acts of a party may be evidence; but here the defendant merely produced a paper in the handwriting of John Brown, without showing that he was identified with the plaintiff."

It is equally inadmissible to prove that a person not before the Court treated an individual as sane, as it is to show that in an oral or written statement he called him sane. This was to a great extent the ground of the judgment in *Wright* v. *Doe* (*g*), in which case the judges in the Exchequer Chamber held, on an issue of *devisavit vel non*, that letters written to the testator by different persons since deceased, and who had been well acquainted with the testator, could not be received in evidence on a question of his sanity. The Court held that the letters were not receivable as mere declarations of deceased witnesses, or as proof of treatment, but that they would have been received if the letters were connected with any act of the testator relating to them by which intelligence was indicated, as, for example, if he had answered them. Parke, B., said:—

"The question is, whether the contents of these letters are evidence of the fact to be proved upon the issue; that is, the

(*g*) 4 Bing. N. C. 489; Cockle, 45.

actual existence of the qualities which the testator is in those letters, by implication, stated to possess; and these letters may be considered, in this respect, to be on the same footing as if they had contained a direct positive statement that he was competent. For this purpose they are mere hearsay evidence, statements of the writers, not on oath, of the truth of the matter in question, with the addition that they have acted upon the statements on the faith of their being true, by thus sending the letters to the testator. That the so acting cannot give a sufficient sanction for the truth of the statements is perfectly plain, for it is clear that if the same statements had been made by parol or in writing to a third person it would have been insufficient. Yet in both cases there has been an acting on the belief of the truth, by making the statements, or writing and sending a letter to a third person; and what difference can it possibly make that this is an acting of the same nature by writing and sending the letter to the testator?"

This decision was affirmed by the House of Lords (*gg*).

Again, the conduct, intention, or course of dealing between two parties cannot be shown by evidence of the conduct, intention, or course of dealing, or of similar transactions, between one of them and a third party; still less of transactions between entirely different parties (*h*). Such evidence is said to be *res inter alios acta*, and will be rejected as irrelevant to the issue, unless, indeed, it is part of the *res gestæ*, or shows some transaction sufficiently connected with that in question, and so tends to throw light upon the question at issue (*i*). The fact that A. contracted or dealt in a particular manner with B. is no evidence that he meant to contract or deal in the same manner with C. Thus, in an action for goods sold and delivered, in which the defence is that the plaintiff sold them to the defendant on certain terms, the defendant cannot show that the plaintiff had sold the same quality of goods to other persons on such terms, for the fact that a man has once or more acted in a particular way does not make it probable that he so acted on the occasion in question; and the admission of such evidence would be fraught with the greatest

(*gg*) 5 Cl. & F. 670.
(*h*) *Kent* v. *Fittall* (No. 3), [1909] 1 K. B. 215.
(*i*) *Milne* v. *Leisler*, 7 H. & N. 786; and see *post*, pp. 62, 63.

inconvenience (*j*). But where in an action for work done to some houses the defendant denied that he was personally interested in the property, the plaintiff was allowed to call other persons as witnesses who had done work or supplied materials on the personal order of the defendant to and for those houses (*k*).

In an action by a brewer against a publican, where the issue was as to the quality of beer supplied by the former to the latter, Lord Ellenborough refused to let the plaintiff call witnesses to show that he supplied them, at the time in question, with good beer. His lordship said :—

"This is *res inter alios acta*. We cannot here inquire into the quality of different beer furnished to different persons. The plaintiff might deal well with one, and not with the others" (*l*).

His lordship's decision might have been otherwise if it had been shown that the beer sold to all was of the same brewing (*m*).

So, where the issue was whether the plaintiff, a tradesman, had given credit to A.'s father, evidence that other tradesmen had given credit to the father was rejected (*n*). In an action for slander alleging maltreatment of boys at a school, evidence of the treatment of boys at other schools, offered to prove what is proper treatment, was rejected (*o*); and where the action was for withdrawing scholars without a quarter's notice, according to a prospectus of terms, which the plaintiff swore the defendant had received, it was held that, although another person called as a witness might state that she had never received any prospectus while her children had been at the school, because this evidence bore on the usual course

(*j*) *Hollingham* v. *Head*, 4 C. B. (N.S.) 388; Cockle, 63; cf. *Howard* v. *Sheward*, L. R. 2 C. P. 148.
(*k*) *Woodward* v. *Buchanan*, L. R. 5 Q. B. 285.
(*l*) *Holcombe* v. *Hewson*, 2 Camp. 391.
(*m*) Stephen's Dig. Law Ev., art. 10.
(*n*) *Smith* v. *Wilkins*, 6 C. & P. 180.
(*o*) *Boldron* v. *Widdows*, 1 C. & P. 65.

of the plaintiff's dealing, yet she could not prove that she had taken her children away without notice and without being called on to pay a quarter's salary, apparently because this might have been merely a matter of special arrangement with her (*p*). So the terms on which one tenant holds are no evidence of the terms on which another tenant holds under the same landlord (*q*). An award in favour of a party to a former action is not evidence for a party to a subsequent action, claiming by paramount title, as against a party who claims through the person against whom the award was made (*r*). In an action to recover money paid to a third person, the receipt given by the latter to the plaintiff is not *per se* evidence against the defendant (*s*).

It will be observed that, whenever an act between third persons has been received, it has been either connected presumptively with the party who is to be affected by it, or has been invested with a *primâ facie* relevancy by evidence of an original unity of nature or title. Unless some such privity or connection is first proved extrinsically, the transactions of third persons are inadmissible (*t*).

On a similar principle, a plaintiff suing for personal injuries can prove that other accidents had occurred at the same place in order to show its dangerous character (*tt*). The defendant, to rebut this inference, can also show that in places exactly similar no accidents had occurred (*u*).

But the general rule excluding such evidence of the acts or conduct of other persons is subject to the

(*p*) *Delamotte* v. *Lane*, 9 C. & P. 261.
(*q*) *Carter* v. *Pryke*, Peake, 95.
(*r*) *Wenman* v. *Mackenzie*, 5 E. & B. 447.
(*s*) *Carmarthen and Cardigan Rail. Co.* v. *Manchester and Milford Rail. Co.*, L. R. 8 C. P. 685.
(*t*) *Per* MAULE and BOSANQUET, JJ., in *Taylor* v. *Parry*, 1 M. & G. 614; *Petrie* v. *Nuttall*, 11 Ex. 569.
(*tt*) *Moore* v. *Ransome*, 14 T. L. R. 539.
(*u*) *Manning* v. *London and North Western Rail. Co.*, 23 T. L. R. 222; cf. *Folkes* v. *Chadd*, 3 Doug. 157.

limitation already stated, that where they directly lead up to or explain, or are sufficiently connected with, the matter in issue, then such acts and conduct may be admitted.

Thus, a custom of trade may sometimes be proved by showing what is the custom of the same trade in a different place. So, evidence of the custom of fisheries off Newfoundland is evidence of the custom of similar fisheries off the coast of Labrador (*v*); and evidence of a usage in the London colonial market, which makes a broker contracting on behalf of an undisclosed principal personally liable unless he discloses his principal within three days from the date of the contract, has been admitted as relevant to show a similar custom in the London fruit trade, on the ground that it was evidence of a usage in a closely allied trade in the same place, and tended to corroborate the evidence as to the existence of such a usage in the fruit trade (*x*). Again, parish books were held to be evidence of the practice of the parish against a member of the vestry, although they related to proceedings of the vestry before he became a member (*y*).

The customs of one manor are not, as a rule, evidence of the customs of another manor (*z*). But such evidence may be admitted on proof that the two manors were once united. Such proof may be afforded by showing that they belong to the same lord, that the same description of tenants has existed in each, and that their leases have been granted in the same terms. In such a case, the usage which has prevailed in one part, and which is therefore evidence to explain the meaning of a grant there, is evidence to explain a grant expressed in similar terms as to any other part of the old manor (*a*);

(*v*) *Noble* v. *Kennoway*, 2 Doug. 510.
(*x*) *Fleet* v. *Murton*, L. R. 7 Q. B. 126.
(*y*) *Cooper* v. *Ward*, 6 C. B. (N.S.) 50.
(*z*) *Marquis of Anglesea* v. *Lord Hatherton*, 10 M. & W. 233.
(*a*) *Per* BAYLEY, J., in *Rowe* v. *Brenton*, 8 B. & C. 764.

but the unity or original identity of the manors must be clearly shown, and the mere fact of their being in the same leet, or parish, is not sufficient (*b*).

Where a letter from the defendant, in answer to a letter written on the plaintiff's behalf, was proved to have been seen by the plaintiff, it was admitted in evidence against the latter.

The most recent illustrative case is *Clifford* v. *Timms* (*c*), where articles of partnership between plaintiff and defendant, who were dentists, provided that either of them could give the other notice in writing to dissolve the partnership, if that other should at any time during the continuance of the partnership (*inter alia*) be guilty of professional misconduct. The defendant gave plaintiff notice in writing, and plaintiff brought his action for a declaration that the notice was void and the partnership still subsisting, and for an injunction. The defendant offered, in justification of his notice, as evidence, an order of the General Medical Council made under the Dentists Act, 1878, directing the Registrar to erase the plaintiff's name from the Dental Register on the ground that it had been proved to their satisfaction that he had been guilty of conduct which was infamous or disgraceful in a professional respect. He also offered as evidence the report of the Dental Committee as to plaintiff's conduct upon which the order had been based. The evidence was held by WARRINGTON, J., to be inadmissible both as to the report made, and as to the fact that the General Medical Council had erased plaintiff's name from the Dental Register, it being in effect *res inter alios acta*. This decision was overruled by the Court of Appeal, which decided that the order (and apparently the report) was admissible, the order being considered in the light of an inquisition or judgment *in rem*, as the General Medical Council had committed to them by

(*b*) *Per* Lord ABINGER, 10 M. & W. 236.
(*c*) [1907] 1 Ch. 420.

statute the sole right of adjudicating on such matters (*d*). But it must be observed that this decision lays down no general rule as to judgments between private individuals in any matter of ordinary private concern. Such a judgment, obtained against A., is not admissible in a subsequent action against B.

On the other hand, whenever proceedings which relate to a matter of public interest have been brought in any Court or any other tribunal legally entrusted with judicial powers in the matter, the judgment, decree, or inquisition which embodies the decision of that Court or tribunal is admissible against all persons as evidence, although it is not conclusive as against those who were not parties to the proceedings.

Thus, in an action for trespass to a several fishery in a navigable tidal river, the defendants justified on the ground that the public had the right of fishing. As evidence of possession and user the plaintiff tendered (*inter alia*) the proceedings and decree in 1687 in a "possessory suit" brought in the Court of Chancery in Ireland by C. (the plaintiff's predecessor in title) against strangers to the present action, by which decree an injunction was awarded to quiet C. and his under-tenants in such possession of their fishing as they had at the time of exhibiting the bill, and three years before, to continue until evicted by due course of law, both parties being at liberty to take proceedings at law against each other for ascertaining their titles. It was held that, as the decree was a solemn and final adjudication and not collusive, and as it could not have been made except upon proof of unbroken user and enjoyment for at least three years before the bill, inconsistent with any actual exercise at that time of a public right of fishing, the proceedings and decree were admissible (*e*). And a verdict against one defendant in

(*d*) [1907] 2 Ch. 236.
(*e*) *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135.

trespass upon an issue of a justification of a public right of way, negativing such right, is evidence in trespass for breaking and entering the same close against another defendant who justifies under the same right (*f*). The right claimed by both defendants being the same public right, both stood in the same relation to the plaintiff.

Certain judgments of our Courts are called "judgments *in rem*," and these are conclusive on everybody, and therefore admissible in evidence against everybody. A judgment *in rem* may be defined as "an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose." Such an adjudication, being the solemn declaration of the properly accredited Court, which has the best right so to adjudicate, concludes not merely the parties to the action and their privies, but all persons, from asserting the contrary.

The distinction between these judgments and ordinary judgments (or judgments *in personam*) was laid down in *Castrique* v. *Imrie* (*g*), where BLACKBURN, J., in advising the House of Lords, said:—

"Some points are clear. When a tribunal, no matter whether in England or a foreign country, has to determine between two parties, and between them only, the decision of that tribunal, though in general binding between the parties and privies, does not affect the rights of third parties; and if, in execution of the judgment of such a tribunal, process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing, for the tribunal neither had jurisdiction to determine, nor did determine, anything more than that the litigant's property should be sold, and did not do more than sell the litigant's interest, if any, in the thing. All proceedings in the Courts of common law in England are of this nature, and it is every day's experience that where the sheriff, under a *fieri facias* against A., has sold a particular chattel, B. may set up his claim to that chattel either against the sheriff or the purchaser from the sheriff. And if this may be done in the Courts of the country in which the judgment was pronounced, it follows of course that it

(*f*) *Reed* v. *Jackson*, 1 East, 355.
(*g*) L. R. 4 H. L. at pp. 427—429.

may be done in a foreign country. But when the tribunal has jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing, and does in the exercise of that jurisdiction direct that the thing, and not merely the interest of any particular party in it, be sold or transferred, the case is very different. . . . Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign Courts of Admiralty, whether they be causes of prize or bottomry, or salvage or forfeiture, of which such Courts have a rightful jurisdiction founded in the actual or constructive possession of the subject-matter."

Judgments *in rem* include judgments in Courts of Admiralty in causes of prize, bottomry, salvage, forfeiture, or the like where the jurisdiction is founded on the actual or constructive possession of the subject-matter (*h*); maritime lien (*i*); condemnation of goods in Exchequer cases (*k*); the actual grant of probate or administration (*l*); or analogous decrees in foreign Courts (*m*); but not an adjudication as to the effect of a will (*n*). The same force is given to adjudications upon the status of persons, as, for example, decrees of nullity or divorce (*o*), but not as to domicil (*p*).

Moreover, judgments *in rem* are conclusive "not merely as to the point actually decided, but as to a matter which it was necessary to decide, and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue" (*q*), but it must clearly appear that a decision on such matter was actually necessary to the judgment (*r*).

(*h*) *Castrique* v. *Imrie*, L. R. 4 H. L. 428, 429.
(*i*) *Minna Craig, etc.* v. *Chartered, etc., Bank*, [1897] 1 Q. B. 460.
(*k*) *Scott* v. *Shearman*, 2 W. Bl. 977.
(*l*) *Concha* v. *Concha*, 11 App. Cas. 541.
(*m*) *In re Trufort*, 36 Ch. D. 600.
(*n*) *Whicker* v. *Hume*, 7 H. L. Cas. 124, 156.
(*o*) *Duchess of Kingston's Case*, 1 Leach, C. C. 146; *Scott* v. *Attorney-General*, 11 P. D. 128.
(*p*) *Concha* v. *Concha*, *supra*.
(*q*) *Per* COLERIDGE, J., in *R.* v. *Hartington*, 4 E. & B. at p. 794.
(*r*) *Concha* v. *Concha*, *supra*; *Ballantyne* v. *Mackinnon*, [1896] 2 Q. B. 455.

The distinction between judgments *in rem* and judgments *in personam* may be well illustrated by certain revenue cases (*s*). The condemnation of goods at the suit of the Crown is conclusive against all the world, but a conviction imposing penalties on the person committing the illegality is not, though before the same Court and concerning the same transaction (*t*).

## II. *What Third Persons said.*

Any statement made by a third person behind the back of a party is not, in general, admissible against him. But to this rule there are several exceptions.

(i.) Words accompanying a material act done behind the back of the party are admissible in evidence against him when such act is itself so admissible, and the words in fact form part of the same transaction, or *res gesta*. The words must strictly accompany the physical act, and be uttered at the time the material act is done, or so shortly before or so shortly after it that they may fairly be described as part of the same transaction. The physical act and the spoken words must together form one transaction. But apparently, so long as the words do thus accompany the acts, it is not material who used the words. It may be the doer of the physical act, the person to whom the act is done, or an onlooker.

Thus, as long ago as 1692, in *Thompson and wife* v. *Trevanion* (*u*), which was an action for an assault committed

(*s*) *Scott* v. *Shearman*, *supra*.
(*t*) *Hart* v. *Macnamara*, 4 Price, 154, n.
(*u*) Skinner, 402; Cockle, 39.

by the defendant on the female plaintiff, Holt, C.J., decided that "what the wife said immediately upon the hurt received, and before that she had time to devise or contrive anything for her own advantage, might be given in evidence." Again, in *R.* v. *Fowkes* (*x*) a man was shot in a room; his son, who was in the room at the time, saw the prisoner look in at the window immediately before the shot was fired, and at once called out, "There's butcher" (that being the name by which the prisoner was known). At the trial the son was permitted to state not only that he saw the prisoner, but what he cried out, although the prisoner was not near enough to hear the exclamation.

In the case of *R.* v. *Foster* (*y*), where the prisoner was tried for the manslaughter of a man by driving over him with a cabriolet, a carter, who was passing at the time and heard the dying man groan, was allowed to give in evidence what the dying man said. Gurney, B., giving judgment, said:—

> "What the deceased said at the instant as to the cause of the accident is clearly admissible."

However, in *R.* v. *Bedingfield* (*z*), where a man was tried for murdering the woman he lived with, and the defence was suicide, and evidence was tendered that the woman rushed out of the room which she occupied with the prisoner with blood streaming from her throat, and cried out, "See what Harry has done," this statement was held inadmissible by Cockburn, C.J., on the double ground that (a) it was not part of the *res gestæ*, inasmuch as her statement was made after she had come out of the room in which her throat was cut, and (b) it was not a dying declaration, inasmuch as, though she was obviously dying at that moment, she had no time to think she was, and consequently made her statement without that absence of hope of recovery and absolute belief in impending

(*x*) Stephen, Dig. Law Ev., art. 3.
(*y*) 6 C. & P. 325; Cockle, 40.
(*z*) 14 Cox, 341; Cockle, 39.

death which the law accepts as the sole substitute for the solemnity of an oath (*a*). This decision was much discussed and criticised (*b*), although it does not appear to have been judicially dissented from, but it is not inconsistent with any of the previous cases, as there was no evidence to show how long an interval had elapsed between the murderous act and the exclamation uttered by the victim.

It was not cited in *R.* v. *Gibson* (*c*), in which a conviction of quarter sessions was quashed by the Court for Crown Cases Reserved on the ground that a statement had been wrongly admitted as evidence. The prosecutor, when walking down a street in which the prisoner lived, received a wound from a stone. A lady, who was then passing, said to the prosecutor, pointing to the prisoner's door, "The person who threw the stone went in there." The door was at once broken open and the house entered, and the only persons found inside were the prisoner and his father, who was in a drunken sleep. The prisoner obviously was not present when the lady made this statement, and there was no evidence that he heard it. She was not called as a witness at the trial. Her statement clearly ought not to have been received, as it did not accompany the material act, nor was it part of the transaction. Some little time must have elapsed between the throwing of the stone and the moment when the lady made the statement, as the prisoner had had time to enter his house and fasten the door.

In an action for false imprisonment, the defendant justified on the ground that he had given the plaintiff in custody for forging a bill of exchange, which had been dishonoured on presentment to the drawee. A witness stated that he had accompanied the defendant to the drawee, who refused to pay. He was then asked what

(*a*) See *post*, p. 81.
(*b*) Stephen, Dig. Ev., art. 3; Taylor, 412, 509; Phipson, 46.
(*c*) 18 Q. B. D. 537; Cockle, 222.

the drawee had said at the time of the refusal. The question was objected to, but the Court held that the evidence ought not to be excluded. There were peculiar circumstances in the case, but Tindal, C.J., said:—

"Even if the inquiry before us had depended on the determination of the point whether evidence by the defendant of the dishonour of the bill, and of the circumstances attending such dishonour, was relevant to the question then before the jury, it would have been difficult altogether to exclude such evidence on the score of its irrelevancy" (*d*).

On the same principle, proof has been received of the language uttered by the holders of seditious meetings in order to show the objects and character of such meetings. In the same way evidence may be given of the inscriptions on flags used at such meetings without producing the flags themselves; for such inscriptions used on such occasions are the public expression of the sentiments of those who bear them, and have rather the character of speeches than of writings (*e*). Thus, a foreign proclamation, contained in a printed placard, posted up at Ibraila, was treated as an act done, and was allowed to be proved by an examined copy. In this case Pollock, C.B., said:—

"Hearsay (*f*) evidence is admissible when it is part of a transaction; and in this way the exclamations of a crowd may be received as evidence. But there is, generally speaking, this distinction between what is said and what is done: in order to admit the former it is necessary that the authority of the speaker should be shown, in order to affect the parties; but if it be something done that is to be proved, no authority is required, because there is no danger of being misled; and I regard a placard or proclamation on a wall rather as something done. In a case before me at Guildford, where the plaintiff sought to recover the expenses of an election, I would not allow orders given by third parties by word

(*d*) *Perkins* v. *Vaughan*, 4 M. & G. 988.

(*e*) *R.* v. *Hunt*, 3 B. & Ald. 574; *R.* v. *Lord George Gordon*, 21 How. St. Tr. 535.

(*f*) It will be observed that the learned judge spoke of the evidence as "hearsay." This was an incautious expression, and not strictly correct. It was really direct evidence of part of the transaction. "Hearsay evidence" is, of course, also behind the back of the parties. See *post*, Book II., Chap. VIII.

of mouth to be admitted in evidence against the defendant, but I admitted inscriptions on coaches" (*g*).

So too, the remarks made by persons looking at a libellous picture are admissible in evidence in an action against the person who exhibited it (*h*).

In a case where the question was in what capacity a person signed a contract, statements as to what he said as to capacity at the time of signing the contract were held admissible (*i*). To prove an act of bankruptcy by the bankrupt beginning to keep his house, it is allowable to prove that the bankrupt was denied to his creditors by a servant at his house; but it is not enough to prove that the bankrupt directed that he should be denied unless the direction be followed up by an act of denial (*j*). In trover by the assignees of a bankrupt for goods, the property of the bankrupt, letters written by him during his absence from home, stating that he was absent to avoid two writs that were out against him, have been held admissible evidence for the plaintiffs of an act of bankruptcy, without proof that there was in fact any writ issued, or any pressure of creditors. It was said in the same case, also, that, in order to make a declaration of a bankrupt admissible evidence of an act of bankruptcy, it is not essential that the declaration and the act should be contemporaneous (*k*). But this was a mere *obiter dictum*, as the question did not really arise in the case, because the act "was a continuous act, and the letter was written during its continuance." In this case Lord DENMAN concurred in a previous decision of PARK, J., that it is impossible to tie down to time the rule as to declarations that may be made part of the *res gestæ* in cases of bankruptcy (*l*); and his lordship

(*g*) *Bruce* v. *Nicolopulo*, 3 W. R. 483.
(*h*) *Du Bost* v. *Beresford*, 2 Camp. 511.
(*i*) *Young* v. *Schuler*, 11 Q. B. D. 651.
(*j*) *Per* Lord TENTERDEN, in *Fisher* v. *Boucher*, 10 B. & C. 710.
(*k*) *Rouch* v. *Great Western Rail. Co.*, 1 Q. B. 51. See also *Rawson* v. *Haigh*, 2 Bing. 99; Cockle, 41.
(*l*) *Rawson* v. *Haigh*, *supra*.

added that "if there be connecting circumstances, a declaration may, even at a month's interval, form part of the whole *res gestæ*." But in this case also the transaction was a continuous one, and the letter was written during its continuance, and was treated as accompanying the act. Indeed, there seems no authority at all for the admission of a statement made after the transaction was closed.

Statements by a deceased vendor as to the property sold, made at the time of a sale, are evidence for its subsequent identification (*m*). For the declaration of a tenant for life to be evidence against the remainderman, it must be accompanied by an act done by the tenant for life; an act done by a third person is not sufficient (*n*).

Notwithstanding the rule that a parent cannot bastardise his child, on an issue as to the legitimacy of the plaintiff, a witness was allowed to state the declaration and conduct of the deceased mother, when questioned about her child's parentage (*o*). And the letters of a living mother were admitted as part of the *res gestæ* on a question of legitimacy of the child; evidence of her acts and conduct being admissible on this question, although, of course, she could not have given such evidence in the witness-box (*p*). The Earl of Selborne, L.C., said:—

"I am of opinion that these letters ought to be read. The authorities which have been referred to I assume to be still in force, that is to say, that you could not put into the witness-box Lady Aylesford, or, if he were still living, Lord Aylesford, for the purpose of proving who the real father of the child was. But it by no means follows that you cannot prove acts and conduct of the one or the other tending, as part of a series of *res gestæ*, to throw light upon and to lead to a just conclusion upon a question on which they could not directly be permitted to give evidence."

(*m*) *Parrott* v. *Watts*, 47 L. J. C. P. 79.
(*n*) *Howe* v. *Malkin*, 27 W. R. 340.
(*o*) *Hargrave* v. *Hargrave*, 2 Car. & K. 701.
(*p*) *The Aylesford Peerage Case*, 11 App. Cas. 1; and see *The Poulett Peerage Case*, [1903] A. C. 395, and *Yool* v. *Ewing*, [1904] 1 Ir. R. 434.

(ii.) Where it has been already proved that two or more persons are engaged in a joint enterprise (such as, a criminal conspiracy, the commission of a joint tort, the making of a joint contract, etc.), anything said or done by one of them in furtherance of their common purpose is admissible against the others, although such others were not present when the words were spoken or written or the act done.

The conspiracy or agreement among several to act in concert together for a particular end must be established by proof before any evidence can be given of acts done or words spoken behind the back of the person against whom the evidence is tendered.

Where several persons are proved to have been engaged in a conspiracy, all the transactions of that conspiracy by the different parties may and ought to be given in evidence against any one of them. As soon as it is proved that the prisoner was privy to the general conspiracy, everything done by each of his fellow-conspirators must also be imputed to him as a part of the conspiracy if it was done to carry out their general purpose (*q*). Thus, in Hardy's trial for high treason, letters written by one conspirator to another were held to be evidence against the prisoner after his complicity in the conspiracy had been established. So, if several defendants in trespass be proved to be co-trespassers by other competent evidence, the declaration of one as to the motives and circumstances of the trespass will be evidence against all who are proved to have combined together for the common object (*r*).

But on a charge of conspiracy, although statements made

(*q*) *Per* EYRE, C.J., in *R.* v. *Hardy*, 24 How. St. Tr. 451.
(*r*) *Per* Lord ELLENBOROUGH, in *R.* v. *Hardwick*, 11 East, 585.

by any conspirator for the purpose of carrying the conspiracy into effect are admissible in evidence against the others, statements by one not made in pursuance of the conspiracy are not admissible against the others, nor are statements made after the conspiracy has been abandoned or its object attained (*s*). Thus, in the case of *R.* v. *Blake* (*t*), where the prisoner was tried for conspiring with one Tye to defraud the Customs, Tye was an agent to pass goods through the Customs, and pay the proper duties. Blake was an official of the Customs called a "landing waiter." Passing goods through the Customs was effected as follows:—Tye made a list of the goods he wished passed. This was copied into the official Customs House record, and the original given to Blake to check the goods by as they came ashore. Blake tallied the goods with the list, and if the list was accurate, his duty was to write "Correct" across it, and add his initials. The duty payable was then calculated according to the list thus checked, and paid. Tye made a false list, which Blake certified as correct. Blake was caught; Tye absconded. To prove the conspiracy, Tye's day-book was tendered in evidence, showing that the list Blake certified as correct could not have tallied with the goods actually put ashore and received, also Tye's cheque book, the counterfoil of which showed the amount of which the Crown had been defrauded by the conspiracy. Both documents were admitted, but on an application for a new trial, on the ground of improper reception of evidence, it was held that the day-book was properly admitted, but that the counterfoil of the cheque book was inadmissible and should have been rejected. Lord DENMAN, C.J., said (*u*):—

"Upon the first point the evidence clearly was receivable. The day-book was evidence of something done in the course of the

(*s*) *R.* v. *Blake*, 6 Q. B. 137; Cockle, 44.
(*t*) 6 Q. B. 126.
(*u*) *Ibid.* at p. 137.

transaction, and was properly laid before the jury as a step in the proof of the conspiracy."

And PATTESON, J., put the law on the point quite succinctly, thus (*x*) :—

"It is laid down that you must establish the fact of a conspiracy before you can make the act of one the act of all, but you are not bound to bring the parties into each other's presence; the concert may be shown by either direct or indirect evidence. The day-book here was evidence of what was done towards the very acting in concert which was to be proved. It was receivable as a step in the proof of the conspiracy."

COLERIDGE, J., said (*y*) :—

"As to the counterfoil, it is quite clear that no declaration of Tye can be received in evidence against Blake which was made in Blake's absence, and did not relate to the furtherance of the common object. What then was this statement? It was made by Tye after the common object was effected."

In *Hardy's Case* (*z*) evidence was tendered by the prosecution of a letter written by one of the conspirators, Thelwall, not then on trial, to his wife, who was not a party to the conspiracy, in which he simply detailed the part he had taken in the crime. EYRE, C.J., refused to admit the evidence, and summed the whole matter up thus :—

"I doubt whether we ought to consider this private letter as anything more than Mr. Thelwall's declaration; and Mr. Thelwall's declaration ought not to be evidence of anything which, though remotely connected with this plot, yet still does not amount to any transaction done in the course of the plot for the furtherance of the plot, but is a mere recital of his, a sort of confession of his of some part that he had taken. It appears to me that that is not like the evidence which we before admitted of a fact done by Mr. Thelwall in carrying the papers and delivering them to the printer, which is a part of the transaction itself."

(iii.) On a criminal charge of rape or indecent assault, statements made by the prosecutrix, though

(*x*) 6 Q. B. 137.
(*y*) *Ibid.* 140.
(*z*) 24 How. St. Tr. 451.

behind the back of the accused, if made at the earliest reasonable opportunity after the offence, are admissible in evidence as corroboration of the story of the prosecutrix told in the witness-box, or as negativing her consent.

This rule is a striking exception to the general principle that statements made behind the back of a party are not admissible in evidence against him.

The origin of the rule is doubtful. It is either derived from the ancient law that a ravished woman should raise a "hue and cry" as soon as she could after the offence was committed, or else from the ancient practice, before the laws of evidence were settled, by which all prosecutors were allowed to give details of complaints in regard to any offence.

Whatever its beginning, it is now clear that the rule only applies to cases of rape, indecent assaults, and like offences under the Criminal Law Amendment Act, 1885. Modern decisions have restated the principle, and it is now only necessary to consider the chain of cases beginning with *R.* v. *Lillyman* (*a*), and ending with *R.* v. *Osborne* (*b*). In the first-named case, the prisoner was tried on an indictment containing three counts: first, an attempt to have carnal knowledge of a girl over the age of thirteen and under the age of sixteen years; second, an assault with intent to rape; and third, an indecent assault. To the first count it is no defence to prove that the girl consented, though it is to the other two charges. Evidence was tendered of a complaint made by the prosecutrix, and, in spite of objection by the prisoner, it was received. The jury convicted, but on the first count only. A case was reserved and the point argued before the Court for Crown Cases Reserved. The Court held that the evidence

(*a*) [1896] 2 Q. B. 167.
(*b*) [1905] 1 K. B. 551.

was rightly received, and upheld the conviction. Hawkins, J. (*c*), laid down the law as follows:—

"It is necessary, in the first place, to have a clear understanding as to the principles upon which evidence of such a complaint not on oath, nor made in the presence of the prisoner, nor forming part of the *res gestæ*, can be admitted. It clearly is not admissible as evidence of the facts complained of; those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains."

It is essential to bear in mind—what has been often overlooked—that, on the charge on which the prisoner was actually convicted, the consent of the prosecutrix was immaterial.

Soon after *R.* v. *Lillyman* an attempt was made to extend the rule to all cases, and in *R.* v. *Folley* (*d*) the Recorder of London admitted evidence of a complaint on a charge of wounding with intent to do grievous bodily harm, but almost immediately that ruling was dissented from in a civil action (*e*) for damages where the female plaintiff alleged that the defendant, a surgeon, had operated upon her without her consent. A complaint was tendered in evidence; but HAWKINS, J., rejected it, saying with reference to *R.* v. *Lillyman*:—

"The principle of that decision is only applicable to cases of rape and similar offences against women and girls. It is not of general application."

The decision in *Beatty* v. *Cullingworth* has since been accepted as stating the correct rule. It has been already pointed out that to the charge on which Lillyman was actually convicted the consent of the prosecutrix was immaterial. But, strangely enough, this fact was

(*c*) [1896] 2 Q. B. at p. 170.
(*d*) 60 J. P. 569.
(*e*) *Beatty* v. *Cullingworth*, 60 J. P. 740.

overlooked, and it was thought that a complaint was admissible only in cases where consent is a defence and for the purpose only of negativing such consent (*f*). But in one case it was admitted where the girl alleged to have been assaulted was so young that her evidence was taken without her being sworn, and her consent was immaterial (*g*).

Lastly, in *R.* v. *Osborne* (*h*) the principle of *Lillyman's Case* was again considered by the Court for Crown Cases Reserved, and all the authorities were discussed. In *Osborne's Case* the prisoner was tried on an indictment containing two counts, one of which charged him with an indecent assault (*i*), and the other a common assault. The girl assaulted was twelve years old, and her consent could have afforded no defence. The prisoner kept a shop in Kidderminster, about five minutes' walk from the child's residence, and on the day in question she and two other little girls came to his shop. He sent the other two out on an errand, detained the prosecutrix, and indecently assaulted her. She made no resistance or objection, but on opportunity offering she ran away. While on her way she met the other two returning, and, on one of them asking her why she had not waited until they came, she made a complaint. At the trial this complaint was tendered in evidence, and was objected to on two grounds: (1) that *R.* v. *Lillyman* only applied to cases in which consent was a defence; and (2) that the complaint was made in answer to a question (*k*). The evidence was admitted, and the prisoner was convicted, but a case was reserved on both points. The Court overruled both objections and

(*f*) *Per* HAWKINS, J., in *R.* v. *Rowlands*, 62 J. P. 459; and *R.* v. *Kingham*, 66 J. P. 393.
(*g*) *Per* RIDLEY, J., in *R.* v. *Kiddle*, 19 Cox, 77.
(*h*) [1905] 1 K. B. 551.
(*i*) Under Offences against the Person Act, 1861, s. 25.
(*k*) See *R.* v. *Merry*, 19 Cox, 442; *R.* v. *Brasier*, 1 Leach, 199.

confirmed the conviction, RIDLEY, J. (who delivered the judgment of the whole Court), saying (*l*):—

"It appears to us that the mere fact that the statement is made in answer to a question in such cases is not of itself sufficient to make it inadmissible as a complaint. Questions of a suggestive or leading character will, indeed, have that effect, and will render it inadmissible; but a question such as this, put by the mother or other person, 'What is the matter?' or 'Why are you crying?' will not do so. These are natural questions which a person in charge will be likely to put. On the other hand, if she were asked, 'Did So-and-so' (naming the prisoner) 'assault you?' 'Did he do this and that to you?' then the result would be different, and the statement ought to be rejected. In each case the decision on the character of the question put as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding judge. If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first. In this particular case, we think that the chairman of quarter sessions acted rightly, and that the putting of this particular question did not render the statement inadmissible."

And again (*m*)—

"It appears to us that, in accordance with principle, such complaints are admissible, *not merely as negativing consent, but because they are consistent with the story of the prosecutrix*. In all ordinary cases, indeed, the principle must be observed which rejects statements made by anyone in the prisoner's absence. Charges of this kind form an exceptional class, and in them such statements ought, under proper safeguards, to be admitted. Their consistency with the story told is, from the very nature of such cases, of special importance."

But the Court's finding (*n*)—

"applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself. Within such bounds we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility and, when consent is in issue, of the absence of consent."

Since the decision in *R.* v. *Osborne* it is now clear law that the complaint of the prosecutrix is admissible only

(*l*) [1905] 1 K. B. at p. 556.
(*m*) *Ibid.* at p. 558.
(*n*) *Ibid.* at p. 561.

in cases of rape, indecent assault, and similar offences under the Criminal Law Amendment Act, 1885; and that in such cases it is admissible only for the purposes of negativing consent (where consent is material) and of showing the general consistency of the story told by the prosecutrix in the box. It is the duty of the judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of the facts or for any other purpose than those above stated. Unless the jury are thus warned, the conviction will be quashed (*o*). The complaint must only relate to the occasion of the alleged offence. Anything else is inadmissible (*p*).

Again, the fact that the complaint was made in answer to a question is not enough in itself to exclude it. The complaint must be made at the earliest opportunity which reasonably offers itself, and only so much of the complaint as relates to the charge under trial is admissible (*q*).

(iv.) Statements made by a person, since deceased, relating to the circumstances which ultimately cause his death, are admissible in evidence against a person who is being tried for the murder or manslaughter of such deceased person, provided such statements were made when he was in settled, hopeless expectation of death. Such statements are known as "dying declarations." They usually are made orally; but they may be reduced into writing. They are not depositions; they are no made on oath; neither the accused nor any magistrate need be there when they are made.

(*o*) See *per* HAWKINS, J., in *R.* v. *Lillyman*, [1896] 2 Q. B. at p. 178.
(*p*) *R.* v. *Pulteney*, 71 J. P. 101.
(*q*) *Ibid.*

We have here another exception to the rule that evidence is inadmissible, unless given on oath, and when the party who is to be affected by it can have the benefit of cross-examining the declarant. It exists only in criminal cases of murder and manslaughter, and is confined to statements, made in settled, hopeless expectation of death, as to the identity of the offender, or the circumstances of the offence. It is presumed that the sense of approaching death in the declarant is calculated to produce in him a sentiment of responsibility, equal to that which a religious and conscientious man feels when required to make a statement on oath (*r*). Where the sense or conviction of approaching death is deficient or uncertain, dying declarations will not be received. Even when they are received, their value and credibility will vary according to the circumstances. But they are still open to the strong objection that they are usually given in evidence against one who has had no opportunity of cross-examining the declarant, and thus of refuting out of his own mouth the errors, omissions, contradictions, and possibly wilful misstatements, which the latter may have committed (*s*). It often happens, also, that the declaration is made on great pressure, when the declarant is suffering from physical exhaustion or mental alienation, and when he is partially, or even wholly, unconscious of the full purport of his declaration. These considerations, combined with the strong objection of the English law to condemn any man on the testimony of an absent, or even a deceased, witness, induce Courts to regard this species of evidence with great watchfulness and suspicion. It is the duty of the judge to inquire into the circumstances under which the declaration has been made, as a condition precedent to its admission; and he will

(*r*) *Nemo moriturus præsumitur mentiri.*
(*s*) *R.* v. *Perry*, [1909] 2 K. B. 697.

generally exclude it, if there appear to be any reasonable doubt as to the sanity, consciousness, or sense of impending dissolution in the mind of the declarant at the time the statement was made (*t*).

Thus, in *R.* v. *Woodcock* (*u*), EYRE, C.J., said:—

"The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice."

In this case it was held that a statement made by the deceased to a magistrate who administered an oath to her extrajudicially, and which, therefore, could not be received as a deposition, was yet admissible as a dying declaration, as it was made by her when her dissolution was fast approaching, and when she must have known the fact, although she said nothing that indicated such a knowledge. The judge there left it to the jury to say whether the statement was made under the apprehension of death; but the law now is that the judge himself should decide this question.

The declaration must be made when the declarant is in actual danger. This proposition is commonly stated more broadly, that the declaration must be made *in extremis* (*v*); but there appears to be no definite limitation of the time, before death, within which the declaration must be made. Moreover, the declarant must be in a settled, hopeless expectation of death. As CHARLES, J., said in *R.* v. *Gloster* (*w*),—

"The result of the decisions upon this subject is this: there must be an unqualified belief in the nearness of death; there

(*t*) See the remarks of Lord DENMAN in *The Sussex Peerage Case*, 11 Cl. & F. 112. Dying declarations are inadmissible in civi cases (*Stobart* v. *Dryden*, 1 M. & W. 626; Cockle, 97).

(*u*) 1 Leach, C. C. 502; Cockle, 144; and see *R.* v. *Edmunds*, 25 T. L. R. 658.

(*v*) *R.* v. *Van Butchell*, 3 C. & P. 629.

(*w*) 16 Cox, 471.

must be a belief without hope in the declarant that he is about to die."

He regarded as the best guide a phrase used by WILLES, J., in *R.* v. *Peel* (*x*) :—

"A settled, hopeless expectation of death."

KENNEDY, J., expressly adopted the above-quoted language of CHARLES, J., in giving his decision in *R.* v. *Abbott* (*y*), when holding that the constant reiteration of the words, "I'm dying," by a woman who had taken poison was insufficient "as the expression of the real idea of impending death." But the statement "I'm dying; look to my children," was held sufficient by HAWKINS, J. (after consulting BAGGALLAY, L.J.) in *R.* v. *Goddard* (*z*).

KELLY, C.B., summed up the matter as it stood in 1869 in *R.* v. *Jenkins* (*a*) in the following manner :—

"The result of the decisions is that there must be an unqualified belief in the nearness of death, a belief without hope that the declarant is about to die. If we look at reported cases, and at the language of learned judges, we find that one has used the expression, 'every hope of this world gone' (*b*); another, 'settled, hopeless expectation of death' (*c*); another, 'Any hope of recovery, however slight, renders the evidence of such declarations inadmissible (*d*). We as judges must be perfectly satisfied, beyond any reasonable doubt, that there was no hope of avoiding death; and it is not unimportant to observe that the burden of proving the facts that render the declaration admissible is upon the prosecution."

In that case a woman made a statement to the magistrate's clerk, who added to it the words, "I have made the above statement with the fear of death before me, and with no hope of my recovery," and then read it over to her and asked her if it was correct. She thereupon requested him to insert the words "at present," so that it read "with no hope at present of my recovery."

(*x*) 2 F. & F. 21; and see *R.* v. *Perry*, [1909] 2 K. B. 697.
(*y*) 67 J. P. 151.
(*z*) 15 Cox, 7.
(*a*) L. R. 1 C. C. R. 187; Cockle, 142.
(*b*) *Per* EYRE, C.B., in *R.* v. *Woodcock*, 1 Leach, 502.
(*c*) *Per* WILLES, J., in *R.* v. *Peel*, 2 F. & F. 22.
(*d*) *Per* TINDAL, C.J., in *R.* v. *Hayward*, 6 C. & P. 160.

It was held that her request to have these words inserted qualified the force of her statement sufficiently to make it inadmissible in evidence as a dying declaration, because it thus showed that there was not that absolute and hopeless expectation of death which is required to give such declarations validity (*e*). In another case, the deceased made a declaration stating at the time that he believed he should not recover. His spine was then broken in such a way that death must have followed soon. Shortly before he had made the declaration, he had said to a witness: "The surgeon has given me some little hope that I am better; but I do not myself think that I shall ultimately recover." The declaration was held to be admissible, as the opinion of the surgeon on the subject is immaterial (*f*). But, given the conditions rendering it admissible at the time of making, a statement is not rendered inadmissible by the fact that after making it the deceased entertained a hope of recovery (*g*).

The test always is, Did the person making the statement believe *at the time of making the statement* that death was impending, and that there was no hope of recovery? "I am in great danger; I fear I must die," was held not sufficient to establish such belief (*h*). So was "I do not think I shall be long with you" (*i*).

Thus, in a case where a young woman who was very ill as the result of an illegal operation performed upon her, but not in fear of immediate death, made a statement to the police as to the cause of her condition, and a week later, when really in fear of death and without hope of recovery, heard the statement read over by a magistrate and acknowledged it as true, DARLING, J., after consulting the Recorder of London, refused to admit it (*j*).

(*e*) *R.* v. *Jenkins*, L. R. 1 C. C. R. 187.
(*f*) *R.* v. *Reany*, D. & B. 151.
(*g*) *R.* v. *Hubbard*, 14 Cox, 565.
(*h*) *R.* v. *Osman*, 15 Cox, 1.
(*i*) *R.* v. *Gloster*, 16 Cox, 471.
(*j*) *R.* v. *Whitmarsh*, 62 J. P. 680.

Any statement made by the deceased shortly before or at the time of making an alleged dying declaration is admissible in evidence to show the state of mind of the declarant at the time the declaration was made (*k*). Declarations made under apprehension of death, if otherwise admissible, will not be rejected because a considerable time elapses between the declaration and the death. Thus, in *R.* v. *Mozley* (*l*), the declarations were held by all the judges to have been rightly received, although the deceased did not die until eleven days after making them, and although the surgeon held out slight hopes of recovery to him until a few hours before his death. Here, however, the deceased had frequently expressed a belief, prior to the statement, that he should never get better.

In *R.* v. *Bernadotti* (*m*) a declaration was admitted although the declarant lived for three weeks after making it. There was no evidence in this case of any subsequent hope of recovery; but, as we have seen, a subsequent hope of recovery does not render a declaration inadmissible.

*The statement must be a declaration, not the result of an examination.* If a declaration is taken down in writing by anyone, it

"should be taken down in the exact words which the person who makes it uses, in order that it may be possible, from those words, to arrive precisely at what the person making the declaration meant. When a statement is not the *ipsissima verba* of the person making it, but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence which it is desirable should not be open in cases in which the person accused has no opportunity of cross-examination" (*n*).

But in *R.* v. *Woodcock* (*nn*) a statement taken down in the usual way by a clerk to magistrates for the purpose

(*k*) *R.* v. *Cleary*, 2 F. & F. 853.
(*l*) 1 Moo. C. C. 97; cf. *R.* v. *Smith*, L. & C. 607.
(*m*) 11 Cox, 316.
(*n*) *Per* CAVE, J., in *R.* v. *Mitchell*, 17 Cox, 503.
(*nn*) 1 Leach, 504.

of being afterwards used as a deposition was received as a dying declaration. So in *R.* v. *Fagent* (*o*) answers made by a person *in articulo mortis* to questions put by a surgeon for the purpose of ascertaining whether he ought to call in a magistrate were received in evidence (*p*).

Evidence of this description is only admissible where the death of the deceased is the subject of the charge, and where the circumstances of the death are the subject of the dying declaration. It is then admissible for the defence as well as for the prosecution (*q*). Accordingly, where the defendant had been indicted by the deceased for perjury, and after conviction had shot the prosecutor, it was held that a dying declaration by the latter as to the circumstances of the perjury was inadmissible on an application by the defendant for a new trial (*r*). So, where the prisoner was indicted for administering savin to a pregnant woman with a view to procure abortion, BAYLEY, J., rejected evidence of her dying declaration concerning the cause of her death, because the death was not the subject of the pending inquiry (*s*).

In a case (*t*) where the prisoner was indicted for poisoning J. K., and it appeared that J. K. had eaten some cake and died, soon after which the servant who had made the cake ate some, and died also, it was held by COLTMAN, J., after consulting PARKE, B., that the dying declarations of the servant were evidence against the prisoner, because the two consecutive deaths formed one transaction. But this is a very doubtful decision. This case was brought prominently before the Court for Crown Cases Reserved in *R.* v. *Hind* (*u*), where the

(*o*) 7 C. & P. 238.
(*p*) See also *R.* v. *Smith*, 65 J. P. 426.
(*q*) *R.* v. *Scaife*, 1 Moo. & R. 551.
(*r*) *Per* ABBOTT, C.J., in *R.* v. *Mead*, 2 B. & C. 605; Cockle, 143.
(*s*) *R.* v. *Hutchinson*, 2 B. & C. 608, n.; cf. *R.* v *Lloyd*, 4 C. & P. 233; *R.* v. *Hind*, 29 L. J. M. C. 147, 253.
(*t*) *R.* v. *Baker*, 2 Moo. & R. 53.
(*u*) *Suprâ*.

Court, affirming *R.* v. *Mead* (*x*), laid down as the rule that a dying declaration is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the declaration. It has been held, however, that a dying declaration made by an accomplice is receivable (*y*).

It only remains to add that not even a dying declaration can be received if made by one who would not be a credible or possible witness in open court or who could not properly appreciate his serious condition. Thus, a declaration by a dying child four years old as to the person who struck her the blow which was causing her death was rejected on the ground that she could not have realised the nature of an oath, or even the serious position in which she was (*z*). But the law has been so altered that very few witnesses now are incompetent; hence this rule seldom applies.

(v.) *Depositions under* 30 *&* 31 *Vict. c.* 35, *s.* 6.—A deposition taken for the perpetuation of testimony in criminal cases, under this statute, is admissible as evidence, either for or against the accused, upon the trial of any offender or offence to which it relates—

(a) if the deponent is proved to be dead, or
(b) if it is proved that there is no reasonable probability that the deponent will ever be able to travel or to give evidence, and
(c) if the deposition is signed by the magistrate by or before whom it is taken, and
(d) if it is proved to the satisfaction of the Court

(*x*) 2 B. & C. 605.
(*y*) *R.* v. *Tinkler*, 1 East, P. C. 354.
(*z*) *R.* v. *Pike*, 3 C. & P. 598; Cockle, 145.

that reasonable notice in writing of the intention to take such deposition was served upon the person (whether prosecutor or accused) against whom it was proposed to be read, and

(c) that such person or his advocate had or might have, had if he had chosen to be present, full opportunity of cross-examining the deponent.

A deposition is a record made by an official person of a statement made on oath duly administered in the presence of a magistrate or other person who has authority in the circumstances to administer the oath. A dying declaration, as we have seen, need not be, and, as a rule, is not, made on oath.

In the ordinary case of a deposition under the Indictable Offences Act, 1848 (*a*), the person accused must be present when the deposition is made, else it cannot in any case be received in evidence against him. But in the case of a deposition under 30 & 31 Vict. c. 35, s. 6, it is sufficient if the accused was given reasonable notice of the proceeding and had the opportunity of being present if he wished. Under the former statute law, the prisoner had to be present in both cases (*b*).

(vi.) Statements made by a person with respect to his bodily or mental feelings or condition, or state of health, are admissible in evidence when such feelings or condition, at the time of such statements, are material to some issue in the proceedings, although the person against whom the evidence is tendered was not present when the statement was made. This is so both in civil and criminal cases, and whether the person whose symptoms are described in the statement is still alive or not.

(*a*) 11 & 12 Vict. c. 42, s. 17.
(*b*) See *R.* v. *Woodcock*, *ante*, p. 86.

A statement made by a patient in answer to the inquiries of his medical attendant is evidence of the state of health of the patient at that date, nor is it in every case essential that the statement should be made to a medical man. Thus, in *Aveson* v. *Lord Kinnaird* (*c*), the action was on a policy of insurance on the life of the plaintiff's wife. The deceased had, at the time of her examination by the medical officer of the defendants, represented herself as being in good health. The defendants offered evidence that a few days after the policy was made she had given to a neighbour a totally different account of her health. It was held that the witness might relate her conversation with the deceased, and that the statements of the latter, as so related, were evidence to show that the policy was obtained by misrepresentation. But letters to a medical man from a patient detailing the symptoms of his malady have been held not admissible (*d*), the Judge Ordinary saying: "I shall not set a precedent for the admission of written communications to a medical man."

Lord ELLENBOROUGH, C.J., in giving judgment in *Aveson* v. *Lord Kinnaird*, said (*e*):—

"What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries and must be resorted to from the very nature of the thing."

But, as CHARLES, J., said in *R.* v. *Gloster* (*f*),—

"the statements must be confined to contemporaneous symptoms, and nothing in the nature of a narrative is admissible as to who caused them, or how they were caused."

On the same principle, in actions for criminal conversation, what the husband and wife had said to each other, or letters written by either party to the other,

(*c*) 6 East, 188; Cockle, 42.
(*d*) *Witt* v. *Witt and Klindworth*, 3 Sw. & T. 143.
(*e*) 6 East, at p. 195.
(*f*) 16 Cox, 473.

when there was no ground to suspect collusion, were admissible evidence to show the terms on which they lived (*g*); and the same rule applies to proceedings in the Divorce Court.

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

## CANADIAN NOTES.

### *RES INTER ALIOS ACTA.*

In an action against the firm of A. and B. for goods sold, the defence was that the sale was to the firm of A. and C. A. the common member gave evidence that the sale was made to A. and B., and on his cross-examination was asked as to entries in the books of A. and C., which books also were put in by defendants to show that the sale was to A. and C. and not to the firm of A. and B. The Supreme Court of New Brunswick set aside the verdict, because of the assumed improper reception of this evidence on the ground that it was *res inter alios acta*, but the Supreme Court of Canada held that it had been properly admitted. The plaintiff's case depended upon showing that A. acted as an agent of B. in the matter. It was competent for the defence to show that the books of A. and C. which were A.'s books were inconsistent with his testimony and in accord with the contention of the defendant. *Miller* v. *White*, 16 S. C. R. 445.

*Exceptions to Inadmissibility of* Res inter alios.

A bank at Milwaukee sent to a bank at Toronto a bill for collection, drawn at Milwaukee, on a party in Toronto, payable forty-five days at sight, together with a bill of lading, endorsed, for wheat consigned to the drawee. On the question whether, in the absence of instruction to the contrary, defendants were bound to retain the bill of lading until payment of the draft by the drawee, at Toronto, or were right in giving it up to him on obtain-

ing his acceptance, evidence was given as to the custom of merchants in such cases, both in the United States and in Canada. It was held that the latter only could be material. *Wisconsin, etc. Bank* v. *Bank of B. N. A.*, 21 U. C. Q. B. 284.

On a reference to settle the form of a lease, on a contract between a municipal corporation and a railway company, for a long term of years, with a perpetual right of renewal, evidence of surrounding circumstances and the practice of conveyancers was held admissible to enable the referee to decide whether the lease should contain a covenant to pay municipal taxes. The referee was held entitled to rule as to the evidence to be admitted, and he was not obliged to admit all the evidence tendered. *In re C. P. R. and City of Toronto*, 27 O. A. R. 54.

In an action against a railway company for an injury to a colt running behind its dam, and which ran against a barbed wire fence erected by the defendant company, evidence was offered of the common use of fences of this kind in other townships, and that other municipalities held out inducements to erect them. *Held*, that this evidence should not have been rejected, as showing that such fences were not considered dangerous or a nuisance. *Hillyard* v. *G. T. R. Ry.*, 8 O. R. 583.

In an action for the price of piling, delivered in New Brunswick, the plaintiff sought to prove that the piling supplied was of equal value to that called for by the contract, and called a witness to prove that he had at the same time that the piling in question was shipped, sent piling of similar dimensions to New York as that shipped by plaintiff and was allowed to produce the account of his sale, and state, subject to objection, the amount which he had received from New York from his sales agent. It was held that this evidence was admissible. *Clarke* v. *Scammel*, 31 N. B. 265.

In an action against a railway company for damage caused by fire from their locomotives, evidence that fires frequently occurred along their line of railway after the passing of their trains was held admissible. *Robinson* v. *New Brunswick Railway Co.*, 23 N. B. 323.

*Words accompanying Material Act.* Res gestæ.

In an action against a railway company for damages for accident, caused by the premises of the company being kept in a slippery and dangerous condition from snow and ice, evidence was given of a statement by the deceased, immediately after receiving the injury, to the effect that he had slipped and been hit. It was held that this was admissible as evidence of the cause of the accident. *Armstrong et al.* v. *C. A. Railway Co.*, 2 O. L. R. 219.

An action was brought for negligence resulting in the death of the injured party by peritonitis consequent upon tripping over a stone left in the street under the control of the defendants. The deceased, after coming to the house of a friend, a few minutes after the accident, made the statement that she had fallen over the stone. She was then suffering great pain, and it was proved that at about the same time, another witness had seen a young girl, whose description answered to the deceased, falling and lying beside the stone, who said that she had fallen over the stone and hurt herself. The question was as to the admissibility of the evidence of the statement made by deceased, at the house of her friend, and it was held that this statement was not part of the *res gestæ*, this being, at most, a statement made in reference to the accident, after it had happened, and after the deceased had had time for consideration. It was, therefore, distinguishable from those involuntary and contemporary exclamations made without time for reflection, which are alone properly admissible as part of the *res gestæ*. *Garner* v. *Township of Stamford*, 7 O. L. R. 50.

Statements made by a prosecutrix in a case of rape made the day following the alleged assault were held in *Reg.* v. *Graham*, 31 O. R. 77, to be inadmissible, not being the unstudied outcome of the feelings of the woman, but having been made after time allowed for deliberation.

In an action on the common counts for money lent, etc., it was proved that the defendants' managing and financial directors wrote to the plaintiffs asking for a credit of one hundred thousand dollars on their Detroit and Milwaukee account, which was considered on April 1st, 1868, at plaintiffs' board, and accepted by letter of their cashier on the same day.

*Held*, that the minutes of the board were admissible for the plaintiffs as part of the *res gestæ*.

*Held* also, that a bank statement sent by the plaintiffs' agent at Hamilton to their head office, showing how the account was kept, was properly admitted.

When it was proposed to open the account, the plaintiffs' cashier met the defendants' financial directors in Toronto to discuss the matter, and made an arrangement which it appeared the financial director was aware that the cashier had to report to his board for approval, and which he told the director he had no doubt would be carried out. *Held*, that the cashier's verbal report to the plaintiffs' board, on his return two days after, was admissible as part of the *res gestæ* as a declaration accompanying an act. *Commercial Bank* v. *Great Western Railway Co.*, 22 U. C. Q. B. 233.

Evidence of statements made by a person, since deceased, immediately after an assault upon him, under apprehension of further danger, and requesting assistance and protection, is admissible as part of the *res gestæ* even though the person accused of the offence was absent at

the time when such statements were made. Statements not coincident in the point of time with the occurrence of the assault, but uttered in the presence and hearing of the accused, and under such circumstances that he might reasonably have been expected to have made some explanatory reply to remarks in reference to them, are admissible as evidence. *Gilbert* v. *Rex*, 38 S. C. R. 284.

In an action for damages resulting from a collision, it was held that evidence of declarations made by the captain of defendant's vessel as to the cause of the accident on the day after it happened were inadmissible, but the verdict was not interfered with, because the statements were merely repetitions of what had been said by the captain at the time of the accident, and which were receivable in evidence. *Shaw* v. *De Salaberry Navigation Co.*, 18 U. C. Q. B. 541.

In an action to recover damages sustained by plaintiff from a bite by defendant's dog, the plaintiff will not be allowed to prove that subsequent to the injury complained of the dog had bitten another person. In the case in which such evidence was admitted, the judge told the jury that the fact that the dog had bitten such other person was no evidence, and did not show that the defendant knew of the mischievous character of the dog on the day the plaintiff was bitten. The majority of the Court held that the objectionable evidence having been withdrawn from the jury, the verdict should not be disturbed, which was for the plaintiff. *Wilmot* v. *Vanwart*, 17 N. B. 456.

### *Joint Enterprise.*

Whenever a joint participation in an enterprise is shown, any act done in furtherance of the common design is evidence against all who are at any time concerned in it. In *Reg.* v. *Slavin*, 17 U. C. C. P. 205, a

case arising out of the Fenian raid, from Buffalo to Fort Erie, on June 1st, evidence was admitted against the prisoner of an engagement between the raiders and the Canadian volunteers, although the same took place several hours after his arrest, as showing to some extent that the engagement had been contemplated by the parties while the prisoner was with them before his arrest.

*Dying Declarations.*

The deceased was found lying on the floor of a bedroom in his house, and it appeared that he had received a bullet wound, which it was subsequently shown was the cause of his death. A man testified that shortly afterwards he entered the room and asked the deceased "Who cut you?" to which the deceased answered, "No cut; Jake shoot." The witness then said to the deceased, that he would send for a doctor, and the deceased answered, "No doctor, Billy, me die."

It was held that the declaration was receivable as a dying declaration, the evidence being sufficient to show that the deceased had spoken in expectation of death, and it was immaterial that the incriminating words preceded the words in which this expectation was shown.

Evidence was also given of quarrels between the deceased and the prisoner, and threats made by the latter. It was held that there was no reason for excluding the evidence. Evidence of threats made by the prisoner against another person were improperly admitted, but it was held that they had done no substantial wrong. *R.* v. *Sunfield*, 15 O. L. R. 252.

In *Regina* v. *Sparham et al.*, below cited, the deceased died on December 28th, 1874. On the 24th she made a statement commencing, "I am very ill. I have no hope whatever of recovering. I expect to die." She then narrated the facts, and added, "If I die in this sickness I believe it will have been caused by the operations per-

formed on me by Doctor Sparham, at the instigation of William Greaves. . . . I make these statements in all truth, with the fear of God before my eyes, for I believe that I am dying." On the 26th she was again examined and the previous statement read over to her. She confirmed its truth in every respect and added that she then felt she was in the presence of God and had no hope of recovery of any kind at the time, and, her attention being called to the expression, "If I die," she said, "I had no doubt whatever that I was dying and felt that I was dying, and did not by the form of the expression mean to doubt in any way that I was dying." It was held that both statements were admissible, that the mere use of the words, "If I die," would not alone defeat the emphatic declaration of abandonment of all hope made on the same occasion, and that the second declaration was receivable in order to explain the first. *Reg.* v. *Sparham et al.*, 25 U. C. C. P. 143.

On the trial of an indictment for murder, the Crown offered in evidence the dying declaration of the deceased that he was shot in the body and was going fast, and that in answer to a question "Can't you take my arm, and I will take you away?" deceased said, "I can never walk again." In answer to another question, deceased said, "Henry Davidson shot me. God help him. I hope he will not be hanged for it."

This was held to be admissible as a dying declaration, notwithstanding the fact that deceased had asked for a doctor, which was urged as a reason for the conclusion that he had still some hope of living. *Reg.* v. *Davidson*, 30 N. S. R. 349.

On an indictment for murder, a witness swore that the deceased lived about thirteen rods from him, and that one night about half an hour after he heard shots in the direction of the deceased's house, deceased came to the house of the witness and asked witness to take

him in because he had been shot. The witness did so, and the deceased died there some hours afterwards. It was held that this statement was not admissible, either as part of the *res gestæ*, or as a dying declaration. *Reg.* v. *McMahon*, 18 O. R. 502.

On an indictment for manslaughter, it appeared that the deceased died about midnight, December 15th, from the effect of severe bruises alleged to have been caused by the prisoner, her husband, striking her with a lighted coal oil lamp. Immediately after receiving the injuries, which was between eight and nine in the evening of December 15th, she said to the prisoner and a female relative that she was dying. Four physicians who saw her almost at once declared that there was no hope of recovery. One of them who had remained with her until 3 a.m. on the 16th returned in the forenoon of that day.. He then told her she would die and asked her if she was afraid to die. She said "No," and asked him if she was dying then. He answered, "Yes, you are," and she replied, "God help me." He said that from the manner of her answering he believed she thought she was dying. She then made the statement which was put in evidence. The doctor asked her how she had caught fire. She said, "Arthur" (the prisoner) "knocked me down with the lamp." He then asked if the prisoner had threatened her before he did it, and she said, "Yes." She died about twelve hours after this from the effects of her injuries. The parish clergyman, who was with her from six to nine o'clock on the morning of the 16th, said he addressed her as a woman who he thought was dying, and that she understood it in that way; that he recommended her to trust in Christ as her only hope, and she said, "Yes, I look to Him." It was held that this statement was admissible as a dying declaration, and that it made no difference that the second answer was given to a leading question. *Reg.* v. *Smith*, 23 U. C. C. P. 312.

## CHAPTER IV.

### WHAT THIRD PERSONS DID OR SAID TO OR IN THE PRESENCE OF A PARTY.

THE acts and statements of third persons, done or made in the presence of a party to the proceedings, are admissible in evidence against that party so far as they throw light upon the subsequent conduct of that party, but they are not admissible for any other purpose; they are, in fact, of no legal value in themselves; they are only admitted because they tend to explain what the party did or said thereupon.

The matter which has to be proved is, What did the party say or do at a certain moment when something was said to him by a third person? And it is obviously material to know what was said to him by the third person, else we cannot understand the true meaning and effect of the party's reply, or, if he made no reply, of his silence.

Thus, if a prosecutor saw a watch in the prisoner's room, and said, "Hallo, that's my watch. How did you get hold of it?" this statement is not of any value in itself, but it is admissible in order to explain the true meaning of what the prisoner said or did in reply. He may assert that the watch is his; he may explain how he came by it; he may hang down his head and say nothing. In each case his words and conduct are admissible both for and against him, and therefore the prosecutor's remark must also be received.

As HAWKINS, J., said in *R.* v. *Smith* (*a*),

"Before a bare statement made by another person in an accused person's presence and prejudicial to him is allowed to be used as evidence against him, there must be something in the shape of action, conduct or words, which, in the opinion of the judge, would justify the jury in drawing an inference that the accused substantially admitted the story told against him."

This, it is submitted, is the true ground on which in *Lister* v. *Perryman* (*b*) hearsay evidence was held rightly admitted as "reasonable and probable cause" for the prosecution of Perryman. Lister's coachman, Hinton, told his master what Perryman had said and done when accused by him and Robinson of stealing Lister's gun and keeping it concealed in his father's stable, where Robinson had told Hinton he had seen it. Lister thereupon ordered Perryman to be arrested, and he was tried and acquitted. He then brought an action for malicious prosecution against Lister, who pleaded that he had reasonable and probable cause for the prosecution. The judge in the court below directed the jury that hearsay evidence could not be reasonable and probable cause, but the House of Lords held this to be a misdirection. Lister, in fact, acted upon what Hinton told him Perryman had said and done when he was accused by Hinton and Robinson of having stolen the gun.

Again, if a person charged with a crime does or says nothing, the fact that he remains silent is admissible as approaching an admission of guilt, and the words of the charge are admissible as explaining it (*c*), the important point being, not the accusation, but the silence or other conduct of the person accused.

Two very recent cases further illustrate this matter. In one case a woman was charged with murder of her child. She made a statement as to its death to her husband, who repeated it to the police in her presence;

(*a*) 18 Cox, 472; but now see *R.* v. *Thompson*, 74 J. P. 176.
(*b*) L. R. 4 H. L. 521.
(*c*) *Bessela* v. *Stern*, 2 C. P. D. 265; Cockle, 102.

she made no reply, but burst into tears. It was held that the husband's statement was admissible, for it led up to and explained her subsequent conduct (*d*). In the other case the prisoner and a friend of his were charged with larceny and receiving. In reply to the charge the friend said, in the presence of the prisoner, that it was "quite right," and that he had sold the goods to the prisoner. The police then read over a previous statement made by the friend. In neither case did the prisoner make any reply. It was held that evidence of such facts was admissible (*e*).

In the case of a criminal charge, where it is alleged that the person accused has confessed his guilt, evidence of what other persons did or said to induce him to make that confession is most material, and may indeed render the confession itself inadmissible (*f*).

But note that silence cannot be construed into an admission, unless the occasion be such that a contradiction or explanation may reasonably be expected from the party (*g*). Thus, a prisoner in the dock may not interrupt the proceedings, and can only make statements at the proper opportunities granted him by the law. Therefore his silence at other times amounts to nothing. So in *Wiedemann* v. *Walpole* (*h*), where the plaintiff had repeatedly written letters to the defendant in which she stated that he had promised to marry her, the mere fact that he had never answered any of them was held to be no corroboration of the plaintiff's story.

Lord ESHER, M.R., said (*i*):—

"There are cases—business and mercantile cases—in which the Courts have taken notice that in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter

(*d*) *R.* v. *Bexley*, 70 J. P. 263.
(*e*) *R.* v. *Bromhead*, 71 J. P. 103.
(*f*) See *post*, p. 105.
(*g*) *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534; Cockle, 103.
(*h*) [1891] 2 Q. B. 534.
(*i*) *Ibid.* at pp. 537, 538

must answer it, if he means to dispute the fact that he did so agree. . . . But such cases as those are wholly unlike the case of a letter charging a man with some offence or meanness. . . . The ordinary and wise practice is not to answer them—to take no notice of them."

And BOWEN, L.J., said (*j*):—

"Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not,"

and later (*k*),

"Silence is not evidence of an admission, unless it is reasonable to expect that if the statements made were untrue they would be met with an immediate denial."

In the case before the Court, the silence was just as consistent with his not having promised as with his having promised.

But a statement made by a third person to one of the parties alone is not admissible in his favour. Thus, in a recent divorce case, where a wife charged her husband with cruelty and adultery, evidence of a statement, made to her by a doctor whom she consulted as to the nature of her illness, was held inadmissible on her behalf (*l*).

It is on the same principle that a statement given by a third person on oath in a former legal proceeding is admitted in a subsequent proceeding. Such evidence, however, is only admitted where the subsequent proceeding is between the same parties or their privies as the former one and raises substantially the same issue, and the party against whom it is tendered or his predecessor in title had the opportunity of cross-examining the witness at the former trial.

Further, such evidence is only admissible if the

(*j*) [1891] 2 Q. B. at p. 539.
(*k*) *Ibid.* at p. 540.
(*l*) *Dawson* v. *Dawson*, 22 T. L. R. 52.

witness is unable to attend the trial of the subsequent proceeding—

(i.) because he is dead, or

(ii.) is permanently insane, or

(iii.) is kept out of the way by the adverse party, or in some cases, if

(iv.) he is so ill that it is probable he will never be able to travel (*m*), or

(v.) is out of the jurisdiction, or

(vi.) cannot be found after proper search and inquiry.

Let us take for instance a case which not infrequently occurs, that is a new trial. Suppose the Court of Appeal has set aside the verdict and judgment given at the first trial of the action and ordered a new trial. In the interval since the last trial a material witness for the plaintiff has died. A shorthand note of the evidence given by this witness at the former trial can be put in and read on the second hearing. And it would make no difference if in the interval one of the parties had died, and his heir or executor had been substituted for him as a party on the record.

But there is more difficulty in applying this rule to cases in which the evidence was given in a different action. In the first place, the parties to the two actions must be substantially the same, and the issues practically identical, although the relief claimed may be different (*n*).

The statements made by the witness cannot be given in evidence against any person who was not "party or privy" (*o*) to the former action (*p*); the person against

(*m*) If the illness is temporary the proper course would seem to be to postpone the trial (*Harrison* v. *Blades*, 3 Camp. 458).

(*n*) *Brown* v. *White*, 24 W. R. 456.

(*o*) See *Morgan* v. *Nicholl*, L. R. 2 C. P. 117; Cockle, 148.

(*p*) *Lady Llanover* v. *Homfray*, 19 Ch. D. 224; Cockle, 146; and see *Printing, etc., Co.* v. *Drucker*, [1894] 2 Q. B. 801; *Shepheard* v. *Bray*, [1906] 2 Ch. 235.

whom this evidence is tendered, or someone under whom he claims, must have had an opportunity to cross-examine the witness (*q*). The statements must be such that they are admissible against the party tendering them as well as against the opposite party (*r*).

The rule applies in criminal cases except that the former evidence of a witness who is out of the jurisdiction, or cannot be found, is, it seems, inadmissible (*s*). If a witness has been kept away by the contrivance of one of two prisoners, his former evidence is admissible against that prisoner, but not against the other (*t*). It is doubtful how far this is the law in civil cases. But both in civil and criminal cases the rule is that the evidence is admissible if a witness be kept away by collusion, or other improper means. Thus, in an old case where a witness was sworn in a trial in the Court of Common Pleas and was subpœnaed by the defendant to appear at a subsequent trial in the Court of King's Bench, but did not appear, persons were allowed to prove what his evidence was at the first trial, because the Court thought there was reason to presume that he was kept away by the petitioner (*u*). It cannot, however, be said that every species of mere subsequent incapacity to appear will let in evidence that has been given at a former trial (*x*).

The former evidence of a witness when admissible may be proved in several ways. Sir JAMES MANSFIELD, C.J., once said (*y*):—

"What a witness, since dead, has sworn upon a trial between the same parties may without any order of the Court be given in evidence, either from the judge's notes or from notes that have

(*q*) *Attorney-General* v. *Davison*, M'Clel. & Y. at p.169; cf. *Nevil* v. *Johnson*, 2 Vern. 447.
(*r*) See *Morgan* v. *Nicholl*, *supra*.
(*s*) *R.* v. *Scaife*, 17 Q. B. 242; Cockle, 149.
(*t*) *Ibid.*
(*u*) *Green* v. *Gatewick*, Bull. N. P. 242 b.
(*x*) *R.* v. *Eriswell*, 3 T. R. 707; Cockle, 99.
(*y*) *Mayor of Doncaster* v. *Day*, 3 Taunt. 262; Cockle, 146.

been taken by any other person who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given."

This remains true except that there is a doubt as to the admissibility of the judge's notes. In *Conradi* v. *Conradi* (*z*), Lord PENZANCE said that he knew of no authority or practice by which the judge's notes in a former trial were admissible in evidence in another suit if objected to; but he did not decide the point. It appears to be open to the parties to enter into an agreement that the judge's or shorthand writer's notes at the first trial shall be received as evidence in the second; and after such consent neither party can dispute their validity (*a*). The Court will, however, require distinct evidence of such an agreement (*b*). In the absence of agreement or consent, it would appear the judge's notes cannot be received to prove the former evidence of a witness.

It appears that a judge of the High Court cannot be called to give evidence of the substance of a former trial, but that he may be called to prove anything collateral or incidental to it (*c*). In *R.* v. *Gazard*, PATTESON, J., recommended the grand jury not to examine one of their number, who had been Chairman of Quarter Sessions on the trial when the prisoner had committed the alleged perjury. His lordship said:—

"It is a new point, but I should advise the grand jury not to examine [*the gentleman*]; he is the president of a Court of record, and it would be dangerous to allow such an examination, as the judges of England might be called upon to state what occurred before them in court."

However, in a trial for perjury, under a committal by a County Court judge, BYLES, J., held that the judge ought to have been called to prove the perjury from his

(*z*) L. R. 1 P. & D. at p. 520; cf. *Ex parte Learmouth*, 1 Madd. 113.
(*a*) *Wright* v. *Tatham*, 1 A. & E. 3.
(*b*) *Doe* v. *Earl of Derby*, 1 A. & E. 783.
(*c*) *R.* v. *Gazard*, 8 C. & P. 595; *R.* v. *Earl of Thanet*, 27 How. St. Tr. 845.

notes, and that the rule prohibiting the calling of judges as witnesses is confined to judges of the superior Courts. His lordship said: "If you had called me, I should not have come" (*d*). An arbitrator is an admissible witness to prove what took place before him up to the making of his award, so as to show what was the subject-matter into which he was inquiring, but he must not be asked how his award was arrived at, nor can he be asked questions to explain or contradict his award (*e*).

It is sufficient that evidence of what occurred at a former trial, when admissible, should be substantially, without being literally, correct, except where actual words are the gist of the issue. Thus, on an indictment for perjury, evidence of the words spoken, coupled with a confident conviction on the part of the witness that they were all that was material to the pending inquiry, and that they were not qualified by other expressions, has been held to be sufficient (*h*).

By the old practice of the Court of Chancery, the depositions of witnesses taken in a former suit might, with the other proceedings, be read at the hearing of a subsequent cause, provided that the issue was the same, that the parties were the same, or that the parties in the second suit were privy to or had a community of interest with the parties in the first suit, and that the individual against whom the depositions were offered, or the person through whom he claimed, or with whom he had a community of interest, had an opportunity of cross-examining the witness (*i*); and it was held by the House of Lords in *City of London* v. *Perkins* (*k*) that the depositions could be read during the lifetime of the witnesses. With regard to the use of affidavits made in a previous

(*d*) *R.* v. *Harvey*, 8 Cox, 99.
(*e*) *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418.
(*h*) *R.* v. *Rowley*, 1 Moo. 111.
(*i*) *Nevil* v. *Johnson*, 2 Vern. 447.
(*k*) 3 Bro. P. C., ed. Toml. 602.

suit, the rule was stated by KINDERSLEY, V.-C., in *Lawrence* v. *Maule* (*l*), as follows:—

"The general rule with regard to the admission of evidence is that where an issue has been raised between certain parties and evidence has been adduced upon that issue by one of those parties which could be used by him as against the other party, and in a subsequent proceeding the same issue is raised between the same parties and the witness who gave evidence in the former proceeding has died, the Court will admit the evidence given by the deceased witness in the former as evidence in the subsequent proceeding; but the evidence is not admissible unless the issue is the same and the parties are the same in both proceedings."

Rule 3 of Order XXXVII. of the Rules of the Supreme Court, 1883, provides that—

"An order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the Court or a judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence."

This rule is only intended to dispense with the necessity of obtaining an order, and does not make evidence in another cause admissible unless the issue be the same and the parties the same (*m*).

Section 136 of the Bankruptcy Act, 1883 (*n*), provides that—

"In case of the death of the debtor or his wife, or of a witness whose evidence has been received by any Court in any proceeding under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the Court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to."

But the answers of a bankrupt on his public examination are not evidence against persons other than himself (*o*). Nor are they evidence against him in an action to which he is a party in a representative capacity (*p*).

As to reading at a trial depositions taken at a previous stage of the proceedings, see *post*, Book IV., Chap. III.

(*l*) 4 Drew. 472.
(*m*) *Printing Telegraph, etc. Co.* v. *Drucker*, [1894] 2 Q. B. 801.
(*n*) 46 & 47 Vict. c. 52.
(*o*) *In re Brünner, Ex parte The Board of Trade*, 19 Q. B. D. 572
(*p*) *New's Trustee* v. *Hunting*, 66 L. J. K. B. 554.

## CANADIAN NOTES.

### EVIDENCE IN FORMER PROCEEDINGS.

In an action before ANGLIN, J., it was desired to use the evidence given orally by a witness in a former trial who could not be found, and was supposed to have gone to the United States. As a preliminary to such user, evidence was given of enquiry as to the whereabouts of the witness, and answers received in searching for him. The trial judge held that this was hearsay and should be excluded. But the ruling was held to be erroneous. MEREDITH, C.J., said that if, in order to the admission of the testimony of the witness it was necessary to prove that he was at the time of the trial out of the jurisdiction the ruling at *nisi prius* was right, but the answers to the enquiries were admissible to prove the unsuccessful search for the witness and the inability of the defendants to find him, and for that purpose they were not to be treated as hearsay evidence. The case of *Munro* v. *Toronto R. Co.*, 9 O. L. R. at 312, is distinguished. The learned Chief Justice in that case said, "Unless by consent or absence from the jurisdiction, and consequent inability to secure his attendance at the trial, the depositions of a witness taken at a former trial could not be received." *Cuff* v. *The Frazee Storage and Cartage Co.*, 14 O. L. R. 263.

An action was begun by one Erdman for injury by negligence. After his death from the same injury, an action was brought under Lord Campbell's Act by his widow and the deposition *de bene esse* of Erdman was admitted in evidence in the second action, although in the second action a third party had been brought in as

defendant, being the party who had caused the accident. There was a wide difference of opinion in the Supreme Court of Canada as to the admissibility of the evidence. GWYNNE and TASCHEREAU, JJ., held, under the authority of *Robinson* v. *Canadian Pacific Railway*, 1892, A. C. 481, that the present action was a wholly different action from the one in which the evidence had been taken *de bene esse*. KING, J., and the majority of the Court agreed to this, but he stated the rule to be, not that the actions must be identical, but that the issues must be the same, and the issue to which the deposition was directed was the same in both actions, namely, the question of fact whether the injury was caused by the negligent act or omission of the defendant. It was also held that the case was not affected by the circumstance of the third party proceedings and the fact that the third party so added had not had notice of the examination of the plaintiff in the first action. The evidence, however, seems only to have been admissible against the town and not against the third party. "In order to make the third party liable, it must be established on the trial as against him that the damages were sustained by reason of an obstruction, excavation or opening placed, made, left or maintained by him. This is not made out against him by evidence admissible against the town but not against him, although such evidence may establish the case as against the original defendant." *Town of Walkerton* v. *Erdman*, 23 S. C. R. 352.

In an action against the defendants for goods sold the question was as to the authority of one McAlpine to bind the defendants as their agent. In another suit, brought by this plaintiff previously, against the same defendants, an affidavit was made by McAlpine and filed by the defendants, on moving for a new trial. It was held that this affidavit was clearly admissible against the defendants in the present suit. *Thayer* v. *Street et al.*, 23 U. C. Q. B. 189.

In *Randall* v. *Atkinson*, 30 O. R. 242, it was held that the deposition of a defendant, taken upon his own behalf, upon a reference, was admissible in evidence, notwithstanding that he had died pending an adjournment of the reference, prior to cross-examination, so that the plaintiff had been deprived of an opportunity to examine him.

ROSE, J., reviews all the authorities at considerable length and it is stated at the end of the report that an appeal is pending before the Divisional Court. There is no entry of any further argument in the reports.

*Mode of Proving Evidence in Former Proceeding.*

In an action for goods supplied to defendant's wife, before marriage, evidence was given by the plaintiff's solicitor to show that on the examination of the wife before a Commissioner for the relief of indigent debtors the defendant was examined and stated, among other things, that he had received from his wife three promissory notes for amounts due at dates which he mentioned.

It was held that this evidence was inadmissible. The minutes of evidence taken by the Commissioner would be the best evidence.

In the opinion of GRAHAM, J., Lord ABINGER'S statement of the distinction between a judge's notes and the minutes of a magistrate is quoted. "A judge only takes notes for his own private convenience, there is no law which requires him to do so. I have always understood that whenever a magistrate had jurisdiction you cannot ask what was said before him without producing the deposition." *Bauld* v. *Reid*, 36 N. S. R. 127.

Where the deposition of a witness had been taken, but not used at the first trial in consequence of the witness being able to attend, but a new trial having been

awarded, the witness died previous to such new trial, it was held that the deposition was receivable in evidence at such second trial. It was contended that the judge's minutes of the evidence at the first trial, or the testimony then given by the witness, and proved by a witness who heard and could verify it on oath, was the only proof that could now be received. But this contention was overruled. *Brown* v. *Boole*, 2 Thomson, N. S. R. 137.

## CHAPTER V.

### WHAT THE PARITES DID OR SAID IN THE TRANSACTION (INCLUDING CONFESSIONS).

ANYTHING that either party did in the transaction in issue is admissible in evidence both for and against him; and so is anything that he did in preparation for or furtherance of that transaction, and also anything that he did in reference to it even after it had taken place.

Anything that either party said in the transaction in issue and forming part of it is also admissible in evidence both against him and in his favour; but, as a rule, anything said in reference to the transaction, whether before or after it took place, is only evidence against the speaker, and not in his favour.

The word "said" is here used to include the words "wrote" and "written."

In the above proposition, the use of the words *res gestæ* (*a*) and *res gesta* (*b*) has been avoided; they are used in several inconsistent senses, and may, according to their context, mean the transaction (*c*) in issue itself, or the events which together constitute that transaction, or the events which do not constitute, but merely accompany, it, or the transaction together with its accompanying events (*d*).

(*a*) *Aveson* v. *Lord Kinnaird*, 6 East, 188.
(*b*) *R.* v. *Horne Tooke*, 25 How. St. Tr. 120.
(*c*) Introduction, *ante*, pp. 5, 6.
(*d*) See Phipson on Evidence, 4th ed., p. 43.

As we have seen, a distinction is drawn between the events which constitute the transaction (or *factum probandum*) and those which so closely accompany the transaction that a knowledge of them is indispensable if the transaction is to be viewed aright. The former are always admissible in evidence, but the latter may or may not be admissible according to the circumstances of each particular case. The judge has a discretion to admit them or not. Moreover, acts accompanying a transaction are more readily admitted than are spoken or written words. Again, when an issue is proved or disproved by documentary evidence, as a rule events leading up to the making of the document cannot be given in evidence (*e*).

First, then, evidence is always admitted to prove or disprove the events forming part of the transaction in issue itself. Thus, in an action for slander, not only can the plaintiff prove what the defendant said, but the defendant can prove that on the same occasion he also said something else which so qualified or explained the words complained of as to make them incapable of bearing the defamatory meaning alleged (*f*). So, too, if a person be prosecuted for making counterfeit coins, the prosecution can prove that they found in the prisoner's room all the materials and things necessary for making such coins, and also coins in various stages of manufacture.

And, in an action by one shipowner against another for damages in respect of a collision between their vessels, the mere impact is only one of the facts going to make up the *factum probandum*, and, standing by itself, proves nothing (*g*). The issue is whether either ship was, or whether both of them were, negligently navigated, and, to prove that, all the factors existing at the

(*e*) See *post*, pp. 180, 181.

(*f*) *Brittridge's Case*, 4 Rep. 19; *Thompson* v. *Bernard*, 1 Camp. 48; and cf. *Tuberville* v. *Stamp*, 1 Ld. Raym. 264.

(*g*) *Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 41.

time which a prudent navigator should take into account can be given in evidence. Thus, either party may adduce evidence to prove where the collision occurred; when it occurred; the depth of water; the state of wind, tide, and weather; the size and means of propulsion of each ship; their respective speeds and courses before, at, and immediately after the collision; the orders given at those times; and the like (*h*).

The same principle applies in cases where the transaction is continuous, as in a conspiracy, or made up of a number of similar acts, as is the case with the offences of common barratry and of keeping a disorderly house. Thus, after a proof of a conspiracy (*i*), the acts, letters, and statements of persons having no apparent connection with one another, occurring at different times and in places far apart, may all be part of the transaction in issue and therefore admissible in evidence, though in some cases it would be difficult to say accurately whether any given piece of evidence formed part of the conspiracy or merely accompanied it.

Secondly, as it is essential that the tribunal should have before it all the events which form the transaction in issue, so is it of vital importance that the tribunal should see them in the proper light. The tribunal must see all the facts, and see them as a whole; and must give to each fact its proper weight, neither exaggerating nor diminishing its relative importance.

Witnesses, therefore, are required to give their evidence, not merely in bare outline, but with reasonable detail. The "surrounding circumstances"—*i.e.*, the facts and events accompanying the transaction—must, as a rule, be proved. The extent to which such surrounding circumstances can be given in evidence will depend on the nature of each particular case.

(*h*) See *The St. Paul*, [1908] P. 320; cf. *The Schwalbe*, Swab. 521, and R. S. C., Order XIX., r. 28.

(*i*) See *R.* v. *Stoddart*, 73 J. P. 348.

As a rule, all facts and events leading up to, accompanying, and following the transaction in issue, which relate to it so closely that they must be known if the issue is to be properly comprehended, are admissible in evidence for either party; but all other written or spoken words are only admissible against the party who wrote or spoke them, not in his favour. Of course, if only part of the conversation on a particular occasion be given, he is entitled to have anything that he said laid before the Court if it qualifies or explains the statements already proved against him.

There are two cases in which the rule as to written or spoken words accompanying a transaction does not apply:—

(i.) When the issue is, With what intention did a party do an act which he is proved to have done? Anything he wrote or said in reference to that act, which throws light upon his intention, is, as a rule, admissible in evidence in his favour as well as against him.

Thus, a person charged with passing counterfeit coin may himself call evidence to show that, when passing the money, he pointed out that the coin did not seem to "ring" properly.

It will, however, be more convenient to discuss this matter in the next chapter, where we shall deal with the admissibility of other transactions in order to show the intention of the party.

(ii.) Statements made in reference to the transaction in issue by a party to a civil action are called "admissions." These are dealt with in a separate chapter (*k*). In criminal cases an admission by the accused person of his guilt is called a "confession."

(*k*) See *post*, p. 420.

Such a confession is *primâ facie* receivable in evidence against him, but not in all cases.

A confession is not admissible in evidence, if it was obtained by any inducement held out to the accused by a person in authority in the proceedings which amounts to a promise or threat of some temporal advantage or disadvantage having direct reference to the charge, and to its result or consequences to him. The reason for this rule is that such an inducement might possibly cause the accused to make an untrue confession.

The term "person in authority" in this connection includes persons directly connected with the prosecution or proceedings against the person charged, such as the prosecutor, the magistrate, and police officers having custody of the prisoner.

This rule has been established by a long series of decisions.

In *R.* v. *Baldry* (*l*), Lord CAMPBELL, C.J., said:—

"The rule seems to be this: If there be any worldly advantage held out to the accused to be obtained by confession, or any harm threatened to him if he refuses to confess, any statement made by him in consequence of any such inducement must be rejected. The reason for this rule I take to be, not that the law supposes that what is said after such inducement is false, but that the prisoner may have said something under a bias, and that it is not a purely voluntary confession."

POLLOCK, C.B., in the same case said:—

"By the law of England every confession to be used against a prisoner must be a voluntary confession. Every inducement held out by a person in authority will render a confession inadmissible; and the cases have gone very far as to who are persons in authority."

The inducement need not be expressed, but may be implied (*m*); it need not be made to the accused directly

(*l*) 2 Den. 430; Cockle, 111.
(*m*) *R.* v. *Gilles*, 11 Cox, 69.

if it is intended to come, and does come, to his knowledge (*n*).

The inducement must be held out by a person in apparent authority, that is, one who appears to the accused to have power to forgive or otherwise influence the course of events.

On these grounds a confession will be inadmissible when it has been obtained by any threat or promise of favour held out by a prosecutor or his wife (*o*); by the prisoner's master or mistress when the crime has been committed against either of them, but not otherwise (*p*); by the solicitor of such person in authority; by a constable, or anyone acting under a constable (*q*); and especially by a magistrate (*r*). A medical man, called in to attend the prisoner, is not a person in authority (*s*).

The master of a servant is a person in authority in a proceeding against the servant only if the offence be one against the master. Thus, where a maidservant was indicted for child murder, a confession elicited from her by her mistress was held admissible, because the crime was in no way connected with the management of the house, and there was, therefore, no probability that the mistress or her husband would prosecute in it (*t*). So, too, when a confession is elicited by an inducement held out by a non-resident daughter of a prosecutor, it appears that she is not a person in authority, and that the confession is admissible (*u*). If, however, the inducement is made in the presence of a person in authority, such as a prosecutor, or one who is likely to be a prosecutor, who stands by and does not object, his silence is treated as a tacit acquiescence in the

(*n*) See *R.* v. *Thompson*, [1893] 2 Q. B. at p. 17.
(*o*) *R.* v. *Spencer*, 7 C. & P. 776.
(*p*) *R.* v. *Moore*, 2 Den. 522.
(*q*) *R.* v. *Enoch*, 5 C. & P. 539.
(*r*) *R.* v. *Drew*, 8 C. & P. 140.
(*s*) *R.* v. *Gibbons*, 1 C. & P. 97; Cockle, 116.
(*t*) *R.* v. *Moore*, *suprà*.
(*u*) *R.* v. *Sleeman*, Dears. 269.

inducement, and the confession will be rejected (*x*). On the other hand, the mere presence of a constable is not enough to render the confession inadmissible if he does not interfere in giving the advice or holding out the inducement (*y*). And where one of two prisoners said to the other in the presence of the prosecutor and a policeman, "You had better tell him the truth," and neither the prosecutor nor the policeman spoke, a confession made by the prisoner so addressed was held admissible (*z*); and so was a confession in the case where the mother of one of the prisoners (who were young boys) said to them, in the presence of a constable and of the mother of the other boy, "You had better, as good boys, tell the truth" (*a*). When the inducement is held out by a person who has no authority in the matter, a confession will be admissible. Thus, when a prisoner's neighbours, who were not connected with the prisoner, advised her to tell the truth for the sake of her family, the confession was received (*b*). When the inducement has been once held out by a person in authority, no subsequent confession to such person will be admissible, unless it appear clear that the impression which it was calculated to make has been removed from the mind of the prisoner (*c*).

A confession made to a person in authority, if not induced by him, may be admissible (*d*); but a confession made to a third party, if induced by a person in authority, is inadmissible (*e*).

The prosecutor must prove affirmatively to the satisfaction of the judge that the confession was not obtained

(*x*) *R.* v. *Luckhurst*, Dears. 245.
(*y*) *R.* v. *Jarvis*, L. R. 1 C. C. R. 96; Cockle, 114; *R.* v. *Reeve*, L. R. 1 C. C. R. 362.
(*z*) *R.* v. *Parker*, L. & C. 42.
(*a*) *R.* v. *Reeve*, *supra*.
(*b*) *R.* v. *Rowe*, Russ. & R. 153; *R.* v. *Taylor*, 8 C. & P. 733.
(*c*) *R.* v. *Clewes*, 4 C. & P. 221; *R.* v. *Doherty*, 13 Cox, 23.
(*d*) *R.* v. *Gibbons*, 1 C. & P. 97; Cockle, 116.
(*e*) *R.* v. *Boswell*, Car. & M. 584.

by improper means (*f*). In the absence of such satisfactory proof, the confession will not, of course, be received; and if a judge subsequently discovers that a confession has been improperly received, he will strike it from his notes, and direct the jury that it is to have no weight with them (*g*).

No general rule can be laid down as to the precise inducements which are sufficient to exclude a confession But a confession will generally be excluded if a prisoner be told by a person in authority that it will be better for him if he confess, or worse for him if he do not confess (*h*). As POLLOCK, C.B., said in *R.* v. *Baldry* (*i*)—

"Where the admonition to speak the truth has been coupled with any expression importing that it would *be better* for him to do so, it has been held that the confession was not receivable, the objectionable words being that *it would be better* to speak the truth, because they import that it would be better for him to say something."

The following are instances of inducement where a subsequent confession has been rejected:—

"If you do not tell me who your partner was, I will commit you to prison" (*j*).

"Tell me where the things are, and I will be favourable to you" (*k*).

"If you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; pray tell me if you did it" (*l*).

"If you do not tell me all about it, I will send for a constable" (*m*).

"You had better tell all you know" (*n*).

"Anything you can say in your defence we shall be ready to hear" (*o*).

"It would have been better if you had told at first" (*p*).

"I should be obliged to you if you would tell us what you know

(*f*) *R.* v. *Warringham*, 2 Den. 447, n.; *R.* v. *Thompson*, [1893] 2 Q. B. 12.
(*g*) *R.* v. *Garner*, 2 Car. & K. 920.
(*h*) 2 East, P. C. 659.
(*i*) 2 Den. 430.
(*j*) *R.* v. *Parratt*, 4 C. & P. 570.
(*k*) *R.* v. *Cass*, 1 Leach, 293, n.
(*l*) *R.* v. *Upchurch*, 1 Moo. C. C. 465.
(*m*) *R.* v. *Richards*, 5 C. & P. 318.
(*n*) *R.* v. *Thomas*, 6 C. & P. 353.
(*o*) *R.* v. *Morton*, 2 M. & R. 514.
(*p*) *R.* v. *Walkley*, 6 C. & P. 175.

about it; if you will not, of course we can do nothing for you" (*q*).

"It will be best for you if you tell how it was transacted" (*r*).

"Speak the truth; it will be better for you if you do" (*s*).

On the other hand, confessions have been received, notwithstanding the following apparent inducements:—

"Be sure to tell the truth" (*t*).

"If you will tell where the property is, you shall see your wife" (*u*) [for this was no benefit to him in the matter of the proceeding].

"I should advise you that to any question that may be put to you you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue" (*x*).

In *R.* v. *Court*, LITTLEDALE, J., said:—

"It can hardly be said that telling a man to be sure to tell the truth is advising him to confess what he is really not guilty of. The object of the rule relating to confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed" (*y*).

In *R.* v. *Fennell* (*z*), a confession made by the prisoner to the prosecutor in the presence of a police inspector immediately after the prosecutor had said to the prisoner, "The inspector tells me you are making house-breaking implements; if that is so, you had better tell the truth; it may be better for you," was held not admissible in evidence. It would seem, also, that a statement made by a prisoner in expectation of a reward and a pardon which have been offered by the Crown is inadmissible (*a*).

A confession obtained by questions accompanied by a mere warning, without threat or promise, is admissible (*b*); thus, where one member of the firm by whom

(*q*) *R.* v. *Partridge*, 7 C. & P. 551.
(*r*) *R.* v. *Warringham*, 2 Den. 447.
(*s*) *R.* v. *Rose*, 78 L. T. 119.
(*t*) *R.* v. *Court*, 7 C. & P. 486; but see *R.* v. *Rose*, *supra*.
(*u*) *R.* v. *Lloyd*, 6 C. & P. 393; Cockle, 115.
(*x*) *R.* v. *Jarvis*, L. R. 1 C. C. R. 96; Cockle, 114.
(*y*) 7 C. & P. 487.
(*z*) 7 Q. B. D. 147.
(*a*) *R.* v. *Blackburn*, 6 Cox, 333.
(*b*) *R.* v. *Thornton*, R. & M. 27.

the prisoner was employed called the latter into the counting-house, and said, in the presence of another member of the firm and two policemen :—

"I think it is right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two police officers; and I should advise that to any question that may be put you will answer truthfully, so that, if you have committed a fault, you may not add to it by saying what is untrue."

and he then produced a letter (which the prisoner denied having written), and added: "Take care; we know more than you think we know," and the prisoner thereupon made a confession, the Court held that the above words did not operate as an inducement or a threat, but were only in the nature of a warning, and admitted the evidence (*c*).

In *R.* v. *Baldry* (*d*), the policeman who apprehended the prisoner told him, at the time of the apprehension, that "he need not say anything to criminate himself; what he did say would be taken down and used in evidence against him." The prisoner then confessed, and the Court for Crown Cases Reserved held that these words did not contain any promise or threat to induce the prisoner to confess, and the confession was admissible.

It is necessary, in order to exclude a confession, that the inducement held out should contain some promise or prospect of a temporal benefit. If, therefore, it amounts to no more than a moral or religious exhortation, the confession will be admitted. Thus, where a person said to a boy of fourteen, who had been apprehended on a charge of murder, "Now, kneel you down by the side of me and tell me the truth," and on the boy doing so added, "I am now going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty," the confession which

(*c*) *R.* v. *Jarvis*, *supra*.
(*d*) 2 Den. 430; Cockle, 111.

followed was admitted by the judges (*e*). So the words, "Do not run your soul into more sin, but tell the truth," have been held not to contain an inducement of a temporal kind (*f*).

The temporal benefit or advantage, moreover, must be connected with or have reference to the result or consequences of the prosecution itself, leading the prisoner to the belief that his position in reference to the charge itself will be rendered better or worse by the confession or silence. The offer of a merely collateral temporal benefit or advantage during his imprisonment or trial is not such an inducement as will render the confession inadmissible. So an offer to give the prisoner some spirits (*g*), or to strike off his handcuffs (*h*), or a promise to let him see his wife (*i*), have been held not to be such objectionable inducements.

A confession will not be inadmissible merely because it has been obtained by deception. Even when the prisoner has made it only on receiving a preliminary oath of secrecy from the person trusted, such person will be competent and compellable to reveal it (*k*); and a confession made by a prisoner while drunk has been received (*l*).

Voluntary statements made by a prisoner before a committing magistrate are strictly admissible against him. As soon as a magistrate decides to commit a prisoner for trial to the Quarter Sessions or Assizes, it is his duty to ask the prisoner if he wishes to make any statement, but he is bound to caution him at the same time in these words, or words to the like effect:—

"Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything

(*e*) *R.* v. *Wild*, 1 Moo. C. C. 452.
(*f*) *R.* v. *Sleeman*, Dears. 269.
(*g*) *R.* v. *Sexton*, 3 Russ. C. & M. 462.
(*h*) *R.* v. *Green*, 6 C. & P. 655.
(*i*) *R.* v. *Lloyd*, 6 C. & P. 393; Cockle, 115.
(*k*) *R.* v. *Shaw*, 6 C. & P. 372.
(*l*) *R.* v. *Spilsbury*, 7 C. & P. 187.

unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial" (*m*).

The magistrate must also add words which give the prisoner clearly to understand that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt; but whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat.

Whatever the prisoner says will be taken down in writing and read over to him, and be signed by the said magistrate, and kept with the depositions of the witnesses, and will be transmitted with them to the Clerk of the Court in which he will be tried. It is known as the "prisoner's statement." It is not a deposition, for it is not on oath (*n*). At the subsequent trial this statement may be given in evidence by the prosecution, unless the prisoner can show that the magistrate purporting to sign the same did not in fact sign the same. The usual course is for the counsel for the prosecution to put this statement in evidence as part of his case, whether it tells against the prisoner or in his favour.

A voluntary remark made by a prisoner before the depositions are complete, and before the statutory caution has been given, is admissible (*o*). And a letter written by the prisoner, whilst in custody, to the prosecutrix, was recently held admissible in evidence against him, although there was no evidence that he had been warned that any letter he wrote might be given in evidence (*p*).

When a confession is inadmissible, every statement or act, which presumably and reasonably flows from it,

(*m*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 18.
(*n*) Though now, of course, the prisoner may if he thinks fit give evidence on oath before the magistrate.
(*o*) *R.* v. *Stripp*, Dears. 648; *R.* v. *Sansome*, 1 Den. 545.
(*p*) *R.* v. *Heal*, 69 J. P. 224.

will be also inadmissible in evidence; for it is held that the influence which produces a groundless confession may also produce groundless conduct (*q*). But although a confession may be inadmissible, yet it seems that a witness may be asked whether, in consequence of something which the prisoner had said, he has made any discovery of other facts which bear on the case. Thus, where a prisoner told a police constable, under circumstances making the statement inadmissible, that he had thrown a lantern into a certain pond, the constable was allowed to be asked whether he searched for the lantern in that pond, and whether the prisoner had told him that he had thrown it there (*r*).

If two persons be charged jointly, the confession of one will not be evidence against the other, for a prisoner is called upon to answer what has been stated on oath by the witnesses called by the prosecution, but not to make any answer to the statement of another prisoner (*s*). And now where one of two prisoners, jointly indicted, gives evidence under the Criminal Evidence Act, 1898, and in so doing incriminates the other prisoner, the latter is entitled to cross-examine the former (*t*). So on an indictment for receiving stolen goods, any confession of guilt made by the thief when charged with the crime, and indeed everything said by the thief behind the back of the receiver, is inadmissible against the latter; and the jury must disregard the fact that, as sometimes happens, they have just heard the thief plead guilty to the larceny (*u*).

A principal is not as a rule criminally responsible for the act of his agent, nor an agent for the act of his principal; and therefore neither can be affected

(*q*) *R.* v. *Jenkins*, R. & R. 492.

(*r*) *R.* v. *Gould*, 9 C. & P. 364; Cockle, 113. Other cases appear inconsistent with this: *e.g.*, *R.* v. *Warwickshall*, 1 Leach, 263.

(*s*) *Per* PATTESON, J., in *R.* v. *Swinnerton*, Car. & M. 593; *R.* v. *Appleby*, 3 Stark. 33.

(*t*) *R.* v. *Hadwen*, [1902] 1 K. B. 882.

(*u*) *R.* v. *Smith*, 18 Cox, 470.

by a confession made by the other. Thus, on Lord Melville's impeachment for malversation of the public moneys, it was held that admissions by his agent to the effect that he had received money on account of his principal only affected the principal with a civil liability, and were therefore inadmissible when the principal was charged with a crime (*x*).

A prisoner may be convicted on proof of a confession without other evidence (*y*); but judges are unwilling to direct a conviction in such cases. Instances are common in which prisoners, under the influence of a morbid sentiment, have confessed crimes which they have never committed; and there are other cases in which the confession seems to have been prompted by the sincere, but unfounded, belief in the confessing party that he had committed the crime. It has been said that—

"Too great weight ought not to be attached to evidence of what a party has been supposed to have said; as it very frequently happens, not only that the witness has misunderstood what the party has said, but that, by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say" (*z*).

Moreover, the conduct of the accused subsequent to the commission of the crime may be proved and used against him, if it be such as to lead to the reasonable inference that he acknowledges his case to be bad: *e.g.*, if he leaves his home and runs away, or if he induces another person to give false evidence for the defence, on the hearing of the case before the magistrate (*a*).

It still remains the law that statements are admissible which are made by an accused person in answer to questions put to him by a policeman or any other person in authority, unless they are

(*x*) 29 How. St. Tr. at p. 764.
(*y*) *R.* v. *Sullivan*, 16 Cox, 347.
(*z*) *Per* PARKE, B., in *Earle* v. *Picken*, 5 C. & P. 542, n.
(*a*) *R.* v. *Watt*, 20 Cox, 852.

induced by some threat or by the promise of some temporal advantage. But a practice has grown up, which is now consistently followed in criminal courts, of rejecting evidence of any confession so obtained, if the judge in his discretion thinks that the prisoner was subjected to any unfair pressure.

Thus, it has been laid down by HAWKINS, J., that the police have no right to put questions to a prisoner in custody which may tend to convict him, even after cautioning him; but it is in the discretion of the judge to admit or reject the answers given to such questions; that he should reject them if there is any reason to believe that a trap was being laid for the prisoner; and that persons about to be taken into custody ought not to be cross-examined by the police (*b*).

The law on the subject has been recently stated by CHANNELL, J., in *R.* v. *Knight* (*c*), a case in which a post office detective questioned a suspected post office clerk for six hours in a private room, not allowing him out for a meal except under conditions equivalent to arrest, and, although he began by cautioning him in proper form, refusing to take his constant denials of the offence alleged against him, though repeated steadily for the first two hours. A confession obtained at the end of the six hours by these means was held inadmissible, the judge saying:—

"It is, I think, clear that a police officer or anyone whose duty it is to inquire into alleged offences as this witness here, may question persons likely to be able to give him information, and that whether he suspects them or not, provided that he has not already made up his mind to take them into custody. When he has taken anyone into custody, and also before doing so when he has already decided to make the charge, he ought not to question the prisoner. A magistrate or judge cannot do it, and a police officer certainly has no more right to do so. I am not aware of any distinct rule of evidence, that if such improper questions are asked, the

(*b*) *R.* v. *Hested*, 19 Cox, 16.
(*c*) 20 Cox, 711.

answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may in his discretion refuse to allow the answer to be given in evidence, and in my opinion that is the right course to pursue."

But the mere fact that a prisoner's statement is made by him in reply to a question put to him by a police constable after he is in custody does not of itself render the statement inadmissible in evidence (*d*).

(*d*) *R.* v. *Best*, [1909] 1 K. B. 692; and see *Rogers* v. *Hawken*, 78 L. T. 655; and *R.* v. *Rose*, 78 L. T. 119.

## CANADIAN NOTES.

### CONFESSIONS.

It was held in *The Queen* v. *Sousie*, 17 N. B. 611, that s. 32 of 32 & 33 Vict. c. 30, providing that before the accused person makes any statement the justice shall state to him, and give him fairly to understand, that he has nothing to hope for from any promise of favour, etc., was directory, and the statement made by the prisoner, as provided for by that Act, might be used against him, although the justice had not complied with the provisions of that section, if it appeared that the prisoner had not been induced to make this statement by any promise or threat.

In *Reg.* v. *Williams*, 28 O. R. 583, it was held that the depositions of a witness, taken at the coroner's inquest, without objection by him that his answers may tend to criminate him, and who was subsequently charged with an offence, were receivable against him at the trial.

Armour, C.J., cites the ruling of the Privy Council in *The Queen* v. *Coote*, L. R. 4 P. C. 599, to the following effect: "From these cases, to which others might be added, it results in their lordships' opinion that the depositions of a witness, on oath, legally taken, are evidence against him should he be subsequently tried on a criminal charge, except so much of them as consist of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle, *nemo tenetur seipsum accusare*, but

does not apply to answers given without objection, which are to be deemed voluntary." This case overruled the case of *Reg.* v. *Hendershott and Welter*, 26 O. R. 678, but was not followed in *Reg.* v. *Hammond*, 29 O. R. 211, where it was held that the privilege applied to any evidence given under oath in the cases provided for in the statute, though the witness had not claimed privilege. See *post*, p. 245*d*.

The prisoner, after his committal for trial, and while in the custody of a constable, made a statement, upon which the latter took him before a magistrate, when he laid an information on oath, charging another person with having suggested the crime and asked him to join in it, which he accordingly did. Upon the arrest of the accused, the prisoner made a full deposition against him, at the same time admitting his own guilt. Both information and deposition appeared to have been voluntarily made, uninfluenced by either hope or threat; but it also appeared that the prisoner had not been cautioned that his statements as to the other might be given in evidence against himself, though he had been duly cautioned when under examination in his own case. *Held*, that both the information and deposition were properly received in evidence as being statements which appeared to have been voluntarily made, uninfluenced by any promises held out as an inducement to the prisoner to make them, and that, too, though they had been made under oath, for that the rule of law excluding the sworn statements of the prisoner under examination applied only to his examination on a charge against himself, and not when the charge was against another; for that in the latter case a prisoner was not obliged to say anything against himself, but if he did volunteer such a statement it would be admissible in evidence against him. *Reg.* v. *Field*, 16 U. C. C. P. 98.

In *The Queen* v. *Finkle*, 15 U. C. C. P. 453, the prisoner was convicted of arson. His admission or confession was

received in evidence on the testimony of the constable, who said that after the prisoner had been in a second time before the coroner he stated that there was something more he could tell, whereupon the constable cautioned him not to say what was untrue. He then confessed the charge. The constable did not recollect any inducement he held out to him. There was also evidence that on the third day of his incarceration he expressed a wish to the coroner to confess, on which the latter gave him the ordinary caution, that anything he said might be used against him, and not to say anything unless he wished. He then made a second statement, and after an absence of a few minutes returned and made a full confession. It was held that on these facts appearing, the statement made to the constable was *primâ facie* receivable, and that the judge was well warranted in receiving as voluntary the confession made to the coroner, after due warning by him. It would seem, however, that a more reasonable rule to adopt in such cases is that, notwithstanding the caution of the magistrate, it is necessary, in the case of a second confession, not merely to caution the prisoner not to say anything to injure himself, but to inform him that the first statement cannot be used against him. But in this case, it having afterwards appeared that the prosecutor had offered direct inducements to the prisoner to confess, it was held that if the judge was satisfied that the promise of favour thus held out had induced the confessions, and continued to act upon the prisoner's mind, notwithstanding the warning of the coroner, he was right in directing the jury to reject them. It was also held that if the judge suspected the confessions had been obtained by undue influence, such suspicion should have been removed before he received the evidence; also, that it was a question for the judge whether or not the prisoner had been induced by undue influence to confess.

A prisoner indicted for forging a promissory note

made a statement to the parties who arrested him, under the following circumstances: Cotton, one of the constables, stated that he told the prisoner he thought prisoner would have to go before a magistrate. This was before the prisoner made the statement to Cotton. They went to Hull's Tavern and stopped all night, and prisoner was not allowed to go away from the tavern until formally arrested next day. Cline, the other constable, confirmed this statement, except that he said he was not aware of anything to prevent the prisoner from going away from the tavern that night if he pleased. Prisoner was aware of the cause for which he was being arrested. It was held that the statement under those circumstances was receivable in evidence. *The Queen* v. *Tufford*, 8 U. C. C. P. 81.

A prisoner was convicted of stealing goods, the property of S. The evidence to connect the prisoner with the crime was his statement to a policeman, who had him in charge, that if he went to a particular place he would find the goods. This statement was made in consequence of his being told by the policeman that S. was a good-hearted man, and he, the policeman, thought that if he got his goods back he would not prosecute. *Held*, that the prisoner's statement was improperly received. *The Queen* v. *McCafferty*, 25 N. B. 396.

A police constable gave the usual caution to a prisoner who had been arrested on a charge of obstructing a railway train by placing blocks upon the line, but afterwards said to him, "The truth will go better than a lie. If anyone prompted you to it you had better tell about it." Thereupon prisoner admitted the act charged. This was held not to be receivable in evidence against the prisoner. *Reg.* v. *Romp*, 17 O. R. 567.

A constable, after making an arrest of a prisoner addressed to him the following remark: "I arrest you for assaulting old man McGarvey." The prisoner then

said, "How much will you fine me?" to which the constable replied that he knew nothing about that. Subsequently the accused asked to have the handcuffs removed as he had no intention of escaping, to which the constable replied that he was taking no chances and had not much sympathy with a man who would kick an old man and bite him. It was held that there was no objection in this case to the admission in evidence of the prisoner's confession. *Rex* v. *Bruce*, 13 B. C. 1.

On a indictment for offering to purchase counterfeit tokens of value, evidence was given that in the course of a conversation between the prisoner and a detective, the prisoner had asked the detective whether he had received a letter written by him stating his desire to purchase counterfeit money, and upon the detective showing the prisoner the letter, prisoner admitted it to be his. It was held that the letter was admissible, as in a sense forming part of the subject-matter of the conversation. *The Queen* v. *Atwood*, 20 O. R. 574.

On the trial of an indictment for offences under the provisions of the Insolvent Act of 1869, it was held, that the statements of the insolvent in his examination before the assignee at the creditors' meeting were evidence against him on the trial of the indictment. *Reg.* v. *McLean*, 17 N. B. 377.

In a prosecution for bigamy no one was called to prove the first marriage who was present on the occasion, nor was documentary evidence adduced, but evidence of the admissions of the prisoner were received and submitted to the jury. The Court, following the latest English case, *Reg.* v. *Savage*, 13 Cox, 178, held that evidence of a confession of his first marriage made by the prisoner was not evidence upon which he could be convicted.

*Per* ARMOUR, C.J., "We must follow the latest English case, *Reg.* v. *Savage*, 13 Cox, 178, decided in

1876, and hold that evidence of a confession of his first marriage made by a prisoner is not evidence upon which he could be convicted. It is not a good thing to allow looseness of proof. A marriage in law must be strictly proved. The conviction will be quashed." *Reg.* v. *Ray*, 20 O. R. 212.

*Confessions Obtained by Artifice—"Sweatbox."*

The practice of detectives cross-examining prisoners after cautioning them in regard to their statements, is adversely commented upon by the Court in *Reg.* v. *Day*, 20 O. R. 209, but nevertheless the answers given in reply to questions were held to be admissible.

ARMOUR, C.J., said: "We think, although we reprehend the practice of questioning prisoners, that we cannot come to the conclusion that evidence obtained by such questioning is inadmissible. The great weight of authority in England and Ireland, and all the cases in which the point has been considered by a Court for Crown Cases Reserved, go to show that the evidence is admissible. We must leave it to the Legislature to determine whether the practice of cross-examining prisoners is legally to obtain hereafter."

It is no objection to the admission of a confession by the prisoner that it was obtained by artifice. Before the trial, and while the accused was in custody on a charge of attempting to murder, the police officer made an untrue statement to the prisoner that another party charged with aiding and abetting had done some talking about the matter. Thereupon, the accused voluntarily made a statement to the officer tending to incriminate himself. This evidence was held to have been properly admitted, as also was evidence of conversations by the accused overheard after the untrue statement of the police officer, in which the accused admitted his guilt. "I will add, speaking for myself, that the practice of police

officers of any grade examining prisoners is to be disapproved of, and that the obtaining confessions or statements from them by trick or deception is to be strongly reprobated. The latter in particular tends to obstruct justice by discrediting an officer whose testimony might otherwise be useful." *Per* OSLER, J., *Rex* v. *White*, 18 O. L. R. 640.

A decoy letter was placed in the post office for the purpose of trapping a letter-carrier, and the note enclosed was shown to the superintendent after having passed through the hands of one of the letter-carriers. The superintendent then had an interview with the letter-carrier, and accused him of the theft, telling him he had the bank-note in question in his possession, and the letter-carrier acknowledged his guilt. There was no threat or inducement, in fact, and the relationship of the superintendent to the letter-carrier was held not to be in itself sufficient to justify the inference of coercion. The statement as to the possession of the bank-note, even if treated as a false statement, did not make the admission of the evidence improper. *R.* v. *Ryan* 9 O. L. R. 137.

## CHAPTER VI.

### WHAT THE PARTIES DID OR SAID IN OTHER TRANSACTIONS.

THE acts and statements of either party in other transactions or upon other occasions are, as a rule, inadmissible in evidence, as they generally afford no ground for any inference respecting the matter in issue. There is usually no reason to infer that, because a person acted in a certain manner on a certain occasion, he acted in the same manner on another occasion.

But there are cases in which things done or said by a party in some other transaction may lead up to or explain the transaction in issue, *e.g.*, by showing a series of acts or events, a systematic course of conduct, or a state of mind such as guilty knowledge, good faith or malice, intention, and in a few instances motive. When such is the case, evidence of these acts or statements is admissible if they bear closely on the matter in issue. But in all other cases evidence irrelevant to the issue will be excluded.

The parties cannot for obvious reasons be permitted to wander off into a discussion as to what they said and did on other occasions. Much time would be wasted and much unnecessary expense incurred, if the Court allowed

them thus to raise issues which are merely collateral. In an action for the price of goods sold and delivered, it is wholly immaterial that the defendant owes money to other tradespeople besides the plaintiff. So if the question in issue before the Court be whether the beer supplied by the plaintiff to the defendant was bad, it is irrelevant to show that beer supplied by the plaintiff to other people was bad, unless such other beer was of the same brew (*a*).

But now suppose that A. has ordered goods on behalf of B. which the plaintiff has delivered to B., and that B. now refuses to pay for these goods on the ground that A. had no authority to order them on his behalf. Here, the burden rests upon the plaintiff to satisfy the Court that A. had authority, expressed or implied, to contract in the name of B.; and for this purpose he will be allowed to prove that on other occasions, both previous and subsequent, A. had ordered other goods, from himself and also from other tradesmen, for which B. had paid without demur. So if it be necessary to prove that A. on a given occasion held a particular office, or acted in a special capacity, evidence is, as a rule, admissible to show that he held that office or acted in that capacity on other occasions.

In divorce suits the Court will receive evidence of adultery committed after the latest act charged in the petition, to show the character and tendency of the earlier acts of familiarity (*b*).

The majority of the cases which fall under this head may be grouped in three classes:—

(1) Acts of ownership.

(2) Facts showing system.

(3) Facts showing the state of mind of a party.

(*a*) *Holcombe* v. *Hewson*, 2 Camp. 391; cf. *Hollingham* v. *Head*, 27 L. J. C. P. 241; Cockle, 63.

(*b*) *Boddy* v. *Boddy*, 30 L. J. P. M. & A. 23.

### 1. *Acts of Ownership.*

A party to an action is sometimes allowed to give in evidence acts which tend to show that he is the owner of or possesses certain less extensive rights (such as manorial rights and easements) over lands, not in dispute in the action, as proof that he owns or has the same rights over the land which is actually in dispute. But before he can do this, he must first satisfy the judge (*c*) that the following two conditions have been fulfilled:—

(a) That the acts are such that the jury may draw from them the inference that the person who did them owned or had the rights he claimed over the lands on or over which they were done; and

(b) that these lands and the land in dispute have such a "unity of character," or are so intimately connected that the jury may come to the conclusion that whoever owns or has rights over the former also owns or has the same rights over the latter.

If the judge decides that these conditions have been fulfilled, then it is for the jury to determine what weight is to be given to those acts.

(a) It is not easy to define precisely what acts will be deemed acts of ownership. Where a person is proved to have been in possession, he is deemed to be the owner; and therefore all acts, which show that the person who did them was in possession of the land on his own behalf, are acts of ownership. They include:—a conveyance of the freehold (*d*), or a lease of the land (*e*), or of

(*c*) *Doe* v. *Kemp*, 7 Bing. at p. 336.
(*d*) *Doe* v. *Kemp*, (Ex. Ch.) 2 Bing. N. C. 102.
(*e*) *Tyrwhitt* v. *Wynne*, 2 B. & Ald. 554.

the mines and minerals under the land (*f*), inclosing the land (*g*) or putting up boundary stones (*h*), depasturing cattle or sheep (*g*), planting or cutting trees or hedges (*i*), mending banks or repairing fences (*k*), building a jetty on a foreshore (*l*), and the like (*m*).

But evidence will not be admitted (*n*) of an act which is equivocal, such as the mere habit of walking across the land. And an act, which would be held to be an act of ownership if done by a private person, will not be received if done on behalf of a statutory body which has no power to own land (*o*).

(b) The land, river, highway or other subject-matter of the action must have a unity of character with the land to which the evidence relates.

Thus, in *Doe* v. *Kemp* (*p*), where the land in dispute between the lord of the manor and the plaintiff lay between the highway and the plaintiff's inclosed land, the lord was allowed to show that he had conveyed other pieces of land lying on both sides of the same road and part of the same waste in order to show that he owned the disputed strip; but not that he had conveyed other pieces of land within the manor which also lay beside a road, but which he had not shown were part of the same waste. Lord DENMAN, C.J., said (*q*) :—

"If the lord has a right to one piece of waste, it affords no inference, even the most remote, that he has a right to another in the same manor, although both may be similarly situated with

(*f*) *Taylor* v. *Parry*, 1 Man. & G. 604.
(*g*) *Doe* v. *Kemp*, *suprà*.
(*h*) *Jenkins* v. *Dunraven*, 62 J. P. 661.
(*i*) *Stanley* v. *White*, 14 East, 332; *Jones* v. *Williams*, 2 M. & W. 326; Cockle, 60.
(*k*) *Jones* v. *Williams*, *suprà*.
(*l*) *Van Diemen's Land Co.* v. *Marine Board, etc.*, [1906] A. C. 92.
(*m*) And see *post*, pp. 121—123, 287.
(*n*) See *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401.
(*o*) *Duke of Newcastle* v. *Clark*, 8 Taunt. 626.
(*p*) 7 Bing. 336; 2 Bing. N. C. 102; and see *Dendy* v. *Simpson*, 18 C. B. 831; and *Coats* v. *Herefordshire County Council*, [1909] 2 K. B. 579.
(*q*) 2 Bing. N. C. at p. 107.

respect to the highway. Assuming that all were originally the property of the same person, as lord of the manor, which is all that the fact of their being in the same manor proves, no presumption arises, from his retaining one part in his hands, that he retained another; nor, if in one part of the manor the lord has dedicated a portion of the waste to the use of the public, and granted out the adjoining land to individuals, does it by any means follow, nor does it raise any probability, that in another part he may not have granted the whole out to private individuals, and they afterwards have dedicated part as a public road; but the case is very different with regard to those parcels which, from their local situation, may be deemed part of one waste or common; acts of ownership, in one part of the same field, are evidence of title to the whole; and the like may be said of similar acts on part of one large waste or common."

So, too, in a case in which the plaintiff claimed the whole bed of a river, he was allowed to prove that he had done acts of ownership upon the whole bed and both banks of the river lower down stream, where the river flowed between his land and that of a third person; and also that he had repaired the hedge which divided that third person's land from the river, as it formed a continuation of the hedge which divided defendant's land from the same river (*r*). PARKE, B., said (*s*):—

"The evidence of acts in another part of one continuous hedge, and in the whole bed of the river, adjoining the plaintiff's land, were admissible in evidence, on the ground that they are such acts as might reasonably lead to the inference that the entire hedge and bed of the river, and consequently the part in dispute, belonged to the plaintiff.

Ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment of the land itself; but it is impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed; evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did.

So I apprehend the same rule is applicable to a wood which is not inclosed by any fence; if you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood, although there is no fence or distinct boundary surrounding the whole; and the case of *Stanley* v. *White* (*t*) I

(*r*) *Jones* v. *Williams*, 2 M. & W. 326; see also *Stanley* v. *White* 14 East, 332; *Earl of Dunraven* v. *Llewellyn*, 15 Q. B. 791

(*s*) 2 M. & W. at p. 331.

(*t*) 14 East, 332.

conceive is to be explained on this principle: there was a continuous belt of trees, and acts of ownership on one part were held to be admissible to prove that the plaintiff was the owner of another part on which the trespass was committed."

And where a strip of land between inclosed ground and the highway communicates with open commons or other larger pieces of land, evidence of ownership of the commons or other lands is admissible to show that the strip does not belong to the owner of the inclosed land (*u*). On a claim of a several fishery over a large area, evidence that over certain parts of that area fishing rights exist which are inconsistent with a several fishery is admissible on the question whether the several fishery exists on the other portions of the area (*x*).

It is on this principle that evidence was admitted of the rights of tenants in one manor to prove the rights of tenants in another, where the manors belonged to the same lord and for centuries had been administered under one commission, and in each there were the same class of tenants who held their tenements by grants in the same words (*z*).

The two pieces of land must be closely connected both in character and locality. Consequently where a canal company created by statute, having power to purchase lands, made a new cut through different lands belonging to different owners, it was held, on a question arising over 100 years later, that, as the making of the cut did not necessarily involve more than the purchase of the actual bed of the navigation, the fact that the company owned the bank of the cut where it ran through other lands was not admissible to show that the company also owned the bank at the point in dispute (*a*).

The principle is not confined to questions of the ownership of land. Thus on an indictment of a parish

(*u*) *Plumbley* v. *Lock*, 67 J. P. 237; *Grove* v. *West*, 7 Taunt. 39.
(*x*) *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401.
(*z*) *Rowe* v. *Brenton*, 8 B. & C. 758.
(*a*) *Hollis* v. *Goldfinch*, 1 B. & C. 205; and see *University College, Oxford* v. *Oxford Corporation*, 68 J. P. 470.

for non-repair of a highway, the prosecution may put in evidence an indictment of an adjoining parish for non-repair of the continuation of the same road, which was either prosecuted to conviction or submitted to, in order to show that the road was a public highway; for the road, being continuous, could not have different characters in the two parishes (*b*). And where common rights are claimed over land now inclosed but formerly open, the plaintiff, on showing that it formed part of the common of the manor, may prove that he exercised common rights over other parts of the common (*c*).

### 2. *Facts showing System.*

Again, evidence of transactions which are not in issue is also admissible whenever it is alleged that a party has pursued a systematic course of conduct which explains his behaviour in the transaction in issue.

The principle as to facts which establish a systematic course of conduct is thus stated by Lord HERSCHELL, L.C., in *Makin* v. *Attorney-General for New South Wales* (*d*):—

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

In that case the prisoners were indicted for the murder of a child entrusted to their care, and the

(*b*) *R.* v. *Inhabitants of Brightside Bierlow and others*, 19 L. J. M. C. 50.
(*c*) *Pearson* v. *Underhill*, 20 L. J. Q. B. 133.
(*d*) [1894] A. C. at p. 65.

question was whether evidence could be given that the bodies of other children had been found in the gardens of houses occupied by the prisoners. It was held that such evidence was properly received as establishing a course of conduct pursued by the prisoners.

A good illustration of this matter is afforded by a recent case. The plaintiff sued a barber for negligence, alleging that he had contracted an infectious disease through the barber using razors and other appliances in a dirty and insanitary condition. In support of his case he tendered two witnesses who deposed that they had contracted a similar disease in the defendant's shop. It was held that, as the negligence alleged was not an isolated act or omission, but was a dangerous practice carried on by the defendant, the evidence was admissible (*e*). CHANNELL, J., in this case said:—

"It is not legitimate to charge a man with an act of negligence on a day in October and ask a jury to infer that he was negligent on that day because he was negligent on every day in September. The defendant may have mended his ways before the day named in October; moreover, he does not come to trial prepared to meet all the allegations of previous negligence. There are many reasons why such evidence is not admissible on such an issue. But where the issue is that the defendant pursues a course of conduct which is dangerous to his neighbours, it is legitimate to show that his conduct has been a source of danger on other occasions, and it is a legitimate inference that, having caused injury on those occasions, it has caused injury in the plaintiff's case also."

Again, where prisoner was charged with obtaining money by a bogus advertisement offering employment, evidence to prove a guilty mind was accepted of there being found on him when arrested six letters, all similar to the letters in answer to the advertisement which were made the subject-matter of the charge, and of there being 281 more letters awaiting delivery to him at the post office; and this, although the last-mentioned letters had never been seen by the prisoner (*f*).

So where the prisoner left her lodgings without paying

(*e*) *Hales* v. *Kerr*, [1908] 2 K. B. 601.
(*f*) *R.* v. *Cooper*, 1 Q. B. D. 19.

the landlady, and it was alleged that such conduct was part of a regular system by which the prisoner fraudulently obtained board and lodging, evidence of previous fraudulent departures from other lodgings without payment has been admitted as showing a systematic course of conduct (*g*). And where in an indictment for obscene words "the intention of corrupting the public morals" is alleged, evidence that other books of an indecent and obscene character were found on the defendant's premises is admissible (*h*).

In *R.* v. *Rhodes* (*i*), where prisoner was indicted for obtaining eggs by fraudulently pretending by repeated advertisements that he was carrying on a substantial business, it was held that evidence was rightly admitted that persons other than the prosecutor had subsequently been deceived by similar advertisements, issued by the prisoner. It is true that WRIGHT, J., at first doubted whether such evidence ought to be received, as the guilty mind might have arisen since the commission of the offence charged, but Lord RUSSELL, C.J., said (*k*) :—

"On the whole I think the evidence was admissible on the ground that it showed part of a scheme to defraud persons by the pretence of carrying on an honest and *bonâ fide* business. . . . The transactions in all three cases were, therefore, connected by the advertisement which formed part of the scheme."

### 3. *Facts Showing the State of Mind of a Party.*

In many cases the Court is only concerned with the acts of a party, and does not stay to inquire into the state of his mind when he did the act. In other cases, however, it is material to ascertain whether the party, at the time when he did the act, was aware of a certain fact or had formed a certain

(*g*) *R.* v. *Wyatt*, [1904] 1 K. B. 188. See also *R.* v. *Walford*, 71 J. P. 215 ; *R.* v. *Mean*, 69 J. P. 27.

(*h*) *R.* v. *Thomson*, 64 J. P. 456 ; approved by DARLING, J., in *R.* v. *Barraclough*, [1906] 1 K. B. at p. 212.

(*i*) [1899] 1 Q. B. 77.

(*k*) *Ibid.* p. 82.

intention, or conceived a fraudulent design. It is proverbially difficult to discover what is passing in the mind of a man. Hence, for this purpose the strict rules of evidence are relaxed, and inquiry may be made into other transactions in which that party was concerned, if they throw any light on the transaction in issue. In short, whenever the state of mind in which a party did an act is material, anything which that party said or did in the transaction is admissible; and so is anything which he said or did in any other transaction, previous or subsequent, if it tends to explain the state of his mind when he did the act.

We will deal first with civil cases. In every action based upon the representation which is alleged to have been fraudulently made, the burden lies upon the plaintiff to give affirmative evidence as to the state of the defendant's mind at the time when he made the representation. Did he intend to mislead the plaintiff? Did he know that his representation was untrue? In order to answer these questions, the plaintiff is allowed to lay before the Court evidence of other similar representations fraudulently made by the defendant. Thus, in an action against a company to recover a sum of money obtained by them from the plaintiff through a fraud of the defendant's agent, committed with their knowledge and for their benefit, evidence of similar frauds committed on persons other than the plaintiff, by the same agent, in the same manner, with the knowledge and for the benefit of the defendant, was held admissible on behalf of the plaintiff (*l*).

In any action brought for libel or slander published on a privileged occasion, it lies upon the plaintiff to

(*l*) *Blake* v. *Albion Life Assurance Society*, 4 C. P. D. 94; *Barnes* v. *Merritt*, 15 T. L. R. 419.

prove malice in the defendant, and for this purpose he may give in evidence any words, as well as any act, of the defendant, whether prior or subsequent to the publication sued on, which throw any light upon the condition of the defendant's mind at the date of that publication (*m*). Evidence of such other transactions may also be given in aggravation of damages. As Lord ESHER said, in *Praed* v. *Graham* (*n*), "The jury . . . are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict." But the plaintiff is not entitled to call evidence to show that the defendant had a general disposition to libel people (*o*).

Again, whenever a defendant pleads insanity as a defence to an action of contract, it is not enough for him merely to prove that he was insane at the date of the contract; he must give some affirmative evidence to show that the plaintiff knew that he was insane. For this purpose it is admissible for the defendant to show by the evidence of third persons that his lunacy at or about the time of the contract was so obvious that everyone who had transactions with him must have been aware of it. Thus in *Beavan* v. *M'Donnell* (*p*), which was an action to recover a sum of money paid by the plaintiff as a deposit on the purchase of an estate, on the ground that he was a lunatic, and therefore incompetent to contract, evidence was received of his conduct before and after the transaction, to show that the lunacy was of such a character as would be apparent to the defendant when dealing with him.

So in criminal cases, the leading principle is that evidence of all matters which are irrelevant to the

(*m*) *Pearson* v. *Lemaitre*, 5 Man. & G. 700; and see Odgers on Libel and Slander (4th edition), pp. 326 *et seq.*
(*n*) 24 Q. B. D. at p. 55.
(*o*) *Scott* v. *Sampson*, 8 Q. B. D. 491.
(*p*) 10 Ex. 184.

issue will be excluded. But to this there is the exception that evidence will be admitted of any facts which tend to explain or throw light on the transaction in issue, as, for instance, to establish a systematic course of conduct, or to show criminal intention or guilty knowledge in the mind of the accused, or to rebut the defence that the criminal act was done accidentally or undesignedly. Our law, for instance, is always extremely careful in criminal cases not to allow any evidence to be given, until after conviction, of any other offences committed by the prisoner or of any previous conviction recorded against him. Nevertheless, such evidence will be admitted when it is necessary to determine in what mind (*quo animo*) or with what intention he did the act with which he is charged. And then not only is such evidence admissible in chief as part of the case for the prosecution, but if the prisoner elects to give evidence on oath, he may be cross-examined on such matters.

Thus, if a prisoner is charged with knowingly passing bad coins, evidence of his passing bad coins on the previous day, or of any other bad coins being found on him at the time of his arrest, would be admissible (*q*). And upon an indictment for uttering a forged banknote, knowing it to be forged, evidence is admissible (to show the prisoner's knowledge that the note mentioned in the indictment was a forgery) of his having a short time previously uttered another forged banknote of the same manufacture, and of there being a number of others also of the same manufacture in circulation with

(*q*) *R.* v. *Jarvis*, 7 Cox, 53.

prisoner's handwriting on the back of them. As HEATH, J., said in *R.* v. *Ball* (*r*),—

"Everything that you said or did was proper to be admitted to show your knowledge of the forgery."

In cases of arson, evidence may be properly given of previous fires that prisoner has experienced on his premises (*s*), and of any suspicious circumstances attending such previous fires, if such evidence shows the state of his mind at the time the alleged offence took place. In poisoning cases, evidence may be given of previous deaths by poisoning (*t*) in which the prisoner was implicated. So, if a person charged with embezzlement sets up as his defence that his omission to hand over to his employer the moneys which he had received for him was the result merely of forgetfulness, and that the corresponding errors in his accounts were accidental, it is open to the prosecution to give evidence of other non-payments not charged in the indictment, and of other errors, all telling against the interests of the employer (*u*).

With reference to the particular crime of receiving stolen goods, knowing them to have been stolen, the Prevention of Crimes Act, 1871 (*v*), provides :—

"Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months (*x*), and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him."

(*r*) 1 Camp. 324.
(*s*) *R.* v. *Gray*, 4 F. & F. 1102.
(*t*) *R.* v. *Geering*, 18 L. J. M. C. 215 ; Cockle, 64.
(*u*) *R.* v. *Richardson*, 2 F. & F. 343.
(*v*) 34 & 35 Vict, c. 112, s. 19.
(*x*) That is, preceding the commencement of the prosecution not the commission of the offence. *R.* v. *Harding*, 53 Sol. Jo. 762.

HAWKINS, J., has thus construed this provision (*y*):—

"If you find other stolen property in the possession of the person charged as a receiver at the same time that you find the property with regard to which you are charging him with receiving, you can prove that you did so find such property if it be property stolen within twelve months preceding. I do not mean to say that you must find the property the subject of the indictment and the property with regard to which you are seeking to give evidence at the same identical moment. It would be enough . . . if a police constable . . . came back to the premises of the accused where he had found the first lot for a further search, and on such search succeeded in finding there more stolen property stolen within the required period . . . that is substantially a finding at the same time."

The prosecution must prove that the other goods found, not those the subject-matter of the indictment, were stolen, and that they were stolen within the preceding twelve months; otherwise the evidence is inadmissible (*z*), and such other goods must be found on the prisoner's premises at the same time as the goods specified in the indictment; it is not sufficient to show that they were on the prisoner's premises at some period during the preceding twelve months. Hence, no evidence can be given of the fact that the prisoner received other stolen goods during the preceding twelve months, if he parted with them before he was found in possession of the goods which he is now charged with receiving (*a*).

The same section of the statute, in order to facilitate proof of guilty knowledge in cases of receiving stolen goods, contains a further provision that where proceedings are taken against any person for having received goods knowing them to have been stolen, or for knowingly having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then, if such person has within five years immediately preceding been convicted

(*y*) *R.* v. *Carter*, 12 Q. B. D. 522.
(*z*) *R.* v. *Girol*, 22 T. L. R. 720.
(*a*) *R.* v. *Carter*, *supra*; *R.* v. *Drage*, 14 Cox, 85; but see *R.* v. *Rowland*, [1910] 1 K. B. 458.

of any offence involving fraud or dishonesty, evidence of such conviction may be given against him, provided that he has been given seven days' notice in writing of the intention to do so.

On an indictment for obtaining, or attempting to obtain, money or goods by false pretences, it is necessary for the prosecution to give some affirmative evidence to show that the prisoner knew that his representation was false. Evidence, which raises merely a suspicion that he knew this, will not be sufficient (*b*). Hence it is open to the prosecution, as in civil cases of fraud (*c*), to give evidence of any similar transaction which throws light upon the state of the prisoner's mind, at the time when he made the false pretence charged in the indictment. This is now clear law; although it was at one time thought that on charges of obtaining goods or money by false pretences evidence of other similar offences committed by the prisoner was never admissible, either to prove a general course of conduct or a guilty mind. This opinion was based on an erroneous view of the decision in *R.* v. *Holt* (*d*), where prisoner was charged with obtaining money by a false representation that he had authority to collect it. Evidence was tendered of similar representations by the prisoner, both before and after; the constant repetition of such a statement does not go to show that the person making it had a guilty mind; it is equally good evidence of *bona fides*, and it was not admitted.

BLACKBURN, J., (*e*) put the decision in *R.* v. *Holt* on its real basis when he said:—

"There the alleged false pretence was an assertion of authority to receive the money, and the question was authority or no authority. The evidence was wholly irrelevant."

(*b*) *R.* v. *Dunleavy*, 73 J. P. 56.
(*c*) See *ante*, p. 126.
(*d*) 30 L. J. M. C. 11.
(*e*) *R.* v. *Francis*, L. R. 2 C. C. R. 128.

And Lord RUSSELL, C.J., in the case of *R.* v. *Rhodes* (*f*) said in reference to *R.* v. *Holt*:—

"There the false pretence charged was a distinct and separate transaction, and the fact that the prisoner had subsequently made a similar false pretence had no bearing on his guilt or innocence of the particular charge preferred."

In other cases of false pretences such evidence has been freely admitted. Thus where prisoner obtained loans from pawnbrokers by depositing sham jewellery with them, falsely pretending it to be real, evidence of previous transactions of similar character was received (*g*). Lord COLERIDGE, C.J., said:—

"It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is whether at the time he did it he had guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake."

In another case a prisoner obtained money by giving cheques which were subsequently dishonoured. He was tried and acquitted on one charge, and next day charged on three others. To show guilty knowledge the prosecutor in the previous day's case was called, although in that case the jury had acquitted the prisoner of guilty knowledge; and his evidence was held rightly admitted (*h*); Lord RUSSELL, C.J., saying:—

"It was relevant as showing a course of conduct on the part of the accused, and a belief on his part that the cheques would not be met."

Even when the only evidence available for such a purpose is evidence of transactions subsequent to the one on which the prisoner is charged, the evidence is admitted if it proves the course of conduct connoting a

(*f*) [1899] 1 Q. B. at p. 82.
(*g*) *R.* v. *Francis*, *supra*.
(*h*) *R.* v. *Ollis*, [1900] 2 Q. B. 758. And see *R.* v. *Walford*, 71 J. P. 215; *R.* v. *Mean*, 69 J. P. 27.

guilty mind (*i*). If, however, the evidence merely proves that the prisoner is a swindler it is not admissible (*j*).

A recent case (*k*) may perhaps be considered as having been decided under this head.

It was an appeal against a decision of Quarter Sessions on appeal from Cheltenham Petty Sessions, convicting appellant for driving a motor-car through the promenade at Cheltenham at a speed which was dangerous to the public having regard to the circumstances of the case. On the appeal to Quarter Sessions evidence was tendered and received, in spite of appellant's objection, as to the traffic which was usually in "the promenade" at the hour of day at which the offence was committed, though it admittedly was not there on the day in question. This was done, no doubt, to meet the requirements of sub-s. 1 of s. 1 of the Motor Car Act, 1903, but Lord ALVERSTONE, C.J., held that the evidence was rightly received apart from the Act.

In another recent case such evidence has been admitted in a charge of procuring abortion, Lord ALVERSTONE, C.J., however, doubting whether there was sufficient connection between the offence charged and the previous offence in evidence to establish a *course* of conduct (*l*). BRAY, J., in this case, said:—

"A careful examination of the cases where evidence of this kind has been admitted shows that they may be grouped under three heads:—

(1) Where the prosecution seeks to prove a system or course of conduct.

(2) Where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake.

(3) Where the prosecution seeks to prove knowledge by the prisoner of some fact" (*m*).

(*i*) See, for instance, *R.* v. *Cooper*, 1 Q. B. D. 19; *R.* v. *Wyatt*, [1904] 1 K. B. 188; *R.* v. *Smith*, 20 Cox, 804.

(*j*) *R.* v. *Fisher*, [1910] 1 K. B. 149.

(*k*) *Elwes* v. *Hopkins*, [1906] 2 K. B. 1.

(*l*) *R.* v. *Bond*, [1906] 2 K. B. 389; and see *R.* v. *Smith*, 20 Cox, 804, and *R.* v. *Rhodes*, *ante*, p. 125.

(*m*) *Ibid.* at p. 414.

In all such cases, evidence, admissible on this principle, will not be excluded merely because it tends to show that the prisoner has been guilty of other offences (*mm*).

### *General Evidence of Character.*

Evidence of general good or bad character must be carefully distinguished from evidence of previous offences or special instances of misconduct on other occasions, and also from evidence of previous convictions. It is only the latter two kinds of evidence which are ever admissible in the cases with which we have dealt in the last section of this chapter. General evidence of a prisoner's bad character or reputation cannot be given to show his state of mind at the time when he did a criminal act; still less can evidence that he has a general tendency or disposition to commit a certain class of crimes (*n*).

The prosecution can never in the first instance give evidence that the prisoner bears a bad character. The prisoner, on the other hand, may always give evidence at the trial that he has hitherto borne a good character; but, if he does so, it will then be open to the prosecution to show the contrary, if it can (*o*). Moreover, by s. 1, sub-s. (f), of the Criminal Evidence Act, 1898, if the prisoner elects to give evidence on oath, and when in the box asserts his own good character, or gives evidence against any other person charged

(*mm*) *R.* v. *Chitson*, [1909] 2 K. B. 945.
(*n*) See the remarks of Lord HERSCHELL, L.C., in *Makin* v. *Attorney-General of New South Wales*, [1894] A. C. at p. 65, cited *ante*, p. 123; and see also *R.* v. *Fisher*, [1910] 1 K. B. 149.
(*o*) *R.* v. *Rowton*, 34 L. J. M. C. 57; L. & C. 520; Cockle, 72.

with the same offence, or if the nature or the conduct of the defence involves imputations on the character of the prosecutor or his witnesses, he may be asked and will be required to answer not only questions tending to show he has been guilty of other offences or been previously convicted, but also questions to show that he is of bad character generally (*p*). After conviction, moreover, it is customary for the prosecution to call witnesses as to the prisoner's general character and reputation for the information of the Court in determining the sentence to be passed (*pp*),—for instance, to assist the Court to come to a conclusion whether a convicted prisoner over 16 and under 21 years of age should be recommended for the "Borstal system" or not (*q*).

Where a prisoner is indicted not only for an offence but also for being a "habitual criminal," the Court proceeds to the trial of the second charge after conviction on the first, and on that trial the Court may, if it thinks fit, permit evidence to be given of the prisoner's general character and repute as a part of the case for the prosecution (*r*).

In no other case can the prosecution give evidence of the general bad character of the prisoner.

Again, the general character or reputation of the prosecutor in any criminal case is, as a rule, wholly immaterial, nor can any independent evidence be given

(*p*) These provisions are fully discussed, *post*, p. 204.

(*pp*) See, for example, *R.* v. *Nuttall*, 73 J. P. 30; *R.* v. *Whiteman*, *ibid.* 102; and *R.* v. *Edwards*, *ibid.* 286.

(*q*) Prevention of Crime Act, 1908 (8 Edw. VII. c. 59), Part I.

(*r*) Prevention of Crime Act, 1908, s. 10. Appendix; and see [19 *R.* v. *Turner* 10] 1 K. B. 346; *R.* v. *Waller*, *ibid.* 364.

of this. If, however, he goes into the witness-box and gives evidence, he can, of course, be cross-examined as to credit like any other witness; but his answers generally cannot be contradicted (*s*). To this general rule, however, there is one exception. In cases of rape or indecent assault evidence may be given to show that the prosecutrix is of generally immoral character (*t*). She may be asked whether she has had connection with other men; but then the prosecution is bound by her answer, and cannot call evidence to contradict her (*u*). She may further be asked whether she has had connection with the prisoner on other occasions, and if she denies this, evidence may be called to contradict her (*x*), for this is relevant to the issue of consent or no consent. "Such evidence is in point as making it so much the more likely that she consented on the occasion charged in the indictment" (*y*).

In civil cases, evidence of good or bad character is generally irrelevant and inadmissible, unless character is of the substance of the issue (*z*). It is a defence to an action for breach of promise of marriage that the plaintiff at the date of the promise was a woman of general immoral character, unless the defendant was then aware of this. So, proof that the plaintiff, after the promise, became unchaste will release the defendant (*a*). In actions for seduction, evidence of the bad character of the person seduced is admitted in reduction of damages; but the evidence must refer to a time prior to the seduction (*aa*). In actions for defamation, evidence of the plaintiff's general good character is held irrelevant,

(*s*) See *post*, pp. 535, 536.
(*t*) *R.* v. *Tissington*, 1 Cox, 48; and see, as to sentence, *R.* v. *Dickenson*, 73 J. P. 287.
(*u*) *R.* v. *Holmes*, L. R. 1 C. C. R. 334.
(*x*) *R.* v. *Riley*, 18 Q. B. D. 481.
(*y*) *Per* Lord COLERIDGE, C.J., *ibid.* at p. 484.
(*z*) *Elsam* v. *Faweett*, 2 Esp. 563.
(*a*) *Jones* v. *James*, 18 L. T. 243.
(*aa*) *Verry* v. *Watkins*, 7 C. & P. 308; Cockle, 71.

even though a justification is pleaded (*b*). Where the libel charged the plaintiff with incompetency as a surveyor, he was not allowed to travel out of the record by showing that he had, at other times, acted competently in that capacity (*c*). The defendant in an action for defamation can give general evidence of the plaintiff's bad character, subject to the provisions of Order XXXVI., r. 37, of the R. S. C. 1883, which is as follows:—

"In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence."

Although general evidence of reputation is admissible, evidence of rumours and suspicions to the same effect as the defamatory matter complained of is not admissible; nor is evidence of particular facts or circumstances tending to show the disposition of the plaintiff (*d*).

The preceding rules determine what facts are relevant in legal proceedings. But, as the case proceeds, evidence which was at first irrelevant may become admissible. For example, although as a rule no evidence may be given in criminal cases of the prisoner's bad character or previous convictions or other offences (*e*), yet as we have just seen the prisoner's conduct of his case may render such evidence admissible. In a civil case,

(*b*) *Cornwall* v. *Richardson*, R. & M. 305.
(*c*) *Brine* v. *Bazalgette*, 3 Ex. 692.
(*d*) *Scott* v. *Sampson*, 8 Q. B. D. 491; *Bell* v. *Parke*, 11 Ir. C. L. Rep. 413. See further on this matter Odgers on Libel and Slander (4th edition), p. 371.
(*e*) For the rule and exceptions, see *ante*, pp. 134, 135.

too, reckless cross-examination may let in evidence which was not admissible in chief. Thus, if a witness be cross-examined as to part of a conversation with a third person on an occasion when the parties were not present, he may be asked in re-examination to give the whole conversation. Again, if an entry in a book be tendered in evidence, or a witness uses a book to refresh his memory, and the cross-examining counsel takes the book and asks questions about other entries in it, he makes those other entries evidence as part of his case (*f*). So, too, if part of a document be put in evidence, the adverse party is entitled to have read all other passages which are connected with or qualify or explain the passage which has been read, but he is not entitled to have read any passages which have nothing to do with it (*g*). If a letter be put in, the reply also becomes admissible. Moreover, statements which are irrelevant may be let in, either by the other party not objecting in time (*h*) or by his express consent.

Lastly, it may not be out of place to mention here that matters clearly relevant may sometimes be excluded either on grounds of public policy (*i*), or out of regard to public decency. Thus, the Court will not allow a husband to say that a child born of his wife after marriage is illegitimate (*k*),

(*f*) *Gregory* v. *Tavernor*, 6 C. & P. at p. 281.
(*g*) See *Darby* v. *Ouseley*, 1 H. & N. 1.
(*h*) *Robinson* v. *Davies*, 5 Q. B. D. 26.
(*i*) See *post*, pp. 241, 289.
(*k*) *Guardians of Nottingham* v. *Tomkinson*, 4 C. P. D. 343; but see *Poulett Peerage Case*, [1903] A. C. 395.

nor a wife to prove non-access, except in the Divorce Court (*l*). These matters are discussed in a subsequent chapter (*m*).

(*l*) Evidence Further Amendment Act, 1869, s. 3.
(*m*) See Book II., Chap. V.

## CANADIAN NOTES.

### EVIDENCE OF SIMILAR ACTS.

In an action on a bond against two sureties, one of the defendants set up the defence, and gave evidence, that his signature to the bond had been obtained by fraud. The evidence of his co-defendant was tendered for the purpose of showing that his signature to the bond had also been so obtained, which was rejected as inadmissible.

It was held that the evidence so rejected was admissible, as showing a fraud practised on him with respect to the same instrument, by the same person, and at or about the same time as the alleged fraud on the other defendant, and because it was confirmatory of the evidence of such defendant.

*Per* ARMOUR, J.: "It seems to me, having regard to these general principles,"—(cited from Taylor on Evidence in the previous paragraph),—"that the evidence of the defendant Clarke ought to have been received to prove the fact that his signature had been obtained to the bond by a similar fraud to that which, according to Robinson's evidence, had been practised upon him, in procuring his signature to it, because the fraud was practised with respect to the same instrument, and by the same person, and at or about the same time, and because the evidence of Clarke that it had been practised upon him was confirmatory of the evidence of Robinson that it had been practised upon him." *The Waterloo Mutual Fire Insurance Co.* v. *Robinson et al.*, 4 O. R. 295.

In a prosecution for obtaining a promissory note with intent to defraud, and inducing another to make a

promissory note with like intent, the circumstances of the particular fraud were proved, and then evidence was given of similar frauds on others, showing that the defendant was at the time engaged in practising a series of systematic frauds on the community. It was held that this evidence was properly received. *Reg.* v. *Hope*, 17 O. R. 463.

In an action by an insurance company to set aside a policy of life insurance issued by it on the ground that the policy was secured by fraud of the assured and the assignee of the policy, evidence is admissible, as bearing upon the fraudulent intent of the assignee, that in other cases, before as well as after, he had engaged in other transactions of a like character with the same fraudulent intent. *Mutual Life Insurance Co.* v. *Jonah et al.*, 1 Trueman, N. B. Eq. 482.

On a charge of wife murder, the Crown sought to prove that the prisoner had been with evil design accumulating insurance on his wife's life. It was held that evidence of various applications for insurance, though in some cases resulting in a rejection of the risk, was admissible, all being made practically at the same time, and forming part of one transaction, which could properly be given as a whole. *Reg.* v. *Hammond*, 29 O. R. 211.

Plaintiff brought action for assault against the defendant. The assault took place on the occasion of an expected fight between two persons, one of whom was plaintiff's nephew. The plaintiff, when going forward towards his combatant, was assaulted by the defendant, who got in a fight with him and bit his hand severely. Defendant's counsel proposed to ask plaintiff, on cross-examination, as to a number of fights in which he was said to have been concerned, but the learned judge refused to allow this, the counsel being unable to state that it was intended for the purpose of testing the

plaintiff's credibility. It was held that the evidence was rightly rejected, and further, that the erroneous exercise of discretion in refusing to allow questions on cross-examination which were irrelevant to the issue would be no ground for a new trial. The ruling to this effect seems to depend upon 37 Vict. c. 7, s. 34. *Hickey* v. *Fitzgerald*, 41 U. C. Q. B. 303.

# BOOK II.

# PROOF.

## CHAPTER I.

### DIFFERENT KINDS OF PROOF.

It has been already pointed out that, as the day of trial draws near, each litigant must ask himself two important questions:—

(i.) What facts shall I be allowed to put in evidence before the Court at the approaching trial?

(ii.) In what way or ways will the Court allow me to prove those facts?

With the first question we have already dealt. In this Book we will discuss the different methods by which the Court permits a party to prove a relevant fact. In other words, we now pass from Relevancy and proceed to consider Proof.

It is most important always to bear in mind the distinction between these two branches of the Law of Evidence. Everything that is irrelevant will be rigorously excluded at the trial. And all relevant facts must be proved in a legitimate way; a fact may be most material, still that is no reason why either party should be allowed to prove it by hearsay evidence. Counsel, when laying their client's

case before the Court, must not only keep rigidly to what is relevant, they must also be prepared to prove all relevant facts by admissible evidence. Henceforward in this volume we shall take it for granted that every fact, the method of proving which we are considering, is admittedly relevant.

"Different kinds of evidence," as Lord ESHER, M.R., says in *Lucas* v. *Williams* (*a*), "may be used to prove the same fact." Thus, if the defendant to an action of debt has pleaded payment, he may prove that he paid the debt in several ways. He can go into the box and swear that he paid it in cash on a particular day to the plaintiff or his agent, giving details if required as to the place where, as to the coins in which, he paid it, who was present, etc. Or he may produce a receipt signed by the plaintiff, or prove that the plaintiff had verbally admitted to some third person that he had been paid. Or, if the facts admit, he may do all three of these; for the existence of documentary evidence will not exclude the oral. So the handwriting of a document may be proved in five different ways (*aa*), some of which are more cogent and convincing than others. It has often been laid down that "the best evidence only is receivable in our Courts." But this maxim is misleading unless it be considerably qualified and explained (*b*). It certainly does not mean that a judge can exclude one method of proving a fact merely because he regards another method of proving the same fact as more satisfactory.

(*a*) [1892] 2 Q. B. at p. 116.
(*aa*) See *ante*, p. 46.
(*b*) For a discussion of this topic, see *post*, pp. 361, and 493—496.

Every fact must be established by the evidence of witnesses, or of documents, or of things other than documents—that is, by oral, documentary, or real evidence. But a witness is not allowed to give in evidence every fact which he regards as throwing light upon the question in dispute. He must confine himself to answering the questions asked by counsel. Many a witness is greatly disappointed because he is not permitted to state in open Court matters which he regards as most material. What other people told him, for instance, will be excluded (*c*). Again, not every writing which contains some reference to the matter in dispute is admissible in evidence as "a document in the case" (*d*). Some documents are primary evidence, some are secondary evidence, some are not evidence at all, though a layman might deem them material.

Whether a fact be established by the evidence of witnesses or of documents or of things, the evidence must be either direct or circumstantial —in other words, it must either go straight to establish the fact in issue or it must tend to establish certain minor facts, the effect of which is to prove the fact in issue. Again, if we look at the nature of such oral, documentary, or real evidence, we shall find that each piece of it must be either primary or secondary—that is, either the original witness, document or thing is produced in Court (this is primary evidence) or only some report, copy or model (this is secondary evidence).

(*c*) Except in the cases specified in Book II., Chap. VIII., *post*, p. 302.

(*d*) See *post*, pp. 172, 360.

Secondary evidence, on its production, discloses the fact that there is, or once was, evidence in existence superior to itself. Thus, one man's recollection of what another said, or a copy of a material document, is secondary evidence. In other words, secondary evidence does not pretend to be original; it confesses that it is not the best evidence conceivable. But in certain circumstances it is admitted either for the sake of convenience, or for reason of public policy, or because it is the best evidence obtainable. And here the maxim that the best evidence only is receivable applies in full force; and secondary evidence will not be admitted until it is clear to the judge that primary evidence is unobtainable.

The existence of direct evidence does not exclude circumstantial; nor will circumstantial evidence exclude direct. The presence of oral evidence will not exclude either documentary or real, nor will the existence of real evidence exclude either oral or documentary. But the existence of documentary evidence does in some cases exclude oral (*e*); and the existence of primary evidence does as a general rule exclude secondary (*f*). Secondary oral evidence, which is usually called "hearsay," will not, as a rule, be admitted even where there is no primary oral evidence available (*g*). Secondary documentary evidence, on the other hand, is generally admitted, if the corresponding primary evidence cannot be produced (*h*).

(*e*) See Book II., Chap. III., p. 167.
(*f*) See Book II., Chap. VIII., p. 302.
(*g*) See Book II., Chap. VIII., p. 302.
(*h*) See Book II., Chap. IX., p. 360.

The law does not require the fullest proof of a fact which the circumstances admit. The law prefers quality to quantity. If two credible witnesses have deposed to a certain fact and have not been shaken in cross-examination, it is not necessary, nor is it always expedient, to go on calling other persons who were present; their evidence may only weaken that which has already been given. *Primâ facie* proof is, as a rule, sufficient; it is not necessary to prove every fact up to the hilt.

Thus, if a letter be properly addressed to A., and posted, with the postage prepaid, and if it has not been returned through the Dead Letter Office, the jury will infer—almost as a matter of course—that A. received it; and the burden rests on A. to prove that he did not (*i*). The jury will also infer that A. received it at the time at which it would be delivered in the ordinary course of postal business. The sender is never held answerable for any delay in the post (*k*), and indeed by several statutes proof of the posting of a properly addressed and prepaid envelope containing a notice is to be deemed sufficient service of that notice (*l*).

Again, it is not necessary to call a witness who can swear that he did post that particular letter. It is generally enough if the writer of the letter can swear that he handed it to the clerk whose duty it was to carry letters to the post (*m*), or even that he placed the letter in question in the post-bag, box, or other receptacle in which his business letters were always placed if they are

(*i*) *Warren* v. *Warren*, 1 C. M. & R. 250; *Jones* v. *Great Central Railway Benefit Society*, C. A., October 15th, 1909 (not reported).

(*k*) *Stocken* v. *Collin*, 7 M. & W. 515; *Ward* v. *Lord Londesborough*, 12 C. B. 252.

(*l*) See, for instance, Bankruptcy Act, 1883, s. 142 (in Appendix); Interpretation Act, 1889, s. 26, *post*, p. 160.

(*m*) *Hetherington* v. *Kemp*, 4 Camp. 193; Cockle, 57.

intended to be posted. In the latter case it is usual to call a clerk to state that at regular intervals he, every day, carried to the post all letters placed in that receptacle. From this evidence the jury will generally infer that the letter was posted, though it is open to them not to do so (*n*). So, whenever a letter is sent by hand and delivered at the office or residence of the person to whom it is addressed, or handed to any clerk or servant of his, it will be assumed, until evidence to the contrary is given, that the letter reached the hands of the person for whom it was intended (*o*). Again, where attestation is necessary to the validity of a document, and the signature to it has been witnessed by two or more attesting witnesses, it is sufficient to call one only unless more than one is required by law; and, if all the attesting witnesses be dead, it is sufficient to prove the handwriting of any one.

Several statutes have been passed which render *primâ facie* proof sufficient. Thus, the "Law List" is admissible as *primâ facie* evidence that everyone whose name appears in it as a solicitor is qualified to practise (*p*). The "Medical Register" is *primâ facie* evidence that the persons specified therein are duly registered medical practitioners (*q*). A certified copy of an entry in the "Register of Newspaper Proprietors" kept at Somerset House is "sufficient evidence of all matters and things thereby appearing, unless and until the contrary thereof be shown" (*r*). And various statutes have rendered *primâ facie* evidence as to the age of a child sufficient (*s*).

Some facts, however, need not be proved at all. Such, for instance, are the common law of England,

(*n*) As to post-marks, see *post*, pp. 392, 393.
(*o*) *Macgregor* v. *Keily*, 3 Ex. 794.
(*p*) 23 & 24 Vict. c. 127, s. 22.
(*q*) 21 & 22 Vict. c. 90, s. 27.
(*r*) 44 & 45 Vict. c. 60, s. 15.
(*s*) See *post*, pp. 158, 159.

public statutes, official seals (*t*), and certain facts so well known that the court takes judicial notice of them without proof (*u*). It is impossible for judges, when trying a case, to shut their eyes to the ordinary course of nature (*x*), or to facts which constantly occur in daily life. They need no proof, therefore, of the ordinary public holidays, weights and measures, the laws of nature or the meaning of ordinary English words. But dictionaries are constantly referred to in court for the meanings of words, especially in trade-mark cases (*y*). So are other works of accepted authority, such as scientific or professional treatises. And, in a recent case, reports of the celebrated engineer Brunel, which were commonly accepted by engineers as accurate, were admitted as evidence (*z*). Again, no party need prove any fact which the law already presumes in his favour (*a*), nor in a civil case any fact which his opponent has admitted (*b*) or is estopped from denying (*c*).

The courts will take notice without proof of all the public statutes of the realm (*d*); and indeed of every statute passed since 1850, unless the contrary is

(*t*) There are several statutes as to judicial notice of certain official seals and signatures, which are set out, *post*, p. 254.

(*u*) See *Stockdale* v. *Hansard*, 7 C. & P. 731, 736; and *R.* v. *De Berenger*, 3 M. & S. 67, 69.

(*x*) *E.g.*, the length of the period of gestation, *R.* v. *Luffe*, 8 East, 193; Cockle, 12; and the fact that rain falls, *Baten's Case*, 9 Rep. 53 a; *Fay* v. *Prentice*, 1 C. B. 828.

(*y*) *R.* v. *Peters*, 16 Q. B. D. 636. See Wigram on Extrinsic Evidence, s. 56.

(*z*) *East London Rail. Co.* v. *Conservators of River Thames*, 90 L. T. 347.

(*a*) See Book II., Chap. XI.

(*b*) See Book II., Chap. XII.

(*c*) See Book II., Chap. XIII.

(*d*) *Pugh* v. *Robinson*, 1 T. R. 116.

expressly provided by such statute (*e*); also of their own course of procedure and practice, and of the procedure and privileges of both Houses of Parliament (*f*); of the maritime law of nations (*g*); of the existence of a war in which this country is engaged (*h*); of the great and privy seals (*i*); of royal proclamations; of the signature of the Clerk of the Parliaments (*k*); of standard almanacs and the *London Gazette*. Should any question arise as to the status of a foreign sovereign or state, or the boundaries of any state, the Court usually inquires of a Secretary of State and acts upon the information thus informally received from him without judicial proof (*l*).

Again, our judges will not require proof of well-known mercantile usages, such as the negotiability of bonds to bearer, whether Government or trading bonds, and whether foreign or English (*m*); and of all general customs established by the course of judicial decision, *e.g.*, the custom of hotel keepers to carry on business with furniture which is not their own (*n*), and that, in the absence of special circumstances, bankers have a general lien on their customers' securities deposited with them as bankers (*o*).

But the Court will not take judicial notice of foreign or colonial law (*p*), or the custom of any particular county, or of a city such as London or Bristol, or the

(*e*) Interpretation Act, 1889, s. 9.
(*f*) *Stockdale* v. *Hansard*, 9 A. & E. 905.
(*g*) *Chandler* v. *Grieves*, 2 H. Bl. 606, n.
(*h*) *Dobder* v. *Huntingfield*, 11 Ves. 292.
(*i*) *Lord Melville's Case*, 29 How. St. Tr. 707.
(*k*) *Badische Anilin, etc.* v. *Levinstein*, 4 R. P. C. 470.
(*l*) *Taylor* v. *Barclay*, 2 Sim. 213; Cockle, 11; *Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 161; *Foster* v. *Globe Venture Syndicate*, [1900] 1 Ch. 811.
(*m*) *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144.
(*n*) *Ex parte Turquand*, 14 Q. B. D. 636.
(*o*) *London Chartered Bank of Australia* v. *White*, 4 App. Cas. 422; *Brandao* v. *Barnett*, 3 C. B. 519; Cockle, 9.
(*p*) *R.* v. *Governor of Brixton Prison*, [1907] 1 K. B. 696. As to Colonial law, see *post*, p. 148. In the Privy Council, however, colonial statutes will be judicially noticed.

law of Scotland or Jersey, the practice of an inferior or foreign court, resolutions of the House of Commons (*q*), or the existence of a war between foreign countries: these must be proved as facts. The existence of a particular or local custom is a question of fact, and it is necessary to prove the custom in each case until it becomes so well known that the Courts take judicial notice of it (*r*). Customs of the City of London can be proved by the certificate of the Recorder, and when it has once been so certified the Court will take judicial notice of it (*s*).

In order to afford facilities for more readily ascertaining the law administered in one part of His Majesty's dominions, when pleaded in the Courts of another part thereof, it has been enacted by the British Law Ascertainment Act, 1859 (*t*), that:—

"If, in any action depending in any Court within Her Majesty's dominions, it shall be the opinion of such Court, that it is necessary or expedient for the proper disposal of such action to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominions on any point on which the law of such other part of Her Majesty's dominions is different from that in which the Court is situate, it shall be competent to the Court in which such action may depend to direct a case to be prepared setting forth the facts, as these may be ascertained by verdict of a jury or other mode competent, or may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the Court for that purpose in the event of the parties not agreeing; and upon such case being approved of by such Court or a judge thereof, they shall settle the questions of law arising out of the same on which they desire to have the opinion of another Court, and shall pronounce an order remitting the same, together with the case, to the Court in such other part of Her Majesty's dominions, being one of the superior Courts thereof, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act . . ."

When an opinion has been thus obtained, the Court in which the action is pending is to apply such opinion

(*q*) *Stockdale* v. *Hansard*, 7 C. & P. 731, 736.
(*r*) *Per* CHANNELL, J., in *Moult* v. *Halliday*, [1898] 1 Q. B. 129.
(*s*) *Crosbie* v. *Hetherington*, 4 M. & G. 933.
(*t*) 22 & 23 Vict. c. 63, s. 1.

to such facts, or to order such opinion to be submitted to the jury, with the other facts of the case, as evidence, or conclusive evidence as the Court may think fit, of the foreign law therein stated (*u*). Under this Act the law of Scotland has been ascertained by a case remitted to the Court of Session in Scotland (*x*), and the law of Bengal by a case remitted to the Supreme Court of Bengal (*z*).

Before we proceed to discuss the nature of the evidence by which each party must establish his case, it is necessary to determine on whom lies the burden of proving any particular issue.

(*u*) 22 & 23 Vict. c. 63, s. 3.
(*x*) *Lord* v. *Colvin*, 1 Drew. & Sm. 24.
(*z*) *Login* v. *Princess of Coorg*, 30 Beav. 632.

## CANADIAN NOTES.

### JUDICIAL NOTICE.

As appellate tribunal for the Dominion of Canada, the Supreme Court of Canada requires no evidence of the laws in force in any of the provinces or territories. It is bound to take judicial notice of the statutory or other laws prevailing in every province or territory in Canada, even where they may not have been proved in the courts below, or although the opinion of the judges of the Supreme Court may differ from the evidence adduced upon those points in the courts below. *Logan* v. *Lee*, 39 S. C. R. 311.

It was held in *Reg.* v. *Bennet*, 1 O. R. 445, that a magistrate could not take judicial notice of orders in council, or their publication, without proof thereof by production of the official gazette, and, therefore, that a conviction was bad which was made without such evidence that the Canada Temperance Act, 1878, was in force in the county, pursuant to the terms of s. 96 thereof.

The introductory part of the Annual Statutes of Canada, containing a statement that an Order in Council had been made bringing the Canada Temperance Act into force in the county, is not evidence of the making of such order. *Ex parte Mercer*, 25 N. B. 517.

The Court will take judicial notice of an Imperial Order in Council upon production of a copy purporting to have been printed by the Queen's printer in London. *The Minnie*, 3 B. C. 161.

*Proof of Telegrams.*

*Primâ facie*, the same principle that admits proof that letters were deposited in the post-office duly addressed, as showing *primâ facie* that they were received by the person to whom they are addressed, applies to telegrams. The Chief Justice had admitted secondary evidence of a telegram addressed by plaintiff to the defendant at Parrsboro, subject to be struck out on further consideration, and had afterwards come to the conclusion that the evidence was improperly admitted, and must be struck out. But the Court of Appeal held that it should have been received. It is not clear from the statement of the case what it was that was proved with reference to the sending of the telegrams, and the decision seems from the remarks of MCDONALD, C.J., from whom the appeal was taken, to have been a novelty. He says: "I do not dissent from the opinion just delivered, because I think the rule, if established, will be very convenient and will avoid the difficulties that ought not to exist in the proof of telegrams." *White* v. *Flemming*, 8 R. & G., 20 N. S. R. 335.

## CHAPTER II.

### BURDEN OF PROOF.

THE judge or jury can decide a case only by considering the truth and value of the several facts alleged and proved by the parties. And as the facts are unknown to both judge and jury, each party must establish what he has alleged by evidence. The question at once arises, By which party must any particular fact be proved? The responsibility of adducing such evidence as will establish the facts in issue is called the "Burden of Proof."

The burden of proving a fact rests, as a rule, on the party who affirms the fact and not on the party who denies it. *Ei incumbit probatio qui dicit, non qui negat.* As a general rule, he who makes an assertion must prove it true; otherwise the jury will deem it untrue. If no affirmative evidence be given, the opposite proposition, the negative of the issue, will be taken as established. The burden of proof is said to lie on A., when A. must either call some evidence or have judgment given against him.

As a rule, the *onus* of proof lies upon the party who has in his pleading maintained the affirmative of the issue; for a negative is usually incapable of proof. The affirmative is generally, but not necessarily, maintained by the party who first raises the

issue. Thus, the *onus* lies on the defendant, as a rule, to prove all facts which he has specially pleaded, such as fraud, performance, release, rescission, accord and satisfaction, etc. But the burden frequently shifts, as the case proceeds, from the person on whom it rested at first to his opponent. This occurs whenever a *primâ facie* case has been established on any issue of fact or whenever a rebuttable presumption of law has arisen.

In all cases it is necessary to determine the question, On whom does the *onus probandi*, or burden of proof, rest? in order that each litigant may properly prepare his case for trial. And on this preliminary question often depends another, which is of great importance at the trial, namely, Which party has the privilege, or incurs the duty, of beginning? Much depends upon the order in which the contending parties are allowed to state their cases to the Court. As a general rule, in any legal proceeding the burden of proof lies on the plaintiff or prosecutor; he therefore begins; it is his duty to establish the case against the defendant or the accused, and this he must do by calling proper evidence (*a*).

In a civil case, the question on whom does the burden of proof rest depends upon the pleadings. At the beginning of the case the test is this: Which party would be unsuccessful if no evidence were given on either side (*aa*)? And if at any stage of the action a question arises as to the party on whom should rest the

(*a*) "A judge has nothing to do with the getting up of a case," *per* MOULTON, L.J., *In re Enoch and Zaretzky*, [1910] 1 K.B. 327. He cannot call a witness of his own motion if either party objects, *ibid.*

(*aa*) *Amos* v. *Hughes*, 1 M. & Rob. 464; Cockle, 83.

burden of proving any particular allegation, the test is, Which party would fail if the allegation in question were struck out of the pleading (*b*)?

The issue must be proved by the party who alleges the affirmative in substance, and not merely the affirmative in form. The precise form of the pleading does not matter; the judge will look at the substance of the allegation. Thus, in a plea of privilege it is immaterial whether the defendant pleads that he published the words *bonâ fide*, or that he published them "without malice"; in either case the plaintiff must prove malice, if the occasion be held privileged. So in *Amos* v. *Hughes* (*c*), where the plaintiff alleged that the defendant had not done certain work in a workmanlike manner, as the Court would not presume the work to have been done in an unworkmanlike manner, the plaintiff had to prove his allegation, as it was the affirmative in substance, although not so in form; and in an action for putting combustible goods on board the plaintiff's ship without due notice, it was held that the plaintiff was bound to prove that no notice was given, as the facts alleged constituted a criminal offence (*d*). Again, in an action for breach of a covenant to repair, if the plaintiff alleges that the premises were not kept in repair, and the defendant pleads that they were, the plaintiff must begin, and prove the non-repair (*e*). So, in ejectment by a landlord, on a breach of covenant by defendant to insure the premises, the burden of proof lies on the plaintiff (*f*). And when a person writes or prepares a will under which he benefits, the *onus* lies on him to show that it expresses the testator's intention (*g*).

(*b*) *Mills* v. *Barber*, 1 M. & W. 427.
(*c*) 1 M. & Rob. 464.
(*d*) *Williams* v. *East India Co.*, 3 East, 192; and see *Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 45; and *Pomfret* v. *Lancashire and Yorkshire Rail. Co.*, [1903] 2 K. B. 718.
(*e*) *Soward* v. *Leggatt*, 7 C. & P. 613; Cockle, 83.
(*f*) *Doe* v. *Whitehead*, 8 A. & E. 571.
(*g*) *Finny* v. *Govett*, 25 T. L. R. 186.

In bankruptcy proceedings the burden is on the petitioning creditor to show that the debtor's domicil is in England (*h*); but if it is not disputed, he need not adduce evidence on the point in the first instance (*i*). The owner of the surface of land has a *primâ facie* right to have it properly supported from below, and the burden of proof is on any person claiming against such right (*k*). In a case where the plaintiffs had brought an action against the defendants for non-delivery of goods shipped under a bill of lading containing the usual exceptions, but not excepting negligence, the goods had been damaged by sea water through the stranding of the vessel, and the defendants claimed exemption from liability on the ground that the loss was occasioned by perils of the sea, to which the plaintiffs rejoined that, even if that were true, that peril of the sea was the result of negligent navigation on the part of the defendants' servants. It was held by the Court of Appeal that as the loss apparently fell within the exception, the burden of showing that the defendants were not entitled to the benefit of it, by reason of negligence, lay upon the plaintiffs. LOPES, L.J., in giving judgment, said :—

"It appears to me in this case that the burden of proving that the loss which has happened is attributable to an excepted cause lies on the person who is setting it up. That in this case would be the defendants, the shipowners. If, however, the excepted cause by itself is sufficient to account for the loss, it appears to me that the burden of showing that there is something else which deprives the party of the power of relying on the excepted cause lies on the person who sets up that contention. That in this case would be the plaintiffs, who are the shippers" (*l*).

In suits to restrain the sale of a patented article, it is incumbent on the plaintiff, not only to prove the sale, but to prove that the article was not made by himself or his agents (*m*). Where a plaintiff sues for damages for

(*h*) *Ex parte Cunningham*, 13 Q. B. D. 418.
(*i*) *Ex parte Barnes*, 16 Q. B. D. 522.
(*k*) *Love* v. *Bell*, 9 App. Cas. 286.
(*l*) *The Glendarroch*, [1894] P. 226.
(*m*) *Betts* v. *Willmott*, L. R. 6 Ch. 239.

negligence, he must prove such negligence; and where the defence of contributory negligence is set up, the burden of proving such contributory negligence is on the defendant; but if the contributory negligence is admitted by the plaintiff, or proved by the plaintiff's witnesses while establishing negligence against the defendant, that is enough (*n*). But where goods have been lost or damaged while in the custody of a bailee or his servants, the *onus* lies on the bailee to show that the loss or damage did not arise from his negligence (*o*). This rule applies as much in the case of a gratuitous bailee as in that of a bailee for valuable consideration. In an Irish case, where a railway company were sued as carriers under a contract which exempted them from liability except for "wilful misconduct," it was held that unreasonable delay, even though entirely unexplained, did not amount to wilful misconduct, and that the burden was on the plaintiff to prove that the defendants intentionally delayed the goods (*p*). When a plaintiff takes an inquiry as to damages arising from the use of his trade mark by the defendant, the *onus* of proving some special damage by loss of custom or otherwise rests upon him.

In some cases the *onus* lies on one party, although the issue was first raised by his opponent. Thus, if a defendant pleads the Statute of Limitations, the *onus* lies on the plaintiff to prove that his cause of action arose within the prescribed period; it does not lie on the defendant to prove the negative.

There are, moreover, exceptions to the rule that the burden of proof lies on the party who affirms, not on him

(*n*) *Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 45.

(*o*) *Carpue* v. *London and Brighton Rail. Co.*, 5 Q. B. 747; *Latch* v. *Rumner Rail. Co.*, 27 L. J. Ex. 155; *Phipps* v. *New Claridge's Hotel, Limited*, 22 T. L. R. 49; *Bullen* v. *Swan Electric Engraving Co.*, 23 T. L. R. 258.

(*p*) *Graham* v. *Belfast Ry.*, [1901] 2 Ir. R. 13; but see *Chapronière* v. *Mason*, 21 T. L. R. 633, *post*, p. 165.

who denies. Thus, in an action for malicious prosecution it is for the plaintiff to establish that there was no reasonable or probable cause for the prosecution. It is not sufficient for him to prove the dismissal of the charge (*q*). So on an issue whether A. be still alive or not, the party asserting the negative, viz., that A. is not living, must prove his death; the presumption is in favour of the continuance of life, till the contrary be shown, or until seven years have elapsed since he was last heard of by those with whom he would naturally correspond if he were still alive. Again, in an action brought to enforce a contract into which the defendant alleges he was induced to enter by a representation made by the plaintiff which is now proved to be false, the burden lies on the plaintiff to show that the defendant did not rely on it (*r*).

In a criminal case, the burden of proof always lies in the first instance on the prosecution; for the accused is presumed to be innocent. As the case proceeds, however, the burden of proof may shift to the prisoner (*s*). Thus, as soon as it has been established that the prisoner was found in possession of stolen goods shortly after they were stolen, it lies upon him to satisfy the jury that he came into possession of them honestly (*t*). Again, on an indictment for murder the prosecution discharges the burden of proof, which lies upon it in the first instance, by simply proving that the prisoner caused the death of the deceased; it is then, in strict law, for the prisoner to prove, if he can, facts which will reduce his act to one of manslaughter or to justifiable or excusable homicide. But in practice it is usual for the prosecution to take

(*q*) *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. 247 Cockle, 84.

(*r*) *Redgrave* v. *Hurd*, 20 Ch. D. 1; and see *Melbourne Banking Corporation* v. *Brougham*, 7 App. Cas. 307, *post*, p. 161.

(*s*) See *R.* v. *Stoddart*, 73 J. P. 348.

(*t*) See *ante*, pp. 129, 130.

upon itself the burden of proving affirmatively malice aforethought.

There are many cases, moreover, in which the Legislature has enacted that, on proof of certain facts, a presumption shall arise against persons charged with certain criminal offences and imposes on them the burden of disproving their guilt. This is especially the case where the fact alleged by the prosecution is so exclusively or peculiarly within the knowledge of the accused, that it is practically impossible, or highly inconvenient for the party alleging it to prove it, and the Legislature therefore throws the burden of disproving it upon the accused.

Thus in the case of many offences against the Debtors Act, 1869 (*u*), it is expressly enacted that on proof of certain acts done by a bankrupt he shall be deemed guilty, unless he can satisfy the jury that he did such acts without any fraudulent intent. And he commits a misdemeanour if he does not fully disclose his assets to his trustee in bankruptcy; or deliver up his assets and accounts, or conceals any property to the extent of £10 or upwards, or any debt, or within four months before, or after, his bankruptcy, conceals, destroys or otherwise makes away with any books or documents or makes any false entries in them, or similar acts set out in the statute (*v*), "unless the jury is satisfied that he had no intent to defraud"; and the task of satisfying the jury of this lies upon the defendant (*w*).

Again, it is a defence to a charge of bigamy if the accused can show that his wife or her husband has "been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time" (*x*).

(*u*) 32 & 33 Vict. c. 62, ss. 11, 12.
(*v*) *Ibid.*, s. 11.
(*w*) *R.* v. *Thomas*, 11 Cox, 535; *R.* v. *Bolus*, 23 L. T. 339.
(*x*) 24 & 25 Vict. c. 100, s. 57; *R.* v. *Curgerwen*, L. R. 1 C. C. R. 1.

The burden of proving continual absence is laid on the accused, but as soon as that is discharged, then it is for the prosecution to prove that the accused knew that his or her spouse was alive during that time.

So, too, it was decided that, in all summary proceedings before magistrates, any defendant who claims a qualification to do an act which is forbidden by statute must prove the fact in his defence; the informer has not to prove the want of it, especially as the fact is peculiarly within the knowledge of the defendant (*y*).

In addition to the above decisions, the Legislature has, in a variety of cases, expressly thrown the burden of proving authority, consent or lawful excuse on the defendant in criminal proceedings. Thus, by the Summary Jurisdiction Act, 1879 (*z*), s. 39 (2), it is enacted that:—

"Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, bye-law, regulation, or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant."

An identical provision is contained in the Merchant Shipping Act, 1894 (*a*), and in several other statutes which create offences unknown to common law. In the case of offences under s. 2 of the Merchandise Marks Act, 1887 (*b*), the burden of proof of the exemptions is thrown on the defendant. So, too, when a person is charged with making or possessing coining tools, under 24 & 25 Vict. c. 99, s. 24, without lawful authority or excuse, the burden of proving that he had such authority or excuse rests on him. The same principle is expressly

(*y*) *R.* v. *Turner*, 5 M. & S. 206; Cockle, 88.
(*z*) 42 & 43 Vict. c. 49.
(*a*) 57 & 58 Vict. c. 60.
(*b*) 50 & 51 Vict. c. 28.

imported into the Game Act, 1831 (*c*), which enacts that:—

> "It shall not be necessary in any proceeding against any person under this Act to negative by evidence any certificate, licence, consent, authority, or other matter of exception or defence; but the party seeking to avail himself of any such certificate, licence . . . shall be bound to prove the same."

Under the Licensing Act, 1872 (*d*), the burden of proving that the person supplied was a *bonâ fide* traveller, rests on the defendant; but, by the Licensing Act, 1874 (*e*), if he fails in such proof, but the justices are satisfied that the defendant truly believed that the purchaser was a *bonâ fide* traveller, and further that the defendant took all reasonable precautions to ascertain whether or not the purchaser was such a traveller, the justices shall dismiss the case as against the defendant.

The burden of proving that he did not know that a ship, built by order of or on behalf of any foreign State when at war with a friendly State, was intended to be used and employed in the military and naval service of such foreign State, is thrown upon the builder of such ship by the Foreign Enlistment Act, 1870 (*f*); and by s. 24 of the Elementary Education Act, 1873 (*g*), when a child is apparently of the age alleged for the purposes of any legal proceedings under that Act, or the Elementary Education Act, 1870 (*h*), it shall lie on the defendant to prove that the child is not of such age. And by s. 3 of the Betting and Loans (Infants) Act, 1892, where such a document as mentioned in the previous sections (*i*) is sent to any person at any place of education, and such person is an infant, the person sending, or causing to be sent, the document, shall be deemed to have known

(*c*) 1 & 2 Will. IV. c. 32, s. 42.
(*d*) 35 & 36 Vict. c. 94.
(*e*) 37 & 38 Vict. c. 49.
(*f*) 33 & 34 Vict. c. 90.
(*g*) 36 & 37 Vict. c. 86.
(*h*) 33 & 34 Vict. c. 75.
(*i*) 55 Vict. c. 4, ss. 1, 2, see Appendix.

that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age (*j*). By s. 123 of the Children Act, 1908, the opinion of the Court as to the age of a person (other than a witness) is binding for all purposes of the Act and offences under it or under Acts incorporated with it, unless the contrary be shown. And many of its provisions cast the *onus* of disproof on the accused in respect of particular matters (*k*). Similar provisions which put the *onus* on the accused of proving certain facts or which raise presumptions against him are contained in the Dangerous Performances Acts, 1879 (*l*) and 1897 (*m*), the Money-lenders Act, 1900 (*n*), and the Cruelty to Children Act, 1904 (*o*).

The general rule that the party who alleges an affirmative in substance must prove his allegation, is also subject to this exception—that where there is a presumption of law in favour of the party alleging a fact, it is incumbent on the other party to rebut such presumption. On proof of certain facts the law will sometimes infer the existence of another fact, which then need not be expressly proved. This presumption is rebuttable; that is, the other side may try to disprove it. But if they cannot do this, the law treats the fact presumed as proved. The presumption is not conclusive, but it shifts the burden of proof.

The plaintiff in an action of libel need not prove that the words complained of are false, for the law already

(*j*) But see *Milton* v. *Studd*, [1910] W. N. 98.
(*k*) 8 Edw. VII. c. 67, s. 123; and see s. 14 (2), 38 (2), 120 (3), Appendix. See also *R.* v. *Cox*, [1898] 1 Q. B. 179.
(*l*) 42 & 43 Vict. c. 34, s. 4.
(*m*) 60 & 61 Vict. c. 52.
(*n*) 63 & 64 Vict. c. 51, s. 5. See Appendix.
(*o*) 4 Edw. VII. c. 15, s. 17. See Appendix.

presumes this in his favour; it is for the defendant to prove that they are true. The holder of a bill of exchange need not prove that he gave value for it; the law presumes that value has been given. This is recognised by s. 30 of the Bills of Exchange Act, 1882 (*p*), which provides as follows:—

"(1) Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value: (2) Every holder of a bill is *primâ facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill."

These provisions substantially reproduce the law as it stood at the time of the passing of the Act. Before the Act, it had been held that when a bill sued on was accepted in the name of a firm the burden of proof was upon the defendants to show that the acceptance was by one of the partners in fraud of the partnership and contrary to the partnership articles, and then the *onus* was on the plaintiff to show that he gave consideration for the bill (*q*).

So, by certain statutes (*r*) proof of the posting of a letter which is properly addressed and the postage prepaid, is made sufficient evidence that the person to whom it was addressed received it.

In an action for goods sold and delivered, if the defendant pleads infancy, the *onus probandi* lies upon him; as the law presumes that, when a man contracts, he is of proper age to contract, until the contrary be shown (*s*). So, legitimacy of children born in

(*p*) 45 & 46 Vict. c. 61.
(*q*) *Hogg* v. *Skeen*, 18 C. B. (N.S.) 426.
(*r*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 26; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 142; and under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 329, such evidence is conclusive in criminal proceedings for not sending a notice
(*s*) *Hartley* v. *Wharton*, 11 A. & E. 934.

wedlock (*t*), duration of life (*u*), and insanity, are all issues in which the *onus probandi* is regulated by the legal presumption as to the fact: and the party who disputes the truth of the presumption in the particular case is bound to show that it does not apply (*x*).

Again, there is a well-known presumption in favour of the regularity and validity of acts which is usually expressed in the maxim *Omnia præsumuntur rite esse acta*. Thus, proof that a man had acted as a constable was held sufficient proof that he *was* a constable, even on a trial for murder (*y*). But, where an act is apparently tainted with illegality, the party justifying it must disprove its illegality. So a defendant in libel, who pleads that the alleged libel is a fair report of certain proceedings in a court of justice, must prove the correctness of the report (*z*). The *onus* is on those who seek to charge an executor or trustee with a loss arising from the default of an agent where the propriety of employing an agent has been established (*a*).

Whenever it is alleged by a party to a deed or his privy that the recitals in such deed are untrue, the burden of proving their falsehood rests upon such party or privy, who is *primâ facie* bound by such recitals as admissions (*b*). Where a person sued upon a covenant in restraint of trade sets up its invalidity, it is for him to prove any facts showing that it is invalid (*c*). In patent cases the burden of proof of infringement is ordinarily on the patentee (*d*); and where a defendant denies the novelty of the plaintiff's invention, the burden of proving the issue thus raised is

(*t*) *Plowes* v. *Bossey*, 2 D. & S. 145.
(*u*) See *post*, p. 411.
(*x*) *Hall* v. *Warren*, 9 Ves. 611.
(*y*) *R.* v. *Gordon*, 1 Leach, 515.
(*z*) *Milissich* v. *Lloyd's*, 46 L. J. C. P. 404.
(*a*) *Brier* v. *Evison*, 26 Ch. D. 238.
(*b*) *Melbourne Banking Corporation* v. *Brougham*, 7 App. Cas. 307.
(*c*) *Rousillon* v. *Rousillon*, 14 Ch. D. 351.
(*d*) *Neilson* v. *Betts*, L. R. 5 H. L. 1.

on him, but the plaintiff can call evidence in reply to rebut the defendant's evidence on this point (*e*).

But although the general presumption in favour of validity of acts throws the burden of proof upon the party who impeaches the transaction, yet when a person who is able to exercise what has been termed "dominion" over another, takes a benefit from him, such person must prove that the transaction was a righteous one (*f*), and that the gift or other benefit was voluntary and not the result of undue influence (*g*). This rule is not confined to cases of parent and child, guardian and ward, solicitor and client, and the like, but extends to every case in which two persons are so situated that one may obtain considerable influence over the other. If, however, a married woman, who has purported to charge her separate property for money advanced to her husband, alleges undue influence, she must prove it (*h*).

So, a Court always treats a deed or instrument, which is *primâ facie* good, as what it purports to be (*i*), and the *onus* of proving that it is not, or that it is invalid, rests upon the party impeaching it (*k*). But where a will is propounded, there are two rules of law which are always acted upon:—

"The first that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to

(*e*) *Penn* v. *Jack*, L. R. 2 Eq. 314. But see *Turner* v. *Winter*, 1 T. R. 602.

(*f*) *Cooke* v. *Lamotte*, 15 Beav. at p. 240; cf. *Allcard* v. *Skinner*, 36 Ch. D. 145.

(*g*) *Walker* v. *Smith*, 29 Beav. 396; cf. *Turner* v. *Collins*, L. R. 7 Ch. 329.

(*h*) *Field* v. *Sowle*, 4 Russ. 112.

(*i*) *Jacobs* v. *Richards*, 18 Beav. 303.

(*k*) *Nichol* v. *Vaughan*, 1 Cl. & F. 49.

pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased" (*l*).

In another case (*m*) it was held:—

"That the second rule is not confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will."

Even where there is no legal presumption to assist the party on whom the burden of proof originally rests, nevertheless, it is not necessary for him to prove his case up to the hilt. He need not give all the evidence which it is possible for him to procure. It is sufficient if he has made out a *primâ facie* case (*n*). The burden of proof will then shift to the other party. And very little affirmative evidence will be sufficient where the facts lie almost entirely within the knowledge of the other side (*o*).

But where the party on whom the *onus* lies of proving an allegation gives only evidence which is as consistent with one view of the case as with the other, he fails in his proof (*p*). This is so, even

(*l*) *Per* PARKE, B., in *Barry* v. *Butlin*, 2 Moo. P. C. 480.

(*m*) *Tyrrell* v. *Painton*, [1894] P. 151.

(*n*) As to *primâ facie* evidence of a particular fact, see *ante*, p. 144.

(*o*) *Hollis* v. *Young*, [1909] 1 K. B. 629.

(*p*) *Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 41; *Pomfret* v. *Lancashire and Yorkshire Rail. Co.*, [1903] 2 K. B. 718; *McDonald* v. *Owners of Steamship Banana*, [1908] 2 K. B. 926; and see *Low* v. *General Steam Fishing Co.*, [1909] A. C. 523, and *Hewett* v. *SS. Duchess*, 26 T. L. R. 300.

where his lack of affirmative evidence is caused by the death of his most important witness (*q*).

Thus, in an action for recovery of land, the defendant being in possession, it will be presumed in his favour that he is rightly in possession; therefore the plaintiff must begin. But as soon as the plaintiff proves that he is the heir-at-law of A., who was in possession of the land at the time of his death last year, the burden of proof is shifted. It is now for the defendant to produce A.'s will, and show a devise to himself. That is a *primâ facie* answer to the plaintiff's case, and the *onus* once more lies on him. The plaintiff must now give some additional evidence, *e.g.*, to show that A. was not of sound mind when he executed that will, or that he revoked it by a subsequent codicil.

So, in an action on a bill of exchange, the holder is *primâ facie* deemed to be a holder in due course (*r*); the *onus*, therefore, lies on the defendant to prove that the acceptance of the bill was obtained by fraud. But as soon as this is established, then it is for the plaintiff to prove that he took the bill in good faith, and for value, and without notice of the fraud (*s*).

Again, "where there is *primâ facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question" (*t*). Therefore, where there is a *primâ facie* right to light in the grantee of land, the burden of proving any limitation of such right is upon the grantor who alleges it (*u*).

The mere happening of an accident is not, in general,

(*q*) Contrast *Bender* v. *Zent*, [1909] 2 K. B. 41; and *Marshall* v. *Wild Rose*, [1909] 2 K. B. 46; with *Rice* v. *Swansea Vale*, 26 T. L. R. 276.

(*r*) See s. 30 of the Bills of Exchange Act, 1882, *ante*, p. 160.

(*s*) *Tatam* v. *Haslar*, 23 Q. B. D. 345.

(*t*) See the opinion of the judges in the *Banbury Peerage Case*, 1 S. & S. 155.

(*u*) *Broomfield* v. *Williams*, [1897] 1 Ch. 602.

proof that it was due to negligence, still less that it was due to negligence on the part of the defendant (*x*), but, in certain cases where the cause of the accident is something in the exclusive management or control of the defendant or his servants, and the accident is such as does not happen in the ordinary course of things when due care is used, the plaintiff is entitled to damages for injuries caused by the accident, unless the defendant gives an adequate explanation, showing that it was not caused by want of care (*y*).

This rule is illustrated by the well-known case of *Byrne* v. *Boadle* (*z*). The plaintiff was walking along the highway past the defendant's premises, when, for some unexplained reason, a barrel of flour fell from an upstairs window and injured him. It was held that in such a case as this, the fact of the accident alone was sufficient to cast on the defendant the *onus* of showing that he used due care. If, however, the defendant could have shown, *e.g.*, that the fall was due to the wrongful act of a stranger, he would have discharged the burden (*a*).

It has been held in the Court of Appeal that the presence of a stone in a bun is *primâ facie* evidence of negligence, and throws on the seller of the bun the burden of rebutting such negligence (*b*). Bray, J., has recently laid down that where goods are given into the sole custody of a person as bailee, and they are lost while in his custody, the burden of proof is upon him to show circumstances negativing negligence on his part (*c*). Where, however, certain bailees of goods proved that

(*x*) *Cotton* v. *Wood*, 8 C. B. (N.S.) 568; *Hammack* v. *White*, 11 C. B. (N.S.) 594.

(*y*) *Scott* v. *London Dock Co.*, 3 H. & C. 596; *Christie* v. *Griggs*, 2 Camp. 79.

(*z*) 2 H. & C. 722; and see *Dominion Natural Gas Co.* v. *Perkins*, 101 L. T. 359.

(*a*) *Goodman* v. *Taylor*, 5 C. & P. 410; *Latch* v. *Rumner Rail. Co.*, 27 L. J. Ex. 155.

(*b*) *Chapronière* v. *Mason*, 21 T. L. R. 633.

(*c*) *Phipps* v. *New Claridge's Hotel, Ltd.*, 22 T. L. R. 49.

they had used such care in their custody as a reasonable man would use in the case of his own property, it was held that they had discharged their burden of proof and were not liable (*d*).

But the burden of proof will not shift until the party on whom it originally rests has made out a *primâ facie* case; and he does not do this if the evidence which he calls is equivocal and creates no preponderance of conviction in support of his contention. Thus if a libel be published on a privileged occasion, it lies upon the plaintiff to prove that the defendant acted maliciously; and he will not succeed in doing this if he gives evidence only of facts which are equally consistent either with *bona fides* (*e*) or with malice in the defendant (*f*).

(*d*) *Bullen* v. *Swan Electric Engraving Co.*, 23 T. L. R. 258.
(*e*) *Wheelton* v. *Hardisty*, 8 E. & B. at p. 263; cf. *Cotton* v. *Wood*, 8 C. B. (N.S.) 568.
(*f*) *Somerville* v. *Hawkins*, 10 C. B. 590; *Harris* v. *Thompson*, 13 C. B. 333; *Taylor* v. *Hawkins*, 16 Q. B. 308.

## CANADIAN NOTES.

### BURDEN OF PROOF.

In *Hetu* v. *Dixville Butter and Cheese Association*, it was pronounced as an *obiter dictum* that the rule as to burden of proof in the Province of Quebec was the same as that under the law of England in actions for malicious prosecution, and that the plaintiff was obliged to allege and prove that the prosecutor acted with malicious intention, or at least with indiscretion or reprehensible want of consideration. 40 S. C. R. 128.

In an action for malicious arrest, it is not sufficient to establish a *primâ facie* case that the plaintiff puts in at the trial the exemplification of the judgment in a former case, by which it appears that a verdict was rendered for the defendant in that action. There should be further evidence showing a want of probable cause. *Sherwood* v. *O'Reilly*, 3 U. C. Q. B. 4.

In an action for damages for injury suffered by an employee in the power-house of an electric establishment, the evidence left some doubt whether the duties of the deceased included the inspection and care of the wires both inside and outside of the power-house, or whether his engagement was to perform the duties in question in respect only to the wires outside the power-house wall. The death resulted from contact with imperfectly insulated live wires while at work in the power-house.

It was held that the burden of proof as to the point in dispute was on the defendants. *Quebec Railway Light and Power Co.* v. *Fortin*, 40 S. C. R. 181.

In administration proceedings, a widow claimed from an executor repayment of certain money paid by her at her husband's request out of her separate property on premiums payable on an insurance policy on her husband's life, which she swore were to be repaid to her. The moneys were paid by a third person who held them to the use of the widow, who had no claim on the policy and paid the money reluctantly. It was held that her statement that the moneys were to be repaid did not require corroboration. The burden was upon the executor to prove that the moneys had been given to the husband. *Elliott* v. *Bussel*, 19 O. R. 413.

To an action for work and labour, defendants pleaded a release under seal. Plaintiff replied that it was an escrow, and set out the conditions and that non-performance made it void. It was held that the defendants must prove the execution of the agreement, and it was not necessary to show the conditional delivery as part of his case. *Light* v. *Woodstock and Lake Erie Rail. Co.*, 13 U. C. Q. B. 216.

In an action for work and labour done under a written agreement the plaintiff was allowed, without objection, to prove his case on the *quantum meruit* without producing the agreement. It was held that this made out a *primâ facie* case, and that the defendant having put in the agreement as part of his case, the onus was on him to show that the plaintiff had not performed the contract. KING, J., dissenting, held, that at the close of the whole case, the question was as to the rights of the parties on the whole evidence, and that, as it showed that the work was in fact done under a written contract, it was for the plaintiff to show the performance of it rather than the defendant. *Steeves* v. *Foxwell*, 23 N. B. 476.

## CHAPTER III.

### EVIDENCE, ORAL AND DOCUMENTARY.

EVERY fact must be proved by one of the following methods; many facts can be proved by two or by all three of such methods:—

(i.) Oral evidence—the words which fall from the lips of living witnesses in open Court.

(ii.) Documentary evidence—words written, printed, or carved on any permanent substance, at or before the trial.

(iii.) Real evidence—a thing produced at the trial, other than a document.

But both documentary and real evidence generally require some oral evidence to make them admissible, by explaining what they are and how they are connected with the case.

We propose in this chapter to compare and contrast Oral and Documentary Evidence, and to explain the relations between them. Real Evidence will be discussed in Chapter X. (*a*).

Oral evidence is generally regarded as more satisfactory and convincing than documentary evidence. Juries certainly prefer to see a witness in the box and hear him cross-examined; they judge by his demeanour whether he is telling the truth or not. A colourless document read aloud by an officer of the Court makes much less impression

(*a*) See *post*, p. 378.

upon them. Moreover, a witness can always explain what he has not at first made clear, or correct any error in his evidence. But no one can cross-examine a document or add to its contents.

Documentary evidence differs from oral in another particular. When a man goes into the witness-box and gives evidence on oath, and is cross-examined thereupon, what he says is evidence both for and against the party calling him; it is primary evidence of the truth of what he states. But when a document is read aloud to the jury, it is evidence that the writer wrote those words and probably believed them to be true; but it does not follow that what he stated was correct. In so far as the document may contain admissions, it is evidence against the writer; but in so far as it states facts in his favour it is not evidence for him, unless it has been received and accepted by the other side. "A person cannot, by a declaration, make evidence to be used for himself or for his successors after his decease" (*b*).

Nevertheless there are certain documents which are received as evidence of the facts stated in them, by whichever party they are put in. Ancient documents, if produced from a proper custody, are evidence of the facts which they record (*c*); and extracts from State records (*d*), public registers (*e*), bankers' books (*f*), etc., are also evidence not

(*b*) *Per* JOYCE, J., in *Brocklebank* v. *Thompson*, [1903] 2 Ch. at p. 352.
(*c*) See *post*, p. 282.
(*d*) See *post*, p. 248.
(*e*) See *post*, p. 264.
(*f*) See *post*, p. 374.

merely of the language of the original documents from which they are extracted, but also that the statements made in those original documents are true.

On the other hand, the memory of man is often treacherous; while a document records details in a permanent form. Hence, although a witness should always state what he himself remembers and not what he has been told by others, he may nevertheless, when giving evidence, refresh his memory as to details by referring to documents made by himself or another by his orders at or very shortly after the date on which the event in question occurred. Such documents, if written by someone else, must have been read and approved by him shortly after the event. It does not matter that the document is not, in itself, evidence for either party, or even that it should be and is not stamped (*g*). But the counsel on the other side is entitled to look at any document by which the witness has refreshed his memory and to cross-examine him on it, but if he does so he makes it evidence against the party whom he represents. The witness should not read aloud the entry by which he refreshes his memory; it is indeed a general rule that a witness must not read his answer to any question.

A witness may refresh his memory by looking at any memorandum—

(1) Which revives in his mind a recollection of the fact to which it refers;

(*g*) *Maugham* v. *Hubbard*, 8 B. & C. 14; *Birchall* v. *Bullough*, [1896] 1 Q. B. 325.

(2) Which, although it fails to revive such a recollection, creates a knowledge or belief in the witness that, at the time when the memorandum was made, he knew or believed it to contain an accurate statement of such facts;

(3) Which, although it revives neither a recollection of the facts, nor of a former conviction of its accuracy, satisfies the witness that the memorandum would not have been made unless the facts which it reports had actually occurred (*h*). This is an extreme case, for it allows a witness to depose to facts of which he even now has no recollection (*i*).

It is not necessary that the memorandum should have been actually made by the witness, if he can otherwise make it an original source of personal recollection. Thus, a witness has been allowed to refresh his memory from a paper which he remembers having recognised as a correct narrative when the facts were fresh in his memory (*k*).

In this way, a writing, which is inadmissible for want of a stamp, may practically be made evidence, as a memorandum to prompt the oral statement of a witness. Thus, a writing which is void as an agreement may be equally serviceable as a memorandum; again, a memorandum of the receipt of money, which was void as a receipt for want of a stamp, has been held strictly admissible to refresh the memory of a witness, and to enable him to say, from the fact of his signature, that he had received money which he had no recollection of having received (*l*). In this case Lord TENTERDEN said:—

"In order to make the paper itself evidence of the receipt of the money, it ought to have been stamped. The consequence of its not

(*h*) *Dupuy* v. *Truman*, 2 Y. & C. Ch. 341.
(*i*) *R.* v. *St. Martin's, Leicester*, 2 A. & E. 210.
(*k*) *Duchess of Kingston's Case*, 20 How. St. Tr. at p. 619; *Burrough* v. *Martin*, 2 Camp. 112; Cockle, 197.
(*l*) *Maugham* v. *Hubbard*, 8 B. & C. 14; Cockle, 195.

having been stamped might be, that the party who paid the money, in the event of the death of the person who received it, would lose his evidence of such payment. Here the witness, on seeing the entry signed by himself, said that he had no doubt that he had received the money. The paper itself was not used as evidence of the receipt of the money, but only to enable the witness to refresh his memory; and, when he said that he had no doubt he had received the money, there was sufficient parol evidence to prove the payment."

The opposite party is entitled to see any memorandum by which a witness refreshes his memory, and to cross-examine him upon it (*m*). He may cross-examine upon such part of the memorandum as is referred to by the witness, without making the memorandum part of his evidence; but if he cross-examines upon other parts, he makes them portions of his own evidence (*n*). Where a document is put into a witness's hand, but nothing is done upon it, the opposite party is not entitled to see it (*o*); and where a diary was used by a witness to refresh his memory, it was held that the opposite party was only entitled to see such portions as referred to the subject-matter of the suit (*p*). Where the witness derives his knowledge of a fact *solely* from his reliance on the accuracy of the memorandum, it must be produced (*q*).

There is no precise time within which a writing must be shown to have been made, before it can be used by a witness. It is not necessary that it should have been made at the moment when the fact occurred, but it ought to have been made soon afterwards, or at least within such a subsequent time as will support a reasonable probability that the memory of the witness had not become impaired when the statement was committed to paper. It appears to be only necessary that the witness should swear positively that the memorandum was made

(*m*) *R.* v. *Hardy*, 24 How. St. Tr. at p. 824.
(*n*) *Per* GURNEY, B., in *Gregory* v. *Tavernor*, 6 C. & P. at p. 281.
(*o*) *Sinclair* v. *Stevenson*, 1 C. & P. 585.
(*p*) *Burgess* v. *Bennett*, 20 W. R. 720.
(*q*) *Doe* v. *Perkins*, 3 T. R. at p. 754.

at a time when he had a distinct recollection of the facts (*r*).

The memorandum must either have been made by the witness, or recognised by him, at or about the time when it was made, as a correct account. It must be the genuine memorandum of the witness, not one prepared by the solicitor for the purposes of the trial (*s*). It must not contain any of the elements of hearsay, and it will therefore be inadmissible if it appears to be the statement of a third person (*t*), as where it had been drawn up afterwards by such a person from the witness's own memoranda; or even if it is a copy made by the witness himself from his own original memoranda (*u*). "The copy of an entry, not made by the witness contemporaneously, does not seem to be admissible for the purpose of refreshing a witness's memory" (*v*). But the author of a written report (*x*), or of an article in a newspaper (*y*), has been allowed to refer to the printed versions of what he wrote.

The obvious fact that a writing is the best record of a transaction has caused several statutes to be passed, and is the reason also for some rules of the common law, which require that certain grants, assignments and agreements must be proved by a writing. In many cases, too, the law requires the further solemnity of a seal; in a few cases it goes further, and requires that the execution of the deed or other instrument should be witnessed by one or more third persons, who witness the signatures and

(*r*) *Burrough* v. *Martin*, 2 Camp. 112; Cockle, 197.
(*s*) *Steinkeller* v. *Newton*, 9 C. & P. 315; *Anon.*, cited in *Doe* v. *Perkins*, 3 T. R. pp. 752—4.
(*t*) *Anon.*, Ambler, 252.
(*u*) *Jones* v. *Stroud*, 2 C. & P. 196.
(*v*) *Per* PATTESON, J., in *Burton* v. *Plummer*, 2 A. & E. at p. 343.
(*x*) *Horne* v. *Mackenzie*, 6 Cl. & F. 628.
(*y*) *Topham* v. *M'Gregor*, 1 Car. & K. 320.

sign their names as guaranteeing the authenticity of the document.

*Grants and Transfers.*

(i.) *Freeholds in possession* at common law were transferable *inter vivos* by means of livery of seisin; if that means be now adopted, a deed is necessary (*z*). But by the Real Property Act, 1845 (*a*), all freeholds are deemed to "lie in grant" as well as "in livery," and consequently can be transferred by a deed of conveyance.

(ii.) *Freeholds not in possession and other Incorporeal Hereditaments* were at common law transferable only by deed, and consequently were said to "lie in grant."

(iii.) *Wills.*—At common law, wills of personalty were left to the ecclesiastical courts, and wills of land were unknown. All wills, now, must be in writing, and signed by the testator, who must either sign or recognise the signature as his in the presence of at least two witnesses in the manner prescribed by the Wills Acts, 1837 (*b*) and 1852 (*c*), and if the testator desires to revoke his will by another instrument, it must be executed in the same manner as a will (*d*).

(iv.) *Fines and Recoveries.*—These common law devices to enable a tenant in tail and others to convey an estate in fee simple, which the ordinary methods of conveyance did not permit, were abolished in 1833; and such conveyances must now be by deed enrolled in the Chancery Division of the High Court (*e*).

(v.) *Leases.*—By the combined effect of the Statute of

(*z*) Statute of Frauds (29 Car. II. c. 3), ss. 1, 2, see Appendix; Real Property Act 1845, (8 & 9 Vict. c. 106), s 3.
(*a*) 8 & 9 Vict. c. 106, s. 2.
(*b*) 7 Will. IV. & 1 Vict. c. 26, s. 9; see Appendix.
(*c*) 15 Vict. c. 24.
(*d*) 7 Will. IV. & 1 Vict. c. 26, s. 21; and see *post*, pp. 257, 363
(*e*) 3 & 4 Will. IV. c. 74, s. 34.

Frauds (*f*) and the Real Property Act, 1845 (*g*), all leases (except leases for not more than three years from the making at a rent not less than two-thirds the improved value) and all assignments of leases must be made by deed.

(vi.) *Equitable Estates.*—By the Statute of Frauds (*h*) all trusts of land, but not of chattels and the like, must be created or evidenced by writing, except such as arise by the implication or construction of law. And all assignments of all trusts (whether of lands or personalty) must be in writing (*i*).

(vii.) It must be observed that wherever the Land Transfer Act, 1897 (*k*), or any other Act which requires dealings in land to be registered (*l*), is in force, all dealings with interests in land must be made in the form required by statute and afterwards registered.

(viii.) *Bills of Sale*, whether absolute or by way of mortgage, must be under seal, and executed in conformity with a number of minute statutory requirements, and registered (*m*).

(ix.) *A transfer of shares* in any company created by a special Act of Parliament, which incorporates the Companies Clauses Consolidation Act, 1845, must be under seal (*n*). But a transfer of shares in a company governed by the Companies (Consolidation) Act, 1908, which incorporates Table A., may be in the form given in that Table (*o*) (which is not under seal), or in any usual or common form which the directors may approve.

(*f*) 29 Car. II. c. 3, ss. 1, 2.
(*g*) 8 & 9 Vict. c. 106, s. 3.
(*h*) 29 Car. II. c. 3, ss. 7, 8; see Appendix.
(*i*) *Ibid.* s. 9; see Appendix.
(*k*) 60 & 61 Vict. c. 65.
(*l*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54); Middlesex Registry Act, 1708 (7 Anne, c. 20); Bedford Level Act, 1663 (15 Car. II. c. 17, s. 8).
(*m*) Bills of Sale Acts, 1878 (41 & 42 Vict. c. 31); 1882 (45 & 46 Vict. c. 43); 1890 (53 & 54 Vict. c. 53); 1891 (54 & 55 Vict. c. 35).
(*n*) Companies Clauses Consolidation Act, 1845, s. 14.
(*o*) 8 Edw. VII. c. 69, s. 22; and First Schedule, Table A., s. 19; see Appendix.

(x.) Many other statutes provide that assignments of personalty, such as ships (*p*), and copyrights (*q*), should be in a prescribed form and under seal.

And, lastly, any acknowledgment which prevents the period of limitation running against a person who is entitled to any interest in freehold must be in writing signed by the person in whose favour time is running, and given to the former person or his agent (*r*).

*Contracts.*

(*a*) *Contracts by Corporations.*—It was a clear rule of the common law that contracts by corporations must be made under the seal of the corporation or by a person authorised under seal, or ratified by seal (*s*).

"The seal is the only authentic evidence of what the corporation has done, or agreed to do . . . Either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation" (*t*).

A number of exceptions have been engrafted on this rule, and the result is that minor contracts, or those of daily necessary occurrence (*u*), or where there is a paramount convenience such as to amount almost to a necessity in carrying out the objects for which the corporation was established, may be proved without being under the seal of the corporation (*x*). Thus, as a general rule, an inferior servant can be retained even by a non-trading corporation by parol. But this does not apply to all servants; for it has been held that the

(*p*) Merchant Shipping Act, 1894, s. 24; see Appendix.

(*q*) *E.g.*, under 5 & 6 Vict. c. 45, s. 13.

(*r*) Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), ss. 14, 42; see Appendix; Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 7, 8, 10; see Appendix. See also *Beamish* v. *Whitney*, [1909] 1 Ir. R. 360.

(*s*) *Arnold* v. *Mayor of Poole*, 4 M. & G. 860; *Mayor of Oxford* v. *Crow*, [1893] 3 Ch. 535.

(*t*) *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815.

(*u*) *Nicholson* v. *Bradfield Union*, L. R. 1 Q. B. 620.

(*x*) *Mayor of Ludlow* v. *Charlton*, 6 M. & W. at p. 821; cf. *Church* v. *Imperial Gas Light and Coke Co.*, 6 A. & E. 861.

contract for the engagement of a clerk to a master of a workhouse by a board of guardians must be under seal (*y*).

The question is: Was the transaction incidental or foreign to the objects and daily business of the corporation? If it was incidental, such as the repair of the premises of the corporation (*z*), or was a contract to buy or sell such goods as the corporation is formed to buy and sell (*a*), or to purchase goods for the ordinary and regular purposes of the corporation (*b*), it does not require to be proved by a formal contract under seal. But when the goods to be supplied are not such as those in which the corporation usually deals (*c*), or when the contract is of such a magnitude, and of such an unusual description, as to require reasonably the formal and express assent of the corporation, the fact must be proved by a writing under seal (*d*).

It is now clear law that a corporation will be bound by a contract not under seal of which it has received the benefit (*e*), except, of course, where any statute intervenes, as in the case of contracts by local authorities (*f*). Thus, where goods which a corporation has contracted by parol to buy have been received by it, or after work is done for the corporation and adopted by it, the objection that the contract was not under seal cannot be taken (*g*). Moreover, the equitable doctrines of acquiescence and part performance apply to contracts by corporations as well as to those by private individuals (*h*).

(*y*) *Austin* v. *Bethnal Green Guardians*, L. R. 9 C. P. 91; cf. *Dyte* v. *St. Pancras Guardians*, 27 L. T. 342.
(*z*) *Sanders* v. *St. Neot's Union*, 8 Q. B. 810.
(*a*) *Church* v. *Imperial Gas Light and Coke Co.*, 6 A. & E. 846.
(*b*) *South of Ireland Colliery Co.* v. *Waddle*, L. R. 4 C. P. 617.
(*c*) *Copper Miners' Co.* v. *Fox*, 16 Q. B. 229.
(*d*) *Homersham* v. *Wolverhampton Rail. Co.*, 6 Ex. 137.
(*e*) *Melbourne Banking Corporation* v. *Brougham*, 7 App. Cas. 307.
(*f*) See *post*, p. 177.
(*g*) *Sanders* v. *St. Neot's Union*, 8 Q. B. 810.
(*h*) *Laird* v. *Birkenhead Rail. Co.*, Johns. 500; cf. *Crook* v. *Corporation of Seaford*, L. R. 6 Ch. 551; and see *Mayor of Kidderminster*

Corporations are either formed for the efficient administration of local affairs, or for trading purposes, and the statutes relating to their contracts differ considerably.

Local authorities, whether actual corporations or not, are bound by statute to make their contracts in prescribed forms. Thus, by s. 174 of the Public Health Act, 1875 (*i*) :—

"Every contract made by an urban authority, whereof the value or amount exceeds £50, must be in writing and sealed with the common seal of such authority."

The House of Lords has held that this section is imperative, and consequently the authority was not bound by a contract not so made, although it was made by an agent appointed under seal, and they had received the full benefit of it (*k*), but the requirements of the statute can be complied with after the work has commenced but before it is finished (*l*).

Trading companies are now of four kinds :—

(i.) Companies governed by the Companies (Consolidation) Act, 1908.

(ii.) Companies created by special Acts of Parliament, which invariably incorporate the Companies Clauses Consolidation Act, 1845.

(iii.) Companies created by letters patent, usually known as "chartered companies." The powers of a chartered company to make contracts are substantially those given to a corporation by the common law.

(iv.) There are also still some joint stock banking companies formed under the special Acts relating to banks (*m*).

v. *Hardwick*, L. R. 9 Ex. 13; *Mayor of Oxford* v. *Crow*, [1893] 3 Ch. 535; *Lawford* v. *Billericay Rural Council*, 1903] 1 K. B. 772.

(*i*) 38 & 39 Vict. c. 55.

(*k*) *Young* v. *Mayor of Royal Leamington Spa*, 8 App. Cas. 517; but see *A.-G.* v. *Gaskill*, 22 Ch. D. 537.

(*l*) *Melliss* v. *Shirley Local Board*, 14 Q. B. D. 911; *Bournemouth Commissioners* v. *Watts*, 14 Q. B. D. 87.

(*m*) County Bankers Act, 1826 (7 Geo. IV. c. 46; Bank Charter

The contracts of companies of the first class are required to be made in accordance with s. 76 of the Companies (Consolidation) Act, 1908 (*n*).

Companies of the second class are governed by the terms of the Act of 1845, s. 97 (*o*), and also of their special statutes modifying that Act. Many statutory companies, notably railway companies, have numerous provisions relating to contracts. It is impossible to discuss them here, and the reader is referred to the text books dealing with the various kinds of companies for further information upon this topic.

(*b*) *Contracts under the Statute of Frauds.*—By s. 4 (*p*) no action can be brought on any of the following contracts (although they may be valid and recognised by law for other purposes), unless the agreement or a memorandum or note thereof is in writing:—

(i.) A promise by an executor or administrator to answer damages out of his own estate.

(ii.) A guarantee.

(iii.) An agreement in consideration of marriage.

(iv.) An agreement concerning land or any interest therein.

(v.) An agreement incapable of performance within a year.

The note or memorandum in writing need not contain the whole of the terms, but must sufficiently set out all the material terms. What terms will be held material depends upon the circumstances of each particular case; but the memorandum must, at the very least, name or unmistakably identify the parties to and the subject-matter of the contract and the consideration for it (*q*).

Act, 1844 (7 & 8 Vict. c. 113), s. 47; Joint Stock Banking Companies Act, 1857 (20 & 21 Vict. c. 49), s. 12.

(*n*) 8 Edw. VII. c. 69; see Appendix.

(*o*) 8 & 9 Vict. c. 16; see Appendix.

(*p*) 29 Car. II. c. 3; see Appendix.

(*q*) Except, so far as to consideration, in the case of a guarantee. Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 3.

It must, however, be remembered that when a writing purports to contain the whole contract it cannot be varied by parol (*r*), and the statute prevents a contract being partly oral and partly in writing, unless the oral terms are not material, as that word is construed in the cases.

(*c*) *Contracts relating to the Sale of Goods.* — The Sale of Goods Act, 1893, re-enacting with modifications s. 17 of the Statute of Frauds as amended by Lord Tenterden's Act, has provided (*s*) three statutory modes of proving a contract for the sale or purchase of goods of the value of £10 and upwards: (1) By showing that the buyer accepted, and actually received, part of the goods. (2) By showing the giving of something in earnest by the buyer or part payment of the purchase-money by him (*t*). (3) By showing that a note or memorandum in writing of the contract has been made and signed by the party to be charged, or his agent authorised in that behalf. Unless one or the other of these formalities is observed, there is no right of action; nevertheless the contract is not void for other purposes (*u*). The price which the parties have agreed to pay for the goods is *primâ facie* evidence of their value.

The acceptance may (*x*) be implied from the buyer's conduct in dealing with the goods, and it may precede the actual receipt (*y*), which also may be constructive (*z*). But an acceptance cannot be implied without some consent (*a*); it need not, however, be absolute (*b*).

(*r*) See *post*, p. 181.
(*s*) 56 & 57 Vict. c. 71, s. 4; see Appendix.
(*t*) See *Davis* v. *Phillips*, 24 T. L. R. 4.
(*u*) *Taylor* v. *Great Eastern Rail. Co.*, [1901] 1 Q. B. 774.
(*x*) Under sub-s. (3) of s. 4.
(*y*) *Cusack* v. *Robinson*, 1 B. & S. 299.
(*z*) *Marshall* v. *Green*, 1 C. P. D. 35.
(*a*) *Smith* v. *Hudson*, 6 B. & S. 431.
(*b*) *Page* v. *Morgan*, 15 Q. B. D. 228; *Abbot* v. *Wolsey*, [1895] 2 Q. B. 97.

The writing must be signed before the commencement of the action (*c*) by the party charged, or by his agent, who need not be appointed in writing (*d*). Such agent must be a third person, and not the other contracting party (*e*).

Under this section, as well as under s. 4 of the Statute of Frauds, the contract may be proved by several sufficiently connected writings.

(*d*) Many other contracts are required to be in writing, and the law often adds other formalities. Thus, a warrant of attorney or *cognovit actionem* must be executed in accordance with s. 24 of the Debtors Act, 1869 (*f*), and all negotiable instruments must, by their very nature, be in writing (*g*). The numerous problems which arise on such matters will be found adequately discussed in books on Contract and Mercantile Law. In one action of tort even—namely, in an action of deceit founded on a representation as to a third person's character or position—a written document is necessary (*h*).

Lastly, the Statutes of Limitation can be prevented from running and even the statute-barred debt revived by the debtor (or, in many cases, his agent) giving a signed acknowledgment in writing to the creditor or his agent (*i*).

Another and a most important rule of evidence is also based upon the fact that the best method of preserving a clear recollection of the details of any

(*c*) *Lucas* v. *Dixon*, 22 Q. B. D. 357.
(*d*) *Acebal* v. *Levy*, 10 Bing. 378.
(*e*) *Sharman* v. *Brandt*, L. R. 6 Q. B. 720.
(*f*) 32 & 33 Vict. c. 62; see Appendix.
(*g*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3.
(*h*) 9 Geo. IV. c. 14, s. 6; see Appendix.
(*i*) 9 Geo. IV. c. 14 (Lord Tenterden's Act), s. 1; see Appendix; Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14; see Appendix; Civil Procedure Act, 1833 (3 & 4 Will. IV. c. 42), s. 5; see Appendix. See also *Cooper* v. *Kendall*, [1909] 1 K. B. 405; *Read* v. *Price*, [1909] 2 K. B. 724.

transaction is to set them down in writing. It is for this reason that whenever the parties to any contract or grant or other disposition of property have set out its terms and conditions in a writing, which they presumably intend to be a record of the transaction, the law forbids any attempt to establish any other terms by means of oral evidence. It would be manifestly unjust to allow either party to alter his liability by introducing terms which are not to be found in the document. Hence it is a clear rule of law that whenever a document purports to be the record of the final intention and agreement of two parties, who have entered into any contract or made any grant or transfer of property, no parol evidence is admissible to contradict or vary its terms.

But parol evidence is admissible to show that there never was any such contract, grant, or transfer at all, or that it never was reduced into writing, or that this is not *the* writing to which it was reduced. In short, any evidence is admissible the effect of which is to wipe the transaction out altogether; *e.g.*, as by showing want of capacity in either party, fraud, mutual mistake, illegality, or the non-fulfilment of a condition precedent (*k*). So, parol evidence is admissible to prove that the contract was induced by a misrepresentation (fraudulent or innocent), or that there was a collateral warranty (*l*).

Parol evidence is also admissible to annex to the contract certain customary incidents which the

(*k*) *Pym* v. *Campbell*, 6 E. & B. 370; *Wake* v. *Harrop*, 31 L. J. Ex. 451; *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25.
(*l*) *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215.

parties had in their minds and took as a matter of course, and therefore did not take the trouble to set down in writing, provided such alleged customary incidents are not inconsistent with the written terms (*m*). Such a custom must be general within the trade or market (*n*), but it need not be ancient (*o*). Again, parol evidence is always admissible to prove that the contract was *rescinded* by a subsequent contract, and also, unless the contract be one which is required by statute to be in writing, to prove that this contract was *varied* by a subsequent contract (*p*). Lastly, parol evidence is admissible to prove that the instrument is wrongly dated, or to fix the date of an undated instrument (*q*).

The rule laid down above applies equally whether the grant or contract in question be required by law to be in writing or not. It is a rule of the common law, wholly independent of any statute. It is also wholly independent of the rules which regulate the admissibility of secondary evidence. It is true that, when an original grant or contract is lost or has been destroyed, secondary evidence of its contents becomes admissible. But such evidence can only be directed to determining with as much precision as possible the terms of the missing document. It will not be allowed to add to or vary those terms.

(*m*) *Wigglesworth* v. *Dallison*, 1 Smith, L. C., 545; *Hudson* v. *Clementson*, 18 C. B. 213.

(*n*) *Nelson* v. *Dahl*, 12 Ch. D. at p. 576; *Willans* v. *Ayers*, 3 App. Cas. at p. 145.

(*o*) *Goodwin* v. *Roberts*, L. R. 10 Ex. at p. 351; *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144.

(*p*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 64; *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634.

(*q*) *Davis* v. *Jones*, 17 C. B. 625.

It is a rule of law, then, that parol evidence is inadmissible to contradict, add to, subtract from, or vary the terms of a written instrument. Where a contract is required by the law to be in writing or has been voluntarily put into writing by the parties, all controversy as to its purport and effect ought clearly to be determined by the inspection of the written instrument, and therefore the written contract must, as a general rule, be produced, and though oral evidence may be given to destroy or explain such a written contract, it cannot be given to vary it, except when relief is sought in equity on the ground of mistake or surprise (*r*).

Neither party can show that, before the contract was reduced to writing, the parties agreed to a term which does not appear in the writing, and which is clearly repugnant to its provisions; for all such antecedent oral terms are merged in the express language of the writing. Thus, where a lease provided that the lessee would pay the rent in advance, it was held that an antecedent parol agreement that he would give bills at three months for the rent in advance was inconsistent with the provision in the lease, and that evidence thereof was inadmissible (*s*).

A policy of insurance cannot be contradicted by an antecedent written agreement, as where a defendant attempts to show, by such an agreement, that the risk was to begin at a place and date subsequent to those which are named in the policy (*t*); nor can a charter-party be varied by a parol agreement substituting one place of destination for another (*u*), unless such an agreement can be treated, not as a new term, but as a new and distinct contract (*x*); nor can a release be

(*r*) *Price* v. *Ley*, 32 L. J. Ch. 530.
(*s*) *Henderson* v. *Arthur*, [1907] 1 K. B. 10; and see *Emmet* v. *Dewhirst*, 21 L. J. Ch. 497.
(*t*) *Kane* v. *Knightley*, Skin. 54.
(*u*) *Leslie* v. *De la Torre*, cited in *White* v. *Parkin*, 12 East, 583.
(*x*) *White* v. *Parkin*, *supra*.

varied by evidence of verbal negotiations prior to such release (*y*).

A written contract to supply flour of XS. quality, cannot be varied by parol evidence to show that by XS. quality the parties intended XSS. quality (*z*). So, a written contract to supply foreign refined oil cannot be varied by oral evidence that the parties agreed to consider an inferior kind of oil a foreign refined oil (*a*); and a policy of insurance cannot be varied by evidence of oral or written declarations which were made to the insurer, but not embodied in the policy (*b*). The valuation of a ship in a valued policy is, in the absence of fraud or wagering, conclusive between the parties for the purposes of the contract (*c*).

Where a deed conveys Blackacre, as specified in a schedule and map annexed, parol evidence will not be received to show that Whiteacre, which is not mentioned in the schedule or map, has always been part of Blackacre (*d*). When several classes of goods, of superior and inferior quality, are comprised under one generic name, and a written contract is made to supply goods of that name, the contract will be fulfilled by a supply of any goods to which that name is applicable; and parol evidence will not be received to show that the parties intended that goods of the superior quality should be supplied (*e*).

A person, who appears on the face of a written contract to have contracted as a principal, cannot, in order to avoid liability, show by extrinsic evidence that he contracted as an agent (*f*); nor can he show that a

(*y*) *Mercantile Bank of Sydney* v. *Taylor*, [1893] A. C. 317.
(*z*) *Harnor* v. *Groves*, 15 C. B. 667.
(*a*) *Nichol* v. *Godts*, 10 Ex. 191.
(*b*) *Halhead* v. *Young*, 6 E. & B. 312.
(*c*) *North of England Ship Insurance Co.* v. *Armstrong*, L. R. 5 Q. B. 244; cf. *Burnand* v. *Rodocanachi*, 7 App. Cas. 333.
(*d*) *Barton* v. *Dawes*, 10 C. B. 261.
(*e*) *Smith* v. *Jeffryes*, 15 M. & W. 561.
(*f*) *Higgins* v. *Senior*, 8 M. & W. 834; but see *Chapman* v *Smethurst*, [1909] 1 K. B. 927.

contract, signed by him expressly as a principal, was made by him as an agent for the party to the action (*g*). If the contract appears to have been made merely in his own name, without addition, it may be shown that he was in fact an agent for another in order to make such other liable (*h*), as this does not contradict the contract, nor does it make any difference if the name of the principal is disclosed at the time the contract is made (*i*). And where a business had been carried on by the widow and sons under the name of the deceased trader, and that name had been signed to a deed executed after the death, parol evidence was received by the Court to show that the name was signed as meaning the firm as it existed at that time (*k*).

Extrinsic evidence is inadmissible to show that a person, not on the face of it a party to a written instrument, was, in fact, a party (*l*); but where a defendant had signed an agreement under seal as agent for a firm, whereby the firm agreed to make certain payments to the plaintiffs, which agreement contained a clause to the effect that the defendant guaranteed such payments, although the defendant was not named as a party to the agreement, extrinsic evidence was held admissible by the Court of Appeal to prove that the defendant intended to sign on his own behalf as well as for his principals so as to make him liable as a guarantor (*m*). It may, however, be observed that this decision does not establish any such principle as that the capacity in which a man signs a document is always provable by extrinsic evidence.

On the other hand, parol evidence is admissible to

(*g*) *Humble* v. *Hunter*, 12 Q. B. 310; *Formby Brothers* v. *E. Formby*, [1910] W. N. 48.
(*h*) *Per* PATTESON, J., *ibid.*
(*i*) *Calder* v. *Dobell*, L. R. 6 C. P. 486.
(*k*) *Wray* v. *Wray*, [1905] 2 Ch. 349.
(*l*) *Robinson* v. *Rudkins*, 26 L. J. Ex. 56.
(*m*) *Young* v. *Schuler*, 11 Q. B. D. 651.

prove that that which purports to be a deed or writing of a certain kind has been made under circumstances which deprive it of all such effect. Thus it may be shown that a written instrument purporting to be a contract between the parties was not so intended (*n*), or that it was made subject to a condition through the non-fulfilment of which no contract has ever arisen (*o*); and on the same principle Lord PENZANCE held that it might be shown that a duly executed codicil was not intended by the testator to be operative (*p*). So it may be shown that an instrument, which purports to be a binding one to take effect immediately, was delivered as an escrow, and was not intended to operate until certain things were done (*q*). Parol evidence is admissible to show that, after signing a document, the defendant assented to certain alterations made by the plaintiff before it was signed by the latter, for such evidence does not vary the contract, but only proves the condition of the document when it first became a contract (*r*). Wherever it is attempted to superadd an oral to a written contract, there must be clear evidence of the actual words used (*s*).

There is more difficulty in adding by parol evidence a new term to a written contract, when that contract is required to be in writing by the Statute of Frauds or some other statute, or by any rule of the Common Law (*t*); and for this reason—the result of thus adding a new term will be that the contract between the parties becomes partly in writing and partly by word of mouth, and it therefore is *ex hypothesi* void. But a written contract may be wholly rescinded by parol, whether it

(*n*) *Clever* v. *Kirkman*, 24 W. R. 159.
(*o*) *Pym* v. *Campbell*, 6 E. & B. 370; Cockle, 177; followed in *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25.
(*p*) *Lister* v. *Smith*, 3 Sw. & Tr. 282.
(*q*) *Davis* v. *Jones*, 17 C. B. 625; cf. *Pattle* v. *Hornibrook*, *suprà*.
(*r*) *Stewart* v. *Eddowes*, L. R. 9 C. P. 311.
(*s*) *Per* JAMES, L.J., in *Thomson* v. *Simpson*, 18 W. R. 1051.
(*t*) For the examples see *ante*, pp. 183 *et seq.*

is such as is required by law to be in writing or not (*u*). This is so both in law and in equity. The important question is, therefore, What was the intention of the parties? Did they intend to rescind or only to vary the original agreement (*x*)

As LINDLEY, J., said in *Hickman* v. *Haynes* (*y*):—

"Neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds."

And this is of course equally true of all attempted variations (*z*). A parol variation of a written contract may, however, be set up as a defence to an action for specific performance of the contract; and it depends on the particular circumstances in each case whether the variation is to defeat the plaintiff's title to have specific performance, or whether the Court will decree performance of the contract, taking care that the subject-matter of the parol agreement or understanding is carried into effect, so that all parties may have the benefit for which they contracted (*a*).

An agreement to waive or rescind may be deduced from conduct (*b*), as well as from words; but there must be clear evidence of the alleged agreement; and therefore Lord ST. LEONARDS refused to hold a loose conversation by a tenant, in which he stated his interest to be different to that which he claimed under a contract for a lease, to amount to an abandonment of the contract (*c*).

(*u*) But note that, by the Wills Act, 1837, s. 21, an instrument revoking a will must be executed in the same manner as a will. It is submitted that the old rule that a deed cannot be revoked except by deed is now obsolete.

(*x*) *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634; cf. *Noble* v. *Ward*, L. R. 2 Ex. 135.

(*y*) L. R. 10 C. P. at p. 605; cf. *Noble* v. *Ward*, *supra*.

(*z*) See *Emmet* v. *Dewhirst*, 21 L. J. Ch. 497.

(*a*) See *Smith* v. *Wheatcroft*, 9 Ch. D. 223; and Fry on Specific Performance, 4th ed., 337.

(*b*) *Carter* v. *Dean of Ely*, 7 Sim. 211.

(*c*) *Moore* v. *Crofton*, 3 J. & L. 438.

But where the parties have *voluntarily* put their contract into writing, without being required to do so by law, it is competent to them at any time before breach of it, by a new contract not in writing, either to rescind the written contract altogether, or to add to, or vary its terms, and thus to make a new contract, which is to be proved partly by the written contract, and partly by the subsequent verbal terms engrafted upon what is left of the written agreement (*d*).

The doctrines of Equity in rectifying mistakes in deeds, so as to make them accord with the real agreement between the parties, may be regarded as a further exception to the general rule under consideration.

But where a deed was executed in conformity with a previous written agreement, the Court refused to receive evidence of the alleged intention of the parties, inconsistent with the written agreement and deed, for the purpose of rectification (*e*). Thus a conveyance of land was recently rectified where the Court was satisfied that there was a mistake common to both parties, which the vendor had only recently discovered, although six years had elapsed since the conveyance (*f*). The reader is referred to the books on Equity for further discussion of this important topic.

Evidence is admissible to show that immediately before the written agreement was signed a distinct oral arrangement was made, adding to, but not inconsistent with, the former (*g*); and whether the oral agreement precede or be contemporaneous with the written agreement is of no consequence, provided it be on a distinct collateral matter, although it is part of the same transaction. Thus a consignor of goods may prove any

(*d*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 58.

(*e*) *Thompson* v. *Hickman*, [1907] 1 Ch. 550; see also *May* v. *Platt*, [1900] 1 Ch. 616; *Davies* v. *Fitton*, 2 D. & War. 225.

(*f*) *Beale* v. *Kyte*, [1907] 1 Ch. 564.

(*g*) *Lindley* v. *Lacey*, 17 C. B. (N.S.) 578; *Frith* v. *Frith*, [1906] A. C. 254; *Jones* v. *Wasley*, 18 T. L. R. 418.

additional contract to carry which does not contradict or vary the written one (*h*). So, too, a tenant may prove the existence of a warranty by his landlord as to drains, collateral to the lease (*i*). But in no case can a collateral oral agreement be set up if it contradicts the terms of the written one (*k*). If an oral arrangement was made as a mere suspension of a written agreement, it will be admissible in evidence (*l*); and on the same principle, when an agreement does not declare the time from which and to which it is to operate, parol evidence is receivable to supply the ambiguity (*m*). If a written agreement has been treated as incomplete, parol evidence of a subsequent further and fuller agreement may be given (*n*).

Where the printed conditions of sale at an auction, signed by the auctioneer, described the time and place of the sale, and the number and kind of timber sold, but said nothing about the weight, evidence of the auctioneer's statements at the sale was held inadmissible to prove that a certain weight had been warranted. Lord ELLENBOROUGH said :—

"There is no doubt that the parol evidence was properly rejected. The purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, I know of no instance where a party may not by parol testimony superadd any term to a written agreement, which would be setting aside all written contracts, and rendering them of no effect. There is no doubt that the warranty as to the quantity of the timber would vary the agreement contained in the written conditions of sale" (*o*).

(*h*) *Malpas* v. *London and South Western Rail. Co.*, L. R. 1 C. P. 336

(*i*) *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215.

(*k*) *New London Credit Syndicate* v. *Neale*, [1898] 2 Q. B. 487; *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634; *Henderson* v. *Arthur*, [1907] 1 K. B. 10.

(*l*) *Wallis* v. *Littell*, 11 C. B. (N.S.) 369.

(*m*) *Davis* v. *Jones*, 17 C. B. 625.

(*n*) *Johnson* v. *Appleby*, L. R. 9 C. P. 158.

(*o*) *Powell* v. *Edmunds*, 12 East, 6.

This case is general in its application; but the rule was probably stated and observed more inflexibly, because the agreement was clearly within the Statute of Frauds; and it is distinguishable from a later case, which decided that unsigned conditions of sale are only in the nature of a personal memorandum, which may be varied at any time before the sale by an express notice to a purchaser (*p*).

Extrinsic evidence is also admissible to annex incidents to a written instrument, where the inclusion of such incidents is consistent with the writing, and carries out the intention of the parties. In such cases the notoriety of the usage makes it probable and reasonable that the parties intended it to be a term of their contract. Thus, where a written contract contained a stipulation that a party should "lose no time on his own account, and do his work well and behave himself in all respects as a good servant," extrinsic evidence was received to show that, by the custom of his trade, such a party was entitled to certain holidays (*q*). As was once said by PARKE, B.:—

"It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages" (*r*).

COLERIDGE, J. laid down the law in similar terms in *Browne* v. *Byrne* (*s*):—

"Mercantile contracts are very commonly framed in a language peculiar to merchants; the intention of the parties, though perfectly well known to themselves, would often be defeated

(*p*) *Eden* v. *Blake*, 13 M. & W. 614.
(*q*) *R.* v. *Stoke-upon-Trent*, 5 Q. B. 303.
(*r*) *Hatton* v. *Warren*, 1 M. & W. 475.
(*s*) 3 E. & B. 703.

if the language were strictly construed according to its ordinary import in the world at large. Evidence, therefore, of mercantile custom and usage is admitted in order to expound it, and arrive at its true meaning. Again, in all contracts, as to the subject-matter of which a known usage prevails, parties are found to proceed with the tacit assumption of those usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify those known usages which are included however, as of course, by mutual understanding: evidence, therefore, of such incidents is receivable. The contract, in truth, is partly express and in writing, partly implied or understood and unwritten; but in these cases a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to or inconsistent with the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less; neither in the construction of a contract among merchants, tradesmen, or others, will the evidence be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words, perfectly unambiguous in their ordinary meaning, are used by the contractors in a different sense from that. What words more plain than 'a thousand,' 'a week,' 'a day'? Yet the cases are familiar in which 'a thousand' has been held to mean twelve hundred; 'a week' only a week during the theatrical season; 'a day' a working day. In such cases the evidence neither adds to, nor qualifies, nor contradicts, the written contract—it only ascertains it by expounding the language."

In that case a bill of lading specified a certain sum as payable for freight, and, in an action for the amount, it was held that an indorsee might give evidence of a customary deduction. The extrinsic evidence in this case, although bordering on repugnancy, was received because the bill of lading merely specified a sum certain for freight, without stipulating that it was to be free of all deductions. If the bill of lading had expressed, or if from the language of it the intention of the parties could have been collected, that the freight at the specified rate should be paid free from all deductions, customary or otherwise, then it would have been repugnant to it to set up the usage (*t*). Again, under a contract to carry a full and complete cargo of molasses from London to Trinidad, evidence has been received to qualify the

(*t*) *Browne* v. *Byrne*, 3 E. & B. 703; cf. *Phillipps* v. *Briard*, 1 H. & N. 21.

contract by showing that a cargo is full and complete if the ship be filled with casks of the standard size, although there be smaller casks of other produce freighted in the same vessel (*u*).

So, there being in every voyage policy of insurance an implied warranty of seaworthiness, parol evidence is admissible to show the amount of seaworthiness contemplated in the particular case (*x*).

Where the defendants buy as brokers for a principal, whose name they do not disclose at the time of contract, it has been held that evidence of a custom will be admitted to show that in this case the broker is personally liable on the contract (*y*). And in the well-known case of *Wigglesworth* v. *Dallison* (*z*) it was held by Lord MANSFIELD, C.J., and the Court of King's Bench that a custom that the tenant, whether by parol or by deed, shall have the away-going crop, after the expiration of his term, is good, if not repugnant to the lease by which he holds. Moreover, whenever the contract is in writing and a custom has been proved in accordance with the rule in *Wigglesworth* v. *Dallison*, evidence is not admissible of a parol agreement to exclude the custom (*a*).

Again, parol evidence is always admissible to show that a written contract, whether under seal or not, never existed legally; or that it was formed under circumstances which rendered it void *ab initio*. Thus, a defendant in an action on a written contract, may plead that it was void, as being made under circumstances of fraud, duress, or for illegal consideration; and he may prove such a plea by any species of parol evidence (*b*). He may also show that a bill or promissory

(*u*) *Cuthbert* v. *Cumming*, 11 EX. 405.
(*x*) *Borges* v. *Wickham*, 3 B. & S. 669.
(*y*) *Humfrey* v. *Dale*, 7 E. & B. 266.
(*z*) 1 Doug. 201; 1 Sm. L. C. 545.
(*a*) 1 Sm. L. C. 545; *Fawkes* v. *Lamb*, 31 L. J. Q. B. 98.
(*b*) *Collins* v. *Blantern*, 1 Sm. L. C. 369; *Robinson* v. *Lord Vernon*, 7 C. B. (N.S.) 231.

note, on which he is *primâ facie* liable, was obtained from him without consideration, for the purpose of being discounted by the plaintiff or by a third party, between whom and the plaintiff there is a privity; or he may show any other similar failure of consideration; but he may not give parol evidence, which goes merely to limit his liability (*c*). As a general rule, upon all written contracts not under seal extrinsic evidence will be admissible to support a plea of failure or want of consideration; but when the contract is under seal it is not necessary to prove a consideration. But either party may, by extrinsic evidence, show that there was consideration, even though none is mentioned in the deed, or that there was another consideration beyond that named in the deed (*d*). Thus, a deed purporting to be founded on a money consideration may be proved to have been founded also on any other valuable consideration, such as marriage (*e*). So where the deed purports to be founded on natural affection, it may be shown to have been founded also on a valuable consideration; this may be most material on a charge of fraud or undue influence (*f*). In such cases the extrinsic evidence is received only to annex an incident which is not clearly excluded by, or inconsistent with, the written instrument (*g*).

Any fact which is not of the essence of the contract can be proved by parol testimony. Thus, a deed may be proved to have been delivered either before or after the day on which it purports to have been delivered (*h*), and

(*c*) *Abrey* v. *Crux*, L. R. 5 C. P. 37; see also *Stott* v. *Fairlamb*, 53 L. J. Q. B. 47.

(*d*) *R.* v. *Scammonden*, 3 T. R. 474; *Clifford* v. *Turrell*, 1 Y. & C. (Ch.) 138; *Peacock* v. *Monk*, 1 Ves. sen. 128; see also *Townend* v. *Toker*, L. R. 1 Ch. 446; *Frith* v. *Frith*, [1906] A. C. 254.

(*e*) *Villen* v. *Beaumont*, 2 Dyer, 146 a.

(*f*) *Gale* v. *Williamson*, 8 M. & W. 405.

(*g*) *R.* v. *Inhabitants of London*, 8 T. R. 379; and see *per* WILLIAMS, J., in *R.* v. *Stoke-upon-Trent*, 5 Q. B. at p. 308.

(*h*) *Goddard's Case*, 2 Rep. 4 b; and see *Doe* v. *Robson*, 15 East, 32, *post*, p. 308.

parol evidence is admissible to show that there was a mistake in the date of a charter-party (*i*), a deed (*k*), or a will (*l*); but the day appointed in a written contract for the performance of a certain act, such as the completion of a purchase, cannot be altered by extrinsic evidence (*m*). Parol evidence is admissible to prove that, owing to a subsequent agreement extending the time for payment, there has been no default within the meaning of a mortgage deed (*n*).

Where a contract for the sale of goods specified no time for removing them, it was held that oral evidence could not be given of a condition that they should be removed immediately, because to admit the evidence would be to vary the contract (*o*).

But it does not follow from the foregoing that whenever a narrative of some event exists in writing, the fact cannot be proved by parol. Thus a marriage may be proved by any one present, although an entry was made in a register. So the fact that A. acted in a certain capacity (*e.g.*, as judge, sheriff, or constable), is sufficient proof, although his appointment was in writing (*oo*).

Again, a written receipt is *primâ facie* evidence of payment; but it is not the only evidence. The payment may, therefore, be proved either by producing the creditor's receipt and proving his signature, or by the oral testimony of the debtor. And the fact that a debtor has given a written promise to pay does not prevent the

(*i*) *Hall* v. *Cazenove*, 4 East, 477.
(*k*) *Payne* v. *Hughes*, 10 Ex. 430.
(*l*) *Reffell* v. *Reffell*, L. R. 1 P. & D. 139.
(*m*) *Stowell* v. *Robinson*, 3 Bing. N. C. 928.
(*n*) *Albert* v. *Grosvenor Investment Co.*, L. R. 3 Q. B. 123.
(*o*) *Greaves* v. *Ashlin*, 3 Camp. 426.
(*oo*) *R.* v. *Gordon*, 1 Leach, C. C. 515. Cf. *Peacock* v. *Harris*, 10 East, 104; *Dickinson* v. *Coward*, 1 B. & Ald. 677; *Collins* v. *Carnegie*, 1 A. & E. 695.

creditor proving that the debtor orally admitted that he owed the money (*p*). Even if there be a written agreement of tenancy, the fact that there is such a tenancy can be proved by parol evidence. But if it be desired to prove who are the parties, what is the rent to be paid and what are the terms of the tenancy, the written document itself must be produced (*q*). If, however, a contract has been established by oral evidence, it is for the adverse party to prove that it was in writing. As BAYLEY, J., said in *R.* v. *Rawdon* (*r*) :—

"There can be no doubt that a party may, by keeping out of view a written instrument, make out by parol testimony a *primâ facie* case of tenancy, and that it then lies on the opposite party to rebut the *primâ facie* case so made out" (*s*).

In an action for infringement of copyright a witness was allowed to state that the infringing photograph was a pirated copy of an original picture painted by Mr. Marcus Stone, which was then in Australia. It was held unnecessary to produce the original picture to establish that the alleged copy was an infringement (*t*). On appeal, Lord ESHER, M.R., remarked :—

"The witness says: 'Looking at the picture which the defendants sold, I say it is exactly like Mr. Marcus Stone's picture.' When he is asked, 'How do you know that?' he answers, 'Because I have seen Mr. Marcus Stone's picture.' That is not secondary evidence, but original evidence. Different kinds of evidence may be used to prove the same fact, and this is another way of proving the fact that the picture which the defendants sold is a copy of the original picture in respect of which there is copyright" (*u*).

(*p*) *Singleton* v. *Barrett*, 2 C. & J. 368.
(*q*) *R.* v. *Kingston-upon-Hull*, 7 B. & C. 611 ; Cockle, 155.
(*r*) 8 B. & C. 710.
(*s*) See *post*, p. 296.
(*t*) *Lucas* v. *Williams & Sons*, [1892] 2 Q. B. 113.
(*u*) *Ibid.*, at p. 116

## CANADIAN NOTES.

### PAROL EVIDENCE RULE.

The Civil Code of the Province of Quebec, article 1,234, contains a prohibition against the admission of parol evidence to contradict or vary a written instrument, and it was held in *Schwersenski* v. *Vineberg*, 19 S. C. R. 243, that this prohibition is not *d'ordre public*, and that if such evidence is admitted at the trial it cannot subsequently be put aside in a Court of Appeal.

On the dissolution of a co-partnership the parties signed a statement showing a certain amount as due to the plaintiff for his share and declaring that, for the sake of peace and quiet and to avoid friction and bother, the plaintiff waived examination of the firm's books, and agreed that the amount so stated should be deemed to be the amount payable by the defendant to the plaintiff. In an action for the amount, the defendants alleged that the plaintiff had verbally agreed that he would not sue upon the account as stated, and that the document should be treated as merely showing what would be payable to him upon the collection of outstanding debts owing to the firm. It was held that, as the effect of this evidence was to vary and annul the terms of the written instrument, it could not be received. *Jackson* v. *Drake et al.*, 37 S. C. R. 315.

Where an agreement was made for maintenance in consideration of the transfer of real property, therein described, the defendant claimed that it was part of the agreement that personal property as well as real estate

should be conveyed. *Held*, that this was an attempt to vary a writing by parol which could not be done, and that it was not a collateral agreement. *Guiou* v. *Thibeau*, 36 N. S. R. 542.

The defendants offered, in writing, to "furnish scows and deliver all the stone required for the Omemee bridge, as fast as you require them for the sum of seventy-five cents per cubic yard," which the plaintiffs, in writing, accepted, "at the price and conditions named." It was held, reversing the decision of the Common Pleas Division, that parol evidence could not be received to show that the delivery was only to take place in case the water along the lake and river routes, over which the stone had to be carried, was of such a height as would enable the defendants to use their steamers in towing the scows. *McNeelly* v. *McWilliams*, 13 O. A. R. 324.

In *McKenzie* v. *McGlaughlin*, 8 O. R. 111, the plaintiff by lease under seal leased to the defendant a shop, save and except certain portions described by metes and bounds. The defendant alleged that prior to his accepting the lease and entering into the consideration of such acceptance, an independent and collateral parol agreement, separate and distinct from and not made part of the lease, was entered into whereby the defendant was to have permission or licence to remove certain rough shelving and to fit up the shop with handsome ornamental show-cases, and so on. It was held that evidence of such agreement was not admissible, as it would add to the written agreement and was not collateral thereto.

Where the defendants gave the plaintiff an acknowledgment in the form, "For value received I promise to pay to James McQueen and Jacob McQueen, or their order, one hundred and two pounds and fifteen shillings currency, to be paid in yearly proportions," it was held that no parol evidence could be admitted of an agreement that the money should not be payable for four years, or

until after the death of the plaintiff's father. *McQueen* v. *McQueen*, 9 U. C. Q. B. 536.

Plaintiff sold to another a property known as the Mill Farm, containing a quantity of woodland, under an agreement in writing, in which the purchaser agreed to pay a portion of the purchase money on the execution of the agreement and the balance in yearly instalments, with interest, subject to the condition that if the purchaser failed to pay any of the instalments with interest as agreed, the payments would be forfeited and plaintiff would be at liberty to resume possession, and subject to the further condition that the purchaser would not cut more than a specified quantity of lumber in any one year. Evidence was tendered to show that all the lumber cut by the purchaser was to be sold and the proceeds, after deducting certain disbursements, paid to the plaintiff on account of the purchase money, and that the title to the land and lumber was to remain in plaintiff until the payments agreed to be made by the purchaser were completed. It was held that this evidence was inadmissible, the effect being to vary a written contract. *Blaikie* v. *McLennan*, 33 N. S. R. 558.

Where a party had entered into a written agreement for the sale for a certain amount of all his right, claim and interest in a certain business, evidence was held inadmissible to prove a prior oral agreement for the sale of the goodwill of the business for a sum in addition to the amount so specified in the written agreement. *Austin* v. *Boone*, 2 Oldright, 149.

In an action against defendant as a shareholder in a company, defendant set up that he was not a shareholder because he signed the stock list on the faith of a parol agreement made with one of the provisional directors of the company that unless he obtained the contract from the company he was not to become a shareholder, but the evidence showed not that the parol agreement made

the obtaining of a contract a condition precedent to his becoming a shareholder, but that defendant's intention and agreement was to become a shareholder forthwith on allotment, and the parol agreement was merely a collateral one as to the effect of his status as a shareholder and his obtaining a contract at a future day. It was held that the defendant was a shareholder. *Newman* v. *Ginty*, 29 U. C. C. P. 34. Affirmed on appeal.

Where certain shareholders of a company sought to restrain a call on stock, on the ground that it was being made in contravention of the terms of a certain unwritten agreement alleged to have been entered into between all the promoters when the company was formed, it was held that evidence of such agreement was inadmissible, since it was contradictory of the written agreement entered into by the plaintiffs when subscribing for their shares, viz., to take stock and pay the calls when duly made. *Christopher et al.* v. *Noxon et al.*, 4 O. R. 672.

The defendants subscribed under seal for capital stock in the plaintiff's company, promising and agreeing with each other, and with the plaintiffs, to pay the full amount of the shares as and when payable. It was held, under the evidence, that there had been a collateral agreement, or representation by the president of the provisional board, that payment would be accepted in goods, and not a subscription conditional on such acceptance, and apparently, if the evidence had shown such a condition made verbally, it could not have varied the unqualified subscription under seal or bound the company. The Court declined to discuss the question whether on the collateral contract so proved the defendants would have any remedy against either the plaintiffs as a company, or Morrison, the president of the provisional board, individually. The defendants were held bound to pay their call on the stock. *Kingston Street Rail. Co.* v. *Foster et al.*, 44 U. C. Q. B. 552.

The plaintiff sued defendants on a contract by them to purchase from him 4,000 barrels of crude petroleum, claiming damages for the loss of property destroyed by an accidental fire, and which he alleged should have been taken by them under the agreement, which bound them to take it as fast as their barrels could be received, emptied and returned. The defendants refused to accept, on the ground that the oil was not of the quality contracted for. *Held*, that evidence was inadmissible, that, in conversation shortly before the written agreement, the defendants spoke of receiving six or seven car loads per week. *Noble* v. *Spencer et al.*, 27 U. C. Q. B. 210.

Under a written contract of sale of a specific article, viz., a gasoline engine with a pump standard, it not being pretended that it did not answer such description, such contract must be taken to cover, as it purported to do, the whole contract between the parties, and parol evidence was not admissible to show a warranty made prior to the entering into of the contract, which was inconsistent with the written warranty, as it would be allowing the admission of parol evidence to vary the written contract, and statements alleged to have been made by the vendors, and acted on by the purchasers, to the effect that the engine would pump sufficient water for a certain number of horses and cattle, were not such as to constitute a separate and independent collateral agreement and admissible as such. *Northy Manufacturing Co.* v. *Saunders*, 31 O. R. 475.

To an action on a note made by defendant jointly with A. and B., the plea was that the note was given for the purchase money of a schooner, sold by plaintiff to A. and B., defendant being their surety; that the plaintiff on such sale guaranteed the vessel to be sound, but she was not sound, but unsafe and rotten, as plaintiff well knew, etc. At the trial, the written instrument of

sale was produced, from which it appeared that the sale was to the defendant alone, and no such guarantee as alleged was contained in it. It was held that verbal evidence of the warranty stated in the plea was not admissible, and apparently also that the defendant could not show in the face of the writing produced that the sale was to A. and B., and not to himself. *Henderson* v. *Cotter*, 15 U. C. Q. B. 345.

Plaintiffs offered defendants a quantity of green cod, which was accepted, the offer and acceptance being in writing, and while the fish were being landed, defendants signed an agreement in writing by which they agreed to buy from the plaintiffs "the cargo of fish now being landed and to pay for the same at the rate of $1.46 per hundred pounds." In an action by the plaintiffs to recover the contract price of the fish, defendants sought to give evidence of a verbal representation at the time of delivery that they were of number one quality. *Held*, that the trial judge was right in refusing to receive such evidence as tending to vary the written contract. *Howard et al.* v. *Cristie et al.*, 33 N. S. R. 367.

The defendant gave a bond to the plaintiff, reciting that he had that day purchased certain land known as the mill property, in the village of P., etc. It was held that parol evidence of the expressions of the parties as to the land intended was inadmissible to support the defendant's construction of the bond. *Greer* v. *Johnson*, 32 U. C. Q. B. 77.

Defendant got from the plaintiff six different sums of money, amounting together to 3,000 dollars, for which he gave receipts; three of these stated that defendant received so much money from plaintiff, loan on oil, usual rate of interest. The remaining three were similar to the others, but concluded, "payable within one year from date, with interest at nine per centum per annum." Defendant set up a parol agreement with

plaintiff by which defendant had the right at any time to require plaintiff to take, in payment of the moneys so lent, the oil which defendant had in plaintiff's hands, at the market price, at the time when defendant so required plaintiff to take the oil.

It was held that such a parol agreement could not be set up to alter the terms of the receipts which showed that such loans were to be repaid in money. *Lancey* v. *Brake*, 10 O. R. 428.

The principle excluding parol evidence to vary an agreement was also applied to the case of an agreement for the use of an invention. The evidence was that plaintiff agreed to prevent any infringement of the patent, and that if he failed to do so, he should not be entitled to any royalties. The agreement contained no such stipulation. The agreement, in this case, was said by the Court to be much more formal than that in question in the case of *McNeelly* v. *Williams*, 13 O. R. 324; *Beam* v. *Merner*, 14 O. R. 412.

*Parol Evidence Rule applied to Negotiable Instruments.*

The parol evidence rule, as applied to negotiable instruments, is illustrated by the case of *Porteous* v. *Muir et al.*, 8 O. R. 127, where it was sought to defend an action on a promissory note, payable on demand, by showing that plaintiff agreed that the defendant should have two years in which to pay it. This was held to be an attempt to vary the writing, and the evidence was held inadmissible.

In an action by an endorsee against an endorser of a note for the price of a piece of land, evidence of a parol agreement, entered into when the note was endorsed, that if the defendant paid the taxes chargeable against the land, the plaintiff would relieve him from liability as an endorser is not admissible. *More* v. *Grosvenor*, 30 N. B. 221.

In *Smith* v. *Squires*, 13 Man. 360, it was held that parol evidence could not be received to show that a person who endorsed a promissory note to another for valuable consideration, stipulated at the time that he was not to be liable on the endorsement, as that would be to contradict the contract which such endorsement by the Bills of Exchange Act imports. This was the judgment of a Court composed of KILLAM, C.J., BAYNE and RICHARDS, JJ.

Defendants, two directors of the Canada Powder Company, placed in the hands of Clarke, their secretary, their promissory note for $8,000, which Clarke deposited with the plaintiffs, having a receipt written under it and signed by their agent, which expressed that the note was to be held by the Bank as collateral security for any unretired paper they might at any time hold of the company. Plaintiffs' agent swore that he took the note upon the understanding expressed in the receipt, which was in Clarke's handwriting, etc. Defendants desired to prove that the note was given in consequence of a doubt as to the power of the Powder Company to become partners to a note and as security only against the want of such power, and until it should be conferred by the Legislature, which was afterwards done. It was held that this evidence was rightly rejected, for that the defendants, having entrusted Clarke with their note, were bound by his agreement, which could not be varied by parol testimony. *The Commercial Bank of Canada* v. *Merritt et al.*, 21 U. C. Q. B. 358.

In *Reed* v. *Reed*, 11 U. C. Q. B. 26, a document was declared on containing a promise to pay a sum certain to a person named, for value received in rent of farm, and evidence was sought to be given of a verbal understanding that the note was not to be enforced until the plaintiff's return or until he should send a power of attorney to someone to collect it. It was held that this was an attempt to vary a writing, and was inadmissible.

*Parol Evidence to add to Will.*

Where a testator devised lot 14, concession 10, in the township of Artemisia, to his two nephews, and, after certain pecuniary bequests, directed the balance to be paid to his relatives, and the evidence showed that testator did not own and never had owned that lot, but that he did own lot 21, concession 10, in the said township, which was not specifically devised by the will, it was held that evidence of the testator's intention, to devise lot 21, in concession 10, to his nephews was inadmissible. *Summers et al.* v. *Summers et al.*, 5 O. R. 110.

In 1862 testator purchased two lots in the township of Mono. In 1863 the township was divided, one of these lots being in the township of Mono, and the other in the new township of Orangeville. In 1866 he made his will, devising all his real estate, situate in the township of Mono. It was held that parol evidence could not be offered to show that testator intended to include the lot which had been placed in Orangeville. The other lot "exactly fitted the words in the will, and the testator had no other property which, at the date of the will, or subsequently, could with accuracy be described as in the township of Mono." *Lawrence* v. *Ketchum*, 4 O. A. R. 92.

*Parol Evidence Rule Distinguished.*

The difference between evidence to vary a written agreement, and evidence to show that what appears to have been a written agreement never came into effect as such, is illustrated by the difference of opinion between OSLER, J., and the majority of the Court in *Brown* v. *Howland*, 9 O. R. 48.

A note had been brought to the defendant, in renewal of a note made by the company, of which one Stockdale was the manager. The defendant signed the note, "per

O. A. Howland," and the name of "William Stockdale, Manager," was below that of Howland, although it seems from the head-note that it was not put there by the defendant. The intention was that the note should be perfected by the stamping of the company's name over the name of Stockdale by the manager. The defendant was the secretary of the company.

*Per* CAMERON, C.J., "The defendant must be treated as maker of the note, extrinsic evidence not being admissible to change its legal effect."

OSLER, J., held that the defendant could not be treated as maker of the note, for the evidence showed that the instrument never was perfected as a note, and that this was no infringement of the rule as to the admission of parol evidence, for its effect was not to alter a note, but to show that the conditions upon which it was to become a note had not been performed.

A plaintiff agreed verbally to sell the defendant a quantity of timber, to be got out by him, upon certain timber limits held by her from the Crown, for 20*s*. per thousand feet, payable on its arrival at Quebec. These limits had formerly belonged to the plaintiff's husband, of whom she was administratrix, and it was agreed, the defendant being a party to the arrangement, that half of the money should be applied towards payment of debts due by the intestate. A written agreement was then signed by the plaintiff as follows:—"Mrs. E. M. Chamberlain, widow, etc., agrees to give Mr. Joshua Smith, of Ottawa, the privilege to cut a raft of timber on her limits on the Mattawa River, this season, at the rate of 10*s*. currency per thousand feet, etc."

The learned judge told the jury that if the whole agreement between the parties had been reduced to writing, and was intended to be put into writing, then the price mentioned, 10*s*. per thousand, must govern, but if the agreement was that the price should be 20*s*. pe

thousand and the parties put only one half in writing, leaving the other part standing on the verbal agreement, then the price was 20*s.* per thousand. It was held by the Court, though with doubt, that evidence of the verbal agreement was admissible, as the writing did not contain, and was not intended to contain, the whole agreement between the parties. *Chamberlain* v. *Smith*, 21 U. C. Q. B. 103.

Under a verbal contract between plaintiffs and the defendants the latter agreed to carry certain petroleum oil of the plaintiffs in covered cars, and on the faith of its being so carried it was delivered to the defendants, but was carried in open cars, and in consequence a large part of it was lost. On the delivery of the oil to the defendants the plaintiffs signed a request note which said nothing about covered cars, and under which the goods were stated to be sent, subject to certain terms and conditions therein. It was held by the Ontario Common Pleas that the verbal contract in no way contradicted the writing, and must be incorporated with it, so that the whole contract must be read as a contract for carriage in covered cars. This case came before the Appeal Court, where it was held by Moss, J., that the parol evidence was admissible, as the nature of the transaction showed that the parties did not intend the document to contain the whole contract. BURTON, J., held it inadmissible, as there was no sufficient evidence to show that the parties did not so intend.

The Appeal Court did not have to decide as to the admissibility of the evidence, the case having been decided on another point. *Fitzgerald et al.* v. *Grand Trunk Rail. Co.*, 27 C. P. 528; 28 C. P. 586; 4 O. A. R. 601.

In *MacKenzie* v. *McMullen*, 16 Man. 11, the principle of *Erskine* v. *Adeane* was followed, and it was held that where a verbal agreement had been made for the sale of horses or other chattels, and the purchasers afterwards

signed a lien note securing payment with the usual provision of such a note, evidence might be given of representations or conditions of the sale, or to prove a warranty, when it appeared that it was not intended to include in the lien note all the terms of the agreement between the parties.

A discussion of the parol evidence rule with special reference to the cases of *Erskine* v. *Adeane*, *Lindley* v. *Lacey*, and *Morgan* v. *Griffith* will be found in the report of *Byers* v. *MacMillan*, 15 S. C. R. at 194. In this case an agreement was made in writing by which Byers contracted to cut for Andrews a quantity of wood and haul and deliver the same at a time and to a place mentioned, Andrews to pay for the same on delivery. The agreement made no provision for securing to Byers the payment of his labour beyond the agreement for the price, but on the trial of the action the defendant set up a parol agreement with Andrews, made at the same time that the written contract was signed to the effect that if the amount due him for cutting and hauling wood for the amount specified was not paid by the date mentioned in the agreement, the defendant would be entitled to hold the wood as security and to sell it to realise what was then due.

It was held, affirming the decision of the Supreme Court of Manitoba, 3 Man. 361, Henry, J., dissenting, that evidence of this verbal agreement was admissible on the trial of an action of replevin of the wood by an assignee of Andrews. *Byers* v. *MacMillan*, 15 S. C. R. 194.

The defendant was a shareholder in a company of which some of the capital stock subscribed for had not been taken up, and these shares being offered to the shareholders at 60 cents on the dollar, defendant took some of them. On March 23rd the plaintiff agreed to take some of the defendant's shares at 67½ cents

on the dollar, and on March 25th the following transfer was executed, "For value received W. E. S. transfers and assigns to J. C. fourteen shares on each of which has been paid five hundred dollars, amounting to the sum of seven thousand dollars in the capital stock of the Lake Superior Navigation Company, etc." It was held that evidence was admissible to show that at the time of the sale on the 23rd the plaintiff was told that these shares had been issued at 60 cents, so that they were paid up in full only as between the directors and the shareholders, for this was evidence to show what was the subject-matter of the contract and that the transfer was not the concluded bargain between the parties. *Clark* v. *Sandford*, 25 U. C. C. P. 256.

D. delivered a document containing written instructions to sell a coal mine on certain terms and a promise to pay H. a commission of five per cent. on the selling price, the commission to include all expenses. H. proceeded to sell the mine and incurred certain expenses. Held, *per* WALKEM, J., that evidence was admissible to show that contemporaneously with the delivery of the document to H. he stated that the mine could not be sold at the price named and that D. agreed to pay his expenses if the sale was not made. Held, *per* McCOLL, J., that such evidence was inconsistent with the written instrument, and, therefore, not admissible. On appeal, however, it was held that the question whether the written instructions constituted the whole contract should have been submitted to the jury. *Harris* v. *Dunsmuir*, 6 B. C. 505.

The defendant and another named Hynd contracted with plaintiffs for the purchase of all their claims against an incorporated company and their interest in the same, and, as far as they could sell it, their control over the charter of the company for three thousand dollars. Defendant and Hynd subsequently gave the plaintiffs a

written promise to pay the price agreed upon "for the charter" as expressed in writing, in the following form: "Two years after date we jointly and severally promise to pay Hugh Miller, Joseph Davids and John Ritchie, junr., the sum of three thousand dollars for the charter of the Metropolitan Gas Company. Mem.: This is to remain in the hands of R. A. Harrison, Esquire, until maturity, as security, etc."

The question was whether the plaintiffs were at liberty to explain what the parties meant and intended by the use of the words "for the charter" in this writing, plaintiffs claiming that they were not bound down to the rigid construction of the word "charter," and were at liberty to show a verbal arrangement that what was bargained for was the giving by the plaintiffs to the defendant and Hynd of the books, plans, and other papers relating to the company and all the plaintiffs' control of and claims of every kind against the company, and so forth. It was held that plaintiffs were at liberty to give the evidence proposed. The judgment seems to depend partly on the principle that evidence can be given to explain the meaning of the term "charter," and partly on the principle that the memorandum was not really intended to embody in full the agreement of the parties. *Per* A. WILSON, J., "The subject of the contract sued upon is not the sale of the charter, the subject is the sum of three thousand dollars which the defendant agreed to pay, and the charter is the consideration for that promise. There is perhaps, therefore, more reason for permitting evidence to explain the meaning and nature of the consideration than if it were the very subject of the action." *Miller et al.* v. *Thompson*, 16 U. C. C. P. 513.

Evidence was given of a verbal warranty on a sale of a vessel, in connection with which a mortgage had been given. An instrument annexed to the mortgage recited that it was executed for the purpose of executing the

true agreement between the parties, and the instrument then set out the terms of payment differing from those in the registered mortgage. The defendants swore that they would not have bought without the warranty, and would not otherwise have given over one-third of the price. It was held that evidence of the verbal warranty was admissible, that it did not vary or alter the writings, and that the declaration that the instrument was made to evidence the true agreement referred merely to the terms of payment. *La Roche* v. *O'Hagan et al.*, 1 O. R. 300.

In an action on a charter-party, the charter-party was proved and also that the vessel did not call at S. for orders as required. Defendants offered evidence to show a verbal agreement, made contemporaneously with the signing of the charter-party, and while one of the defendants, by whom it was signed as agent for the other owners, was in the act of handing it over to the plaintiff, to the following effect: "Now, you are not to have this charter-party, or it is not to be binding, if the vessel does not go to S.," to which one of the plaintiffs said, "Yes," or words to that effect, and upon plaintiffs assenting to accept it upon these terms, he gave them the charter-party. This evidence was rejected. It was held, KING J., *dubitante*, that the evidence should have been received, that the object of it was not to vary the terms of a written agreement that the parties had already entered into, but to show that the writing which they had signed, but which was not then a complete agreement, was not to operate at all unless the vessel called at S. *Watters* v. *Milligan*, 22 N. B. 622.

The plaintiff, wishing to speculate in shares on the Montreal Stock Exchange, employed the defendants to purchase certain shares for him on margin. He knew that the defendants would employ a broker in Montreal as their agent, and that the latter would make the actual purchases, advance the money required, and hold the

shares in his own name as security. In an action by the plaintiff to recover back the sums paid for the margin, as moneys paid on a consideration which had failed, plaintiff attempted to rely on the terms of the bought notes received from the defendants as follows: "We have this day bought for your account, etc.," as evidence that the defendants should have purchased and held the shares in their own name. It was held that the true agreement between the parties could be given, notwithstanding the language of the bought note. *Jackson* v. *Allen*, 11 Man. 36.

Plaintiff wrote to defendants, proposing to sell them a vessel for a certain sum, the proportion of premium on the insurance then effected, during the time the policy had yet to run, to be paid by the purchaser in cash. The proposition was accepted verbally, and a regular assignment of the vessel executed to the defendants in which no mention of the insurance was made. *Held*, that the plaintiff might nevertheless recover the premium from the defendants. *Mason* v. *Brunskill et al.*, 15 U. C. Q. B. 300.

By an agreement under seal, B., who held nearly all the shares in the Caraquette Railway Company, agreed to transfer four-ninths of his shares to C., M. and O., for which they agreed to pay him $27,000 and four-ninths of the survey and preliminary expenses of the company, and B. was authorised to sell the whole stock and assets of the company for a sum sufficient to give C., M. and O. a profit of at least $2,500. It was held that evidence was admissible to show that it was also verbally agreed that if B. could not affect the sale, he and C., M. and O. themselves were to construct and operate the road and divide the profits in proportion to the stock held by them. *Burns* v. *Chishol*, 32 N. B. 588.

Oral evidence was held admissible of a defence to a promissory note, by personal representatives of the payee

against the maker, that at the time of making the note an oral agreement was entered into between the payee and the maker which had been fully performed, that if the latter would pay interest on the note and, although not liable to do so, would support for life a relative of the former, the note should be considered paid. The action was brought after the complete performance of the agreement. *McQuarry* v. *Brand*, 28 O. R. 69.

To an action on certain promissory notes and bills of exchange and on the common counts against the defendant as jointly liable with one Hobb, defendant pleaded satisfaction and discharge of plaintiff's claim before action by executing with Hobb an assignment of the joint effects to plaintiff and another for the benefit of creditors and that plaintiff accepted this in full satisfaction of the cause of the action in question. On the trial parol evidence was admitted of the agreement to accept the assignment in satisfaction and discharge. It was held that this had been properly received, the effect of it being not to vary the terms of the writing, but merely to prove a collateral agreement. *Whitney* v. *Wall*, 17 U. C. C. P. 474.

House property was sold by a written contract for two thousand dollars, the parties to the contract at the same time verbally agreeing that, until payment of the purchase money, the vendor would insure the property for that sum, which he did with the defendants by policy, insuring against damage by fire, etc. It was held that evidence of the parol contract to insure was admissible. *Keefer* v. *Phœnix Ins. Co.*, 29 O. R. 394.

The rule against varying by parol evidence a document in writing does not apply to a receipt.* Therefore, where the document was in the following form, "Received

* See, however, *Commercial Bank, etc.* v. *Merritt et al.*, *supra*, p. 195*h*. A document may be a receipt and also embody the terms of a contract. As a receipt *simpliciter* it may be open to contradiction, while conclusive as to the terms of the contract.

from J. L. for T. the sum of five hundred dollars on account of elm and soft maple, etc.," on a lot described in the receipt, parol evidence was admitted to show that one of the conditions of the sale was that the timber should be removed in two years. *Steinhoff* v. *McRae*, 13 O. R. 546.

A guarantee for the price of goods furnished from a Birmingham house was addressed to Messrs. Irving, Van Wart & Co., New York. They were agents in New York for the Birmingham house referred to, whom the defendant knew, but they had no other connection with them. It was held, that the Birmingham firm could sue upon the guarantee if intended for their benefit, which might be proved by parol evidence. A guarantee of this description may be sued upon by those for whose benefit it was in fact given, though their names may not appear in it, and the intention of the guarantee in that respect may be made out by oral evidence. This seems to be a relaxation of the rules of evidence made in favour of commercial dealers. *Per* ROBINSON, C.J., delivering judgment of the Court. *Van Wart et al.* v. *Carpenter*, 21 U. C. Q. B. 320.

In an action on an agreement, as follows, due to William McAdy 100 dollars payable in lumber, on demand at the Stinson mill, it was held, that parol evidence was admissible to show what kind of lumber the parties intended, namely, culls and joists. *McAdy* v. *Sills*, 24 U. C. C. P. 606.

A party in contracting offered to "take the stuff at a valuation" and pay a stipulated amount. It was held that the meaning of the word "stuff" might be explained by parol evidence. *Johnston* v. *Wilson*, 28 U. C. C. P. 432.

# CHAPTER IV.

## WITNESSES.

### COMPETENCY: OATH AND AFFIRMATION.

EVERY sane person is a competent witness in both civil and criminal cases, except a child who does not understand the nature of an oath. In some criminal cases a child who does not understand the nature of an oath is allowed by special statutes (*a*) to give testimony unsworn. In all criminal cases the husband or wife of the accused is a competent witness; but only by consent of the accused, except in a few special cases (*b*).

Every person competent to give evidence can, generally, be compelled by the Court to give evidence in civil, but not always in criminal (*c*), proceedings. A person in this position is described as a "competent and compellable witness."

Any objection to the competency of a witness is for the decision of the judge. If there is any doubt on the matter the judge will examine into the competency of the witness tendered before allowing him to be sworn; he will if necessary hear witnesses for this purpose (*d*).

(*a*) See *post*, p. 215.
(*b*) See *post*, p. 209.
(*c*) Cf. *post*, pp. 210, 211.
(*d*) This was called the examination on the *voir dire*, *i.e.*, *vrai dire*.

In no branch of our law, perhaps, have more important or more beneficial changes been made than in this portion of the law of evidence. A hundred years ago the mouths of all persons who knew most about the matters in dispute in any legal proceeding were closed. No one could give any evidence if he or she had the slightest interest in the result of the litigation.

In any civil action neither the plaintiff nor the defendant could be heard (*e*). If there were several plaintiffs or defendants, the evidence of them all was excluded; so was the evidence of their respective husbands and wives. It was supposed that they might commit perjury, because they had some remote interest in the damages or the property sought to be recovered in the action. If a man insured his life, and died, and the insurance company resisted the claim made by his executors on the ground that the deceased had shortened his life by habitual intemperance, no member of his family could give evidence as to the real habits of the deceased, unless he or she was excluded from all benefit in his estate. The same rule prevailed in criminal proceedings. Neither the accused nor the wife or husband of the accused could give any evidence. If two or more prisoners were being tried together on a joint indictment, none of the prisoners or their wives or husbands could give evidence against or in favour of any one of them, nor could any person who would be pecuniarily benefited by the prisoner's conviction. Thus a merchant whose name had been forged to a bill of exchange could not go into the witness-box at the trial of the forger and swear that he never signed the document; he had to sit by in silence while his acquaintances, who had no interest in the result of the proceedings,

(*e*) In the Court of Chancery, it is true, the plaintiff after filing a bill could administer interrogatories to the defendant and compel him to answer them on oath; but he could not cross-examine the defendant on his answer or call him as a witness at the trial: see "Century of Law Reform," pp. 181—187.

were called to offer their conjectures as to the handwriting (*f*). As COCKBURN, C.J., said :—

"People were formerly frightened out of their wits about admitting evidence, lest juries should go wrong. In modern times we admit the evidence, and discuss its weight" (*g*).

Moreover, in those days no witness might give evidence unless he first took an oath in such form as would bind his conscience. But there were many most scrupulous and veracious persons who, taking too literally the admonition, "But I say unto you, swear not at all," refused on conscientious grounds to take an oath, even at the bidding of an officer of the State. There were others who had no religious belief, and to whom therefore an oath was meaningless. Both classes of persons were excluded from the witness-box, though they were ready and willing to state the truth, the whole truth, and nothing but the truth.

And not content with excluding witnesses on the ground of *interest* and of their religious opinions or the absence of them, our Courts, following the Roman law, excluded the evidence of all "infamous" persons, or those who had been convicted of treason, felony, or certain misdemeanours.

But anyone who objects on conscientious grounds to take an oath is now permitted to make a solemn affirmation that he will speak the truth; and it is no longer an objection to the competency of a witness that he is of infamous character, or that he is a party to the proceedings, or in any other way interested in the result.

It is necessary to state briefly how these important changes were effected.

Only when the nineteenth century was well advanced was it that the Legislature began to recognise that the inquiry after truth in courts of justice was often, and

(*f*) This absurdity in the special case of forgery was removed by a statute of 1828.

(*g*) *R.* v. *Overseers of Birmingham*, 1 B. & S. 767.

needlessly, obstructed by the rules of evidence then in force.

The first important inroad on the old law was made in 1833, when the incompetency of persons *in pari jure* with the parties was abolished (*h*). Then came Lord Denman's Act (*i*) which enacted that no person offered as a witness should thereafter be excluded from giving evidence by reason of incapacity arising from crime or interest.

This Act, however, left the actual parties on the record and their husbands and wives incompetent witnesses. When, however, the new County Courts were created in 1846, the parties were allowed to give evidence in all cases in these Courts (*k*). Five years later the incompetency of the parties was removed in all courts by the Law of Evidence Amendment Act, 1851 (*l*), which enacts that—

"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 (*m*) to give evidence, either *viva voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

But it was by s. 4 of this Act provided, that nothing therein contained should apply to proceedings instituted, in consequence of adultery, or to actions for breach of promise of marriage.

The Law of Evidence Further Amendment Act, 1869 (*n*), abolished these two exceptions. After repealing

(*h*) 3 & 4 Will. IV. c. 42.
(*i*) 6 & 7 Vict. c. 85.
(*k*) 9 & 10 Vict. c. 95.
(*l*) 14 & 15 Vict. c. 99.
(*m*) "Compellable" means "compellable by process of law," *Kops* v. *The Queen*, [1894] A. C. at p. 652.
(*n*) 32 & 33 Vict. c. 68.

s. 4 of the last-mentioned Act, the Act of 1869 (s. 2), renders the parties to actions for breach of promise of marriage competent witnesses; enacting, at the same time, that the uncorroborated testimony of the plaintiff is not to be sufficient proof of the promise to marry; his or her testimony must be corroborated by some *material evidence* in support of the alleged promise (*o*). Section 3 of the same Act renders the parties to proceedings instituted in consequence of adultery, and the husbands and wives of such parties, *competent* witnesses; with the proviso that no witness in any proceeding, whether a party or not, is to be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery (*p*), unless such witness has already given evidence in the same proceeding in disproof of such adultery (*q*). It has now been decided that this section relates only to the adultery charged in the petition (*r*). Hence, the husband and wife are now both competent witnesses in proceedings instituted in consequence of adultery, but they cannot be compelled to answer questions tending to prove their guilt. This matter is dealt with more fully under the head of "Privilege" (*s*).

It was held by two judges of the Common Pleas Division, in *Guardians of Nottingham* v. *Tomkinson* (*t*), that in proceedings by the guardians of the union against a husband to compel him to maintain a child of his wife born in wedlock, which he refused to maintain on the ground that he was not its father, the

(*o*) See *post*, Book III., Chap. III.
(*p*) See *S.* v. *S.*, [1907] P. 224.
(*q*) Although these statutes have rendered parties to actions for breach of promise of marriage, and the parties to proceedings taken in consequence of adultery, and their husbands and wives competent witnesses, it is not clear that they are also compellable witnesses. The better opinion is that they are both.
(*r*) *Hall* v. *Hall*, 25 T. L. R. 524.
(*s*) See *post*, p. 228.
(*t*) 4 C. P. D. 343.

evidence of the husband was inadmissible to prove non-access to his wife, as the proceedings were not "proceedings instituted in consequence of adultery" within the meaning of s. 3 of the Act. In *Re Rideout's Trusts* (*u*), which was a petition for the payment out of a fund in court to a father and five children, the evidence of the father was tendered before JAMES, V.-C., to prove non-access to his wife so as to bastardise the respondent, a child of hers, on the ground that the proceedings were "instituted in consequence of adultery" within the meaning of the Act. The Vice-Chancellor said that he must have other evidence. But it is not clear from the reports whether he intended to exclude the evidence of the father or not. HALL, V.-C., in a similar case of *Re Yearwood's Trusts* (*x*), considered that the Vice-Chancellor intended not to exclude the evidence, and therefore he (HALL, V.-C.) admitted the evidence of the father in the case before him. The judges of the Common Pleas Division, however, were of opinion that JAMES, V.-C., intended to exclude the evidence, and that the case of *Re Rideout's Trusts* was therefore in favour of the decision which they came to, and that the decision in *Re Yearwood's Trusts* was founded upon a mistaken view of *Re Rideout's Trusts*. In *Re Walker* (*y*), which was an application by an infant for maintenance, resisted on the ground that the infant was illegitimate, KAY, J., and in *Burnaby* v. *Baillie* (*z*), which was an action by a husband, who had been divorced from his wife, for a declaration that there was no legitimate child of the marriage, NORTH, J., followed *Guardians of Nottingham* v. *Tomkinson*; the *ratio decidendi* in both the last cited cases being that the proceedings were not "instituted in consequence of adultery" within the meaning of the Act of 1869.

(*u*) L. R. 10 Eq. 41.
(*x*) 5 Ch. D. 545.
(*y*) 34 W. R. 95.
(*z*) 42 Ch. D. 282.

It has long been held that a prosecutor, in a criminal proceeding, is a competent witness against a prisoner; and, although there were formerly exceptions to the rule, they have all been removed by Lord Denman's Act and other statutes. The husband or wife of a prosecutor is a competent witness either for the prosecution or for the defence.

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

At common law, a defendant in a criminal charge, so far from being bound or competent to give evidence against himself, was never bound even to answer the questions put to him upon his examination before a magistrate. Section 3 of the Evidence Amendment Act, 1851 (*b*), confirms this state of the law; and enacts that—

"Nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband."

It is a principle of the common law that no man is bound to criminate himself. But a prisoner, when arraigned, may, if he thinks fit, plead guilty to the charge, and such a formal confession, although not irrevocable (*c*), is, unless revoked, tantamount to a conviction. Again, though a prisoner cannot be

(*a*) 6 & 7 Vict. c. 85.
(*b*) 14 & 15 Vict. c. 99.
(*c*) *R.* v. *Verney*, 73 J. P. 288.

compelled (*d*) to make a statement before the magistrates, yet he frequently does so, even after the statutory caution (*e*) has been given, and it is open for the jury to convict him on the admissions made in such a statement. And, as we have seen (*f*), his voluntary statements may also be given in evidence against him.

Legislative inroads were from time to time made upon the principle *nemo tenetur seipsum prodere*. Many statutes, passed after 1851, enacted that on the trial of the offences created by them, the accused persons and their husbands and wives should be competent witnesses. But their provisions in this respect have been superseded by the Criminal Evidence Act, 1898, with one exception, namely, the first section of the Evidence Act, 1877 (*g*), which still remains law; it is as follows:—

"On the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant shall be admissible witnesses and compellable to give evidence."

Lastly, in 1898, was passed the Criminal Evidence Act (*h*), which applies to all criminal proceedings (*i*). It makes every person charged with an offence a competent witness "for the defence at every stage of the proceedings"; but he cannot be called except on his own application (*k*). It is the duty of the presiding judge, however, to inform him that he has a right to give

(*d*) Although a prisoner cannot be compelled to make a statement before the magistrates, yet at the subsequent trial the counsel for the prosecution can comment on the fact that he said nothing and reserved his defence: *R.* v. *McNair*, 25 T. L. R. 228.

(*e*) See *ante*, Book I., Chap. V.

(*f*) *Ibid.*

(*g*) 40 & 41 Vict. c. 14.

(*h*) 61 & 62 Vict. c. 36; *Charnock* v. *Merchant*, [1900] 1 Q. B. 474. Consequently the provisions as to cross-examination in the Act of 1898 now govern all criminal proceedings.

(*i*) Proceedings for extradition have been held to be within the Act: *R.* v. *Kams*, Times, April 28th, 1900.

(*k*) Criminal Evidence Act, 1898, s. 6 (1).

evidence if he wishes so to do (*l*). Where the only witness to the facts of the case called by the defence is the person charged, he must be called as a witness immediately after the close of the evidence for the prosecution (*m*). If he elects to go into the witness-box and give evidence on oath, he is liable to be cross-examined and cannot refuse to answer any question on the ground that it would criminate him as to the offence charged, but his cross-examination as to other offences and as to character is governed by the provisions of s. 1 (f) of the Act, which runs as follows:—

"A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i.) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or the nature or conduct of the defence is such as to involve imputations (*n*) on the character of the prosecutor or the witnesses (*o*) for the prosecution; or

(iii.) he has given evidence against any other person charged with the same offence" (*p*).

But note that where the cross-examination addressed to the prisoner tends to show that he is guilty of the offence charged, it cannot be excluded merely on the ground that it also shows that he had previously been guilty of other offences (*q*).

The counsel for the prosecution may comment upon any evidence given under the Act by a person charged (*r*), but he must not comment upon the failure of any such person, or of the wife or husband of such person, to give

(*l*) *R.* v. *Warren*, 25 T. L. R. 623.
(*m*) 61 & 62 Vict. c. 36, s. 2.
(*n*) See the remarks of Lord ALVERSTONE, reported in 69 J. P. p. 556.
(*o*) *R.* v. *Marshall*, 63 J. P. 36.
(*p*) *R.* v. *Hadwen*, [1902] 1 K. B. 882.
(*q*) *R.* v. *Chitson*, [1909] 2 K. B. 945.
(*r*) *R.* v. *Gardner*, [1899] 1 Q. B. 150.

evidence (*s*). But it has been held that the judge may comment upon such failure (*t*). There are, however, many cases in which it would not be expedient or calculated to further the ends of justice so to do (*u*); the matter must be left to the discretion of the judge in the particular case. If he thinks fit to do so, he should also point out to the jury that it is still for the prosecution to make out the case against the prisoner, and that, if it be not made out, the latter's failure to offer himself as a witness cannot legally turn the scale against him.

We have stated that the Act makes the accused person a competent witness "for the defence at every stage of the proceedings." But to this there is obviously one exception. The accused cannot give evidence before the grand jury; for the grand jury hears no evidence for the defence (*x*), nor does the Act entitle the accused to give evidence on oath in mitigation of punishment after he has pleaded guilty (*y*). The prisoner may, however, give evidence on oath both at the preliminary hearing before the magistrates and on his trial before the petty jury. If he has elected to give evidence before the magistrate, his deposition may be put in against him, even though he refuses to go into the witness-box at his trial (*z*). Nevertheless it has been laid down that, where a prisoner is about to be committed for trial, the justices should impress upon him the advisability of giving evidence in defence—if he intends to set up a defence—at the earliest possible stage, otherwise the value of the evidence in defence is, it is said, much lessened, and he will lose the benefit of the Poor Prisoners' Defence Act, 1903 (*a*).

(*s*) 61 & 62 Vict. c. 36, s. 1 (b).
(*t*) *R.* v. *Rhodes*, [1899] 1 Q. B. 77.
(*u*) *Kops* v. *The Queen*, [1894] A. C. 653.
(*x*) *R.* v. *Rhodes*, *supra*.
(*y*) *R.* v. *Hodgkinson*, 64 J. P. 808.
(*z*) *R.* v. *Bird*, 79 L. T. 359; *R.* v. *Boyle*, 20 T. L. R. 192.
(*a*) 3 Edw. VII. c. 38; see *R.* v. *Humphries*, 67 J. P. 396; and *R.* v. *McNair*, 25 T. L. R. 228.

At the trial, if the person charged is the only witness as to the facts called by the defence, it is provided by s. 2 of the Act that he must give his evidence immediately after the close of the evidence for the prosecution. But if other persons are to be called for the defence to speak, not merely as to the character of the accused, but as to the facts of the case, the person accused may give his evidence with these other witnesses after the opening speech of his counsel.

Where transactions are proved against a prisoner which are capable of an innocent explanation, and he could have given it, and there is *primâ facie* evidence that he is acting illegally, the jury may draw their own conclusions from the fact that he does not give evidence on his own behalf (*b*).

The fact that the prisoner has given evidence does not entitle the prosecution to a general reply (*c*). But if the prisoner calls anyone else—even his own wife—as a witness to the facts of the case, the prosecution will have the last word to the jury.

The proviso, permitting certain questions to be asked the prisoner, if he gives evidence, when the "nature or conduct of the defence" involves an imputation on the prosecutor or his witnesses, has received a judicial interpretation.

Thus, where the prisoner, on being cross-examined, was asked if the evidence of the prosecutor was true and replied, "It is a lie and he is a liar," it was held that the answer was merely an emphatic denial of the charge, and consequently did not entitle the prosecution to cross-examine as to his previous offences and character (*d*).

Nor will the prosecution be entitled to do so, if the cross-examination of the witnesses for the prosecution

(*b*) *R.* v. *Corrie*, 68 J. P. 294; and see *R.* v. *Stoddart*, 73 J. P. 348.
(*c*) Criminal Evidence Act, 1898, s. 3.
(*d*) *R.* v. *Rouse*, [1904] 1 K. B. 184; *R.* v. *Grout*, 26 T. L. R. 60.

or the evidence given by the prisoner does not amount to "more than developing his defence . . . and seeking to substantiate that defence by means of admissions from" the witnesses for the prosecution, then the prisoner cannot be cross-examined as to his previous offences or character (*e*). So if, on an indictment for rape, the prisoner elects to give evidence, and swears that the prosecutrix consented to the connection, this is not such an imputation on her character as will entitle the prosecution to prove that the prisoner has been previously convicted (*f*).

"To say that a man who, in clearing himself, alleges consent on the part of the prosecutrix, brings himself within s. 1 (f) (ii.) of the Criminal Evidence Act, 1898, is, to my mind, a total subversion of the principle of the Act. It is otherwise if he goes out of his way to make an attack upon the prosecutrix, founded on matters outside the pith and substance of the charge. The statement that the prosecutrix consented is a defence to the charge. The prisoner must not be prevented from denying on his oath that what he did was against her consent" (*g*).

And where a prisoner, in his evidence, alleged that his identification at the police station was not to be relied on, because the persons brought to identify him had been coached by a police officer, who was called as a witness for the prosecution, and ended by asserting, under cross-examination, "It is not an honest case at all. It is a got up affair," it was held that he ought not to have been cross-examined as to previous convictions (*h*). CHANNELL, J., in delivering the judgment of the Court in the Court of Criminal Appeal, said (*i*):—

"If the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case,

(*e*) *R.* v. *Bridgwater*, [1905] 1 K. B. 131, at p. 134; *R.* v. *Jones*, 26 T. L. R. 59; and see the remarks of Lord ALVERSTONE noted in 69 J. P. p. 556.
(*f*) *R.* v. *Sheean*, 72 J. P. 232.
(*g*) *Per* JELF, J. (on circuit), *ibid.* at p. 232.
(*h*) *R.* v. *Preston*, [1909] 1 K. B. 568.
(*i*) *Ibid.* at pp. 575, 577.

but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner as to his antecedents and character with the view of showing that he has such a bad character that the jury ought not to rely upon his evidence. . . . With regard to the decision of JELF, J., in *R.* v. *Sheean* (*j*), we desire to express no opinion upon that case and to leave it open for future consideration, as there are special considerations applicable to a charge of rape."

Where the prisoner giving evidence alleged that the offence was really committed by one of the witnesses for the prosecution, it was held that the prosecution was then entitled to cross-examine the prisoner as to her previous offences and bad character (*k*).

There may be some difficulty in determining what is a criminal proceeding as distinguished from a civil proceeding. This question arose in *Attorney-General* v. *Radloff* (*l*), which was an information for penalties under the repealed Prevention of Smuggling Act, 1845 (*m*); the defendant offered himself as a witness, and the Court was divided as to his competency. It was held by POLLOCK, C.B., and PARKE, B., that he was not a competent witness, because it was a criminal proceeding punishable on summary conviction; but PLATT, B., and MARTIN, B., held it to be not of a criminal nature, and that the defendant was a competent witness. The view of PLATT, B., appears to contain the true solution of all such difficulties:—

"What is a civil proceeding as contradistinguished from a criminal proceeding? It strikes me that the true test is to see if the subject-matter be of a personal character; that is, if the proceeding relates to goods or property which it is sought to recover by legal proceedings, that is a *civil* proceeding; but if it is one which may at once affect the defendant personally, by the imprisonment of his body in the event of a verdict of guilty being pronounced against him as a public offender, that is what I consider a *criminal* proceeding. . . . Now, although informations of this kind by the Attorney-General may by some be

(*j*) 72 J. P. 232.
(*k*) *R.* v. *Marshall*, 63 J. P. 36.
(*l*) 10 Ex. 84.
(*m*) 8 & 9 Vict. c. 87.

considered criminal proceedings, I rather deem them in the nature of civil proceedings, and like the old actions to recover penalties under the Game Laws, which we all remember were civil proceedings. . . . Here the object is to recover money—to recover that which, by the law, is made a debt."

The Crown Suits Act, 1865 (*n*), s. 34, removed all doubt as to proceedings on the revenue side of the Court of Exchequer (*o*) by making the 14 & 15 Vict. c. 99, ss. 2, 3, and the 16 & 17 Vict. c. 83, applicable to such proceedings, which, for the purpose of these enactments, are not to be deemed criminal proceedings (*p*). Similar doubts were raised in bastardy cases as to the competency of the putative father to be sworn as a witness on his own behalf; but ERLE, J., held him to be competent, on the ground that the proceedings on an affiliation order are of a civil, and not of a criminal nature (*q*). This view is confirmed by the language of Lord CAMPBELL in another case (*r*), in which the proceedings against the defendant were for a breach of the Game Laws, viz., for using snares for game without having a certificate. The inclination of the Court in this case was, to hold all proceedings to be of a criminal nature when the judgment assumes the form of a fine, which may be enforced by imprisonment. The test, according to Lord CAMPBELL, in such cases seems to be to consider whether it is sought to recover a sum of money in the nature of a debt from a person, as in bastardy cases; or to inflict punishment of an exemplary and public nature.

### *Husbands and Wives.*

In civil cases, previously to the Evidence Amendment Act, 1853 (*s*), husbands and wives were not

(*n*) 28 & 29 Vict. c. 104.
(*o*) Now, of the King's Bench Division.
(*p*) *R.* v. *Hausmann*, 73 J. P. 516.
(*q*) *Ex parte Crowley*, 24 L. T. 244.
(*r*) *Cattell* v. *Iveson*, E. B. & E. 91.
(*s*) 16 & 17 Vict. c. 83.

competent to give evidence for or against each other (*t*). But that Act rendered husbands and wives competent and compellable, in all *civil* cases, to give evidence "on behalf of any or either of the parties to the said suit, action, or proceeding." But neither husband nor wife is made compellable to disclose any *communication* whatsoever made to him or her by the other during marriage (*u*). These provisions were, by the Act, not to apply in criminal cases, nor in proceedings instituted in consequence of adultery; but, as stated above, the Evidence Further Amendment Act, 1869, made the husbands and wives of parties to proceedings instituted in consequence of adultery competent witnesses (*v*).

In criminal cases the old rule was that husbands and wives were not competent to give evidence for or against each other (*w*), and this rule prevented such witnesses from being examined either as to circumstances that happened before marriage, or as to the fact of marriage. Nor could a wife or husband be a witness for or against any person who was indicted jointly with the husband or wife (*x*); so, on an indictment for a conspiracy, the wife of one of the conspirators formerly could not give evidence in favour of the others; because their acquittal must enure to the benefit of the husband (*y*). This rule was preserved by s. 3 of the 14 & 15 Vict. c. 99, which provided that nothing contained in that Act should on any criminal proceeding, render any husband competent or compellable to give evidence for or against his wife, or any wife competent, or compellable to give evidence for or against her husband; and by the Evidence Amendment Act, 1853 (*yy*), which provided that nothing

(*t*) *Barbat* v. *Allen*, 7 Ex. 609; *Stapleton* v. *Crofts*, 18 Q. B. 367.
(*u*) See further hereon, *post*, p. 229.
(*v*) See *ante*, p. 200.
(*w*) Co. Litt. 6 b.
(*x*) *R.* v. *Thompson*, L. R. 1 C. C. R. 377.
(*y*) *R.* v. *Locker*, 5 Esp. 107.
(*yy*) 16 & 17 Vict. c. 83.

therein should 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, or in any proceeding instituted in consequence of adultery (*z*).

Statutory exceptions, however, were made to this rule. By various Acts of Parliament the husband or wife of a person charged with an offence under such Acts was made a competent and in some cases a compellable witness. And now, by the Criminal Evidence Act, 1898 (*a*), the wife or husband of a person charged with any criminal offence is made a competent witness for the defence at every stage of the proceedings (*b*); but such a witness cannot be called except on the application of the person charged, unless the offence is under one of the six enactments mentioned in the schedule to the Act (*c*), or in cases where at common law the wife or husband of a person charged can be called without the consent of such person (*d*). Communications between husband and wife during marriage are expressly protected from compulsory disclosure by the Act (*e*).

In all cases where the husband is charged with a personal injury to the wife, or the wife with a personal injury to her husband, the injured party is at common law a competent witness against the other. Thus, when a husband was indicted for assisting another to commit a rape on his wife, she was held entitled to give evidence against him (*f*). This is confined to cases of personal injuries affected by violence or coercion, and does not

(*z*) On a charge of bigamy, the so-called second wife was always competent to give evidence against the prisoner.

(*a*) 61 & 62 Vict. c. 36; see Appendix.

(*b*) Not, however, before the Grand Jury: see *R.* v. *Rhodes*, [1899] 1 Q. B. 80, *ante*, p. 205.

(*c*) See *post*, pp. 212, 213.

(*d*) See *post*, p. 212.

(*e*) Section 1 (d).

(*f*) *Lord Audley's Case*, 1 How. St. Tr. 393.

extend to defamatory libels (*g*) nor to injuries to the children of the marriage. The dying declarations of a wife who has been murdered by her husband, if not otherwise inadmissible, are evidence against him (*h*). In high treason it is doubtful whether a wife can or can not be made a witness against her husband (*i*); the better opinion is that she can not (*k*).

It should be observed that the Married Women's Property Act, 1884 (*l*), enacts that in any such criminal proceeding against a husband or a wife as is authorised by 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.

In an action against a husband for necessaries supplied to his wife when living apart from him, the defence being the wife's adultery, she is admissible to prove the adultery (*m*); though such evidence would be, of course, open to suspicion.

Hence, now, the prisoner's wife can give evidence against him, without his consent, in the following cases:—

(i.) Whenever at common law she might be called as a witness without his consent (*n*).

(ii.) When the proceeding, though criminal in form, is "instituted for the purpose of enforcing a civil right only" (*o*).

(iii.) In proceedings taken under the Vagrancy Act, 1824.

(*g*) *R.* v. *Lord Mayor of London*, 16 Q. B. D. 772.
(*h*) *R.* v. *John*, 1 East, P. C. 357; *R.* v. *Woodcock*, 1 Leach, 502.
(*i*) *R.* v. *Griggs*, Sir T. Raym. 2; see Archbold, Cr. Pl. 398.
(*k*) Taylor, Ev., p. 1167.
(*l*) 47 & 48 Vict. c. 14.
(*m*) *Cooper* v. *Lloyd*, 6 C. B. (N.S.) 519.
(*n*) Criminal Evidence Act, 1898, s. 4 (1).
(*o*) Evidence Act, 1877, s. 1.

(iv.) In proceedings taken under the Offences Against the Person Act, 1861, ss. 48 to 55.

(v.) In proceedings taken under the Criminal Law Amendment Act, 1885.

(vi.) In proceedings taken under the Prevention of Cruelty to Children Act, 1904 (*p*).

(vii.) In proceedings taken under Part II. of the Children Act, 1908 (*q*); and lastly,

(viii.) In proceedings taken under the Punishment of Incest Act, 1908 (*r*).

The same rule, of course, applies to the husband of a female prisoner.

### *Mental Incompetency.*

Mental incompetency may be either constitutional or accidental, and in the latter case it may be either temporary or permanent. It may also arise from immaturity of age. Hence we have three classes of persons as to whom it may (subject to the qualifications hereinafter mentioned) be said that they are incompetent witnesses:—

(1) Idiots.

(2) Lunatics.

(3) Children of immature intelligence.

(1) An idiot is one that hath had no understanding from his nativity, and therefore is by law presumed never likely to attain any; and such a person is incapable of giving evidence. The presumption is always in favour of sanity; hence the *onus* of proving the unsoundness of mind of any person tendered as a witness rests on those who dispute his sanity (*s*). Deaf

(*p*) 4 Edw. VII. c. 15.
(*q*) 8 Edw. VII. c. 67, s. 27.
(*r*) 8 Edw. VII. c. 45, s. 4 (4).
(*s*) *Per* Lord HATHERLEY in *Harrod* v. *Harrod*, 1 K. & J. at p. 9.

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 (*t*) either by signs, or through an interpreter, or in writing. When a deaf and dumb witness has been pronounced competent to testify, but it appears in the course of taking his evidence that he is incompetent, his evidence may be withdrawn from the jury (*u*).

(2) A lunatic is one that hath had understanding, but by disease, grief, or other accident, has lost the use of his reason (*x*).

As long as the suspension of the intelligence continues, the lunatic is an incompetent witness: but his competency is restored during a lucid interval. Moreover, the disability does not extend to cases of monomania as to some immaterial matter (*y*), nor where the hallucination permits the witness to understand the nature of the duty which is expected from him (*z*). But where a person is tendered as a witness who is believed to be suffering from monomania, a preliminary inquiry as to his capacity to give evidence must be instituted and he himself must be examined (*a*).

(3) Infants.—There is no fixed period of legal discretion under which an infant is an incompetent witness. The rule by which an infant under seven years of age cannot commit a crime, because the law presumes him conclusively not to have sufficient intelligence for the act, has no analogy in the law of evidence (*b*). Age is immaterial; and the question is entirely one of

(*t*) 1 Hale, P. C. 34; *Rushton's Case*, 1 Leach, 408; *Morrison* v. *Lennard*, 3 C. & P. 127; but see *R.* v. *Emery*, [1909] 2 K. B. 81.
(*u*) *R.* v. *Whitehead*, L. R. 1 C. C. R. 33.
(*x*) 1 Bl. Com. 304.
(*y*) See *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549, overruling to some extent the decision in *Waring* v. *Waring*, 6 Moo. P. C. 341.
(*z*) *R.* v. *Hill*, 2 Den. 254; Cockle, 192.
(*a*) *Per* BACON, V.-C., in *Spittle* v. *Walton*, L. R. 11 Eq. 420, quoting *R.* v. *Hill*, *supra*.
(*b*) *Per* PATTESON, J., in *R.* v. *Williams*, 7 C. & P. 320.

intelligence, which, whenever a doubt arises, the Court will ascertain to its own satisfaction, by examining the infant on his knowledge of the obligation of an oath (*c*), and, if necessary, of the obligation of a solemn affirmation under the Oaths Act, 1888 (*d*). Although tender age is no objection to the infant's competency, he cannot, when wholly destitute of religious education, be made competent by being superficially instructed just before a trial, with a view to qualify him (*e*). A judge may, however, in his discretion, postpone a trial, in order that the witness may be instructed in the nature of an oath, but the inclination of judges is against this practice.

A child of tender years who does not in the opinion of the Court understand the nature of an oath may give unsworn testimony in any proceeding for—

Any offence under ss. 27, 55, or 56 of the Offences Against the Person Act, 1861 (*f*);

Any offence against a child or young person under ss. 5, 42, 43, 52, or 62 of the Offences Against the Person Act, 1861 (*g*);

Any offence against a child or young person under the Criminal Law Amendment Act, 1885 (*h*);

Any offence under the Dangerous Performances Acts, 1879 and 1897 (*i*);

Any offence under the Prevention of Cruelty to Children Act, 1904 (*k*);

(*c*) *R.* v. *Brasier*, 1 Leach, 199; Cockle, 191.
(*d*) 51 & 52 Vict. c. 46.
(*e*) *Anon.*, 1 Leach, 430, n.; *R.* v. *Nicholas*, 2 Car. & K. 246.
(*f*) 24 & 25 Vict. c. 100.
(*g*) *Ibid.*
(*h*) 48 & 49 Vict. c. 69.
(*i*) 42 & 43 Vict. c. 34; 60 & 61 Vict. c. 52.
(*k*) 4 Edw. VII. c. 15.

Any offence under Part II. of the Children Act, 1908 (*l*);

Any other offence involving bodily injury to a child or young person,

if, in the opinion of the Court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; but the prisoner cannot be convicted unless the evidence of the child is corroborated in some material particular (*m*).

It has recently been decided that for a child to understand the nature of an oath within the meaning of s. 15 of the Prevention of Cruelty to Children Act, 1904, so that he can be sworn, he must understand that his duty in giving evidence on oath is something more than the mere duty of telling the truth. But it seems that he need not understand that a prosecution for perjury may ensue upon the giving of false evidence on oath (*n*).

### INCOMPETENCY FROM DEFECT OF RELIGIOUS BELIEF.

#### *Oath and Affirmation.*

It was formerly a strict rule of law that no person was a competent witness unless he believed in a Supreme Being who would punish him, either in the present or a future life, for perjury (*o*). Under the law as it now stands, however, the evidence of atheists is admissible, subject to any observations as to its credibility.

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

(*l*) 8 Edw. VII. c. 67.
(*m*) *Ibid.* s. 30; and see Corroboration, Book III., Chap. III.
(*n*) *R.* v. *Dent*, 71 J. P. 511.
(*o*) *Omichund* v. *Barker*, Willes, 538; Cockle, 193.

to this rule were granted by the Legislature to satisfy the conscientious scruples of Quakers, Moravians, and Separatists; members of which sects were allowed to give evidence on affirmation instead of oath. This principle was further encroached upon from time to time by various Acts of Parliament, and in particular by s. 4 of the Evidence Further Amendment Act, 1869 (*p*), which provided that if any person called to give evidence in any court of justice objected to take an oath, or was objected to as incompetent to take an oath, such person should, if the presiding judge were satisfied that the taking of an oath would have no binding effect on his conscience, make the promise and declaration set forth in the section.

Ultimately was passed the Oaths Act, 1888 (*q*), which repealed the previous statutory provisions on the subject, and enacted—

"1. 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 any matter or thing 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.

2. Every such affirmation shall be as follows: 'I, A.B., do solemnly, sincerely, and truly declare and affirm,' and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.

3. 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.

4. Every affirmation in writing shall commence, 'I, , of , do solemnly and sincerely affirm,' and the form in lieu of jurat shall be 'Affirmed at , this day of , 18 . Before me.'"

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

(*q*) 51 & 52 Vict. c. 46; now amended, as to the form of administering an oath, by the Oaths Act, 1909 (9 Edw. VII. c. 39).

This Act applies to all cases in which oaths are administered in or out of court in any part of the United Kingdom.

It is noticeable that it is only an objection to take the oath emanating from the deponent that enables an affirmation to be substituted for an oath. A deponent cannot now, as he could under the Act of 1869, be objected to as incompetent to take an oath. It is also noticeable that the ground of the objection must be stated, and such ground must be one of the two mentioned in the Act, viz., absence of religious belief, or that the taking of an oath is contrary to deponent's religious belief. An objection based on any other ground, or an objection based on no stated ground, will be insufficient. The judge on a trial in court must satisfy himself that a witness is entitled to affirm before he can be allowed to give evidence on affirmation; and an objection to evidence as inadmissible under this statute can be taken after verdict (*r*).

The mode of administering an oath is regulated by and should be adapted to the peculiar religious belief of the deponent (*s*). This common law rule was confirmed by the 1 & 2 Vict. c. 105, which enacts that:—

"In all cases in which an oath may lawfully be and shall have been administered to any person, either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

If, therefore, there is any doubt as to the proper form to be adopted in administering the oath to any particular witness, such witness should be asked what form he

(*r*) See *R.* v. *Moore*, 17 Cox, 458.
(*s*) *Omichund* v. *Barker*, Willes, 538; Cockle, 193.

considers binding on his conscience. If a witness is sworn in the usual way as a Christian, the objection may be subsequently taken that he has been informally sworn; but if he states that the oath as administered is binding on his conscience, his answer is conclusive (*t*).

Section 5 of the Oaths Act, 1888 (*u*), provides that—

"If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question."

The witness can still claim to be sworn in this manner as a matter of right; if he does not do so, the form prescribed by the Oaths Act, 1909 (*x*), will be followed. A witness is not entitled, it seems, to be sworn on his own Testament (*y*).

The cases in which an infant is allowed to give evidence without an oath have already been referred to (*z*).

(*t*) *The Queen's Case*, 2 B. & B. 284.
(*u*) 51 & 52 Vict. c. 46.
(*x*) 9 Edw. VII. c. 39.
(*y*) *Rabey* v. *Birch*, 72 J. P. 106.
(*z*) See *ante*, p. 215.

## CANADIAN NOTES.

### COMPETENCY OF WITNESS.

The rules of evidence in the Canada Evidence Act do not apply to civil actions. Thus, where gambling instruments and money were seized in a gambling house under the warrant issued under the Criminal Code, and confiscated by the order of a magistrate in Montreal, and an action was brought against the Attorney-General for the recovery of the money, it was held that the plaintiff could not invoke the provisions of the Canada Evidence Act so as to be a witness on his own behalf. The rules of evidence applicable to such a case were those provided by the law of the Province of Quebec. *O'Neill* v. *Attorney-General of Canada*, 26 S. C. R. 122.

A plaintiff allowing the defendant's witness to be examined and cross-examined cannot afterwards object to his competency upon the grounds known to the plaintiff and the Court before the witness went into the box; the case of *Jacobs* v. *Leyburn*, 11 M. & W. 685, deciding nothing more than this, that an objection to the competency of a witness is always in time if made as soon as the interest is discovered. *Prescott* v. *Jarvis*, 5 U. C. Q. B. 489.

A valuable review of the decisions in reference to the incompetency of the first wife to give evidence on a prosecution of her husband for bigamy will be found in *R.* v. *Maddon*, 14 U. C. Q. B. 588, by ROBINSON, C.J., at p. 589 of the report.

*Want of Religious Belief.*

It was held in *Gray* v. *MacCallum*, 2 B. C. 104, that it was not the duty of the trial judge to examine a witness on the *voir dire* as to his religious belief for the purpose of testing his competency as a witness, even if requested to do so by counsel for the opposite party, and a party who has not been examined on the *voir dire* at the trial will not be heard upon affidavit on appeal against the competency of the evidence.

Where a person stated that he believed in a Supreme Power, a God as defined by Christ's teaching, in heaven and hell, in a future state of rewards and punishments, but that he did not believe he was under any greater obligation to tell the truth by reason of taking the oath, and that he did not believe that a person who swears falsely will be punished in the hereafter, it was held that he was competent.

Mr. Justice BARKER disposed of the objection in the following terms: "Mr. Perkins does not seem to have answered the enquiry as to his belief in the existence of hell, but as he later on in his examination, expressed a very positive opinion that the gentleman whom he considered responsible for this catechising would certainly go there, I feel at liberty to assume that he believes in its existence."

It is not to be assumed that the opinion thus expressed was the determinant which rendered the evidence admissible. The learned judge concludes his judgment as follows:

"It would be a mistake, I think, in this age, with its almost endless variety of religious thought and belief, to refine too much in determining as to the competency of a witness; the taking of an oath implies a belief in God to whom the appeal is made. The two important points, I think, are a belief in a God, and a belief in a

future state of rewards and punishments. The witness in *Bell* v. *Bell*, 34 N. B. 615, did not believe in either. *Farrell* v. *Portland Rolling Mills*, 3rd Trueman, N. B. Eq. 508.

In the case cited from 34 U. B. R., a person offered as a witness, upon being examined upon the *voir dire*, stated that he believed in God, but did not believe in a future state of rewards and punishments dependent on his conduct while on earth, whereupon he was rejected as incompetent, and it was held that the rejection was proper.

On a trial for murder, an Indian witness was offered, and on his examination by the judge it appeared that he was not a Christian, and had no knowledge of any ceremony in use among his tribe binding a person to speak the truth. It appeared, however, that he had a full sense of the obligation to do so, and that he and his tribe believed in a future state, and in a Supreme Being who created all things, and in future rewards or punishment, in a future state, according to their conduct in this life.

He was then sworn in the ordinary way, and it was held that his evidence was admissible.

ROBINSON, C.J., in delivering the judgment of the Court, said that if there had been any ceremony known to his tribe, and used for the purpose of binding the conscience, it would have been indespensible to have resorted to it, no matter how fantastic or superstitious, but as the tribe had no such ceremonies there had been no omission of anything required. The oath upon the Gospels had no signification in his case, but his holding the testament in his hand, or kissing it, did at least no harm. *Reg.* v. *Pah-Mah-Gay*, 20 U. C. Q. B. 195.

*Counsel tendering himself as Witness.*

In *Davis* v. *Canada Farmers Mutual Insurance Co.*, the senior counsel for the plaintiff, a partner of the

attorney, offered himself as a witness for the plaintiff to corroborate the evidence of his partner who had previously been examined as a witness. His evidence was rejected, the learned judge saying that he must choose between the positions of advocate and witness, and must cease to act as counsel if he desired to give evidence. It was held that he was a competent witness and could not properly be rejected, but the Court commented strongly upon the impropriety of such evidence being given, although strictly admissible. The discussion of the matter by HARRISON C.J., is very full and interesting. *Davis* v. *The Canada Farmers Mutual Insurance Co.*, 39 U. C. Q. B. 452.

## CHAPTER V.

### PRIVILEGE OF WITNESSES.

So far we have dealt with the competency of witnesses. A competent witness, who has duly taken an oath or made an affirmation, can as a rule be compelled to answer any question that may be put to him. But there are cases in which a competent witness has the right to refuse to answer certain questions, if he thinks fit. This right is quite distinct from the disability created by incompetence. If the witness be incompetent, the judge should not allow him to answer any question on the merits of the case even though he wishes to do so; but the right to refuse to answer certain special questions is generally the privilege of the witness, which he may waive or insist on as he chooses. He alone can raise the objection; if he does not do so, the judge will accept his answers.

There are some cases also in which a witness will not be permitted to answer a question, even if he wishes to do so. This is because some privilege intervenes which is the privilege either of another person or of the State; in the former case that other person can waive his privilege, if he thinks fit, and permit the witness to answer, but the witness cannot waive it. In the latter case, where the State asserts its right of excluding certain kinds of evidence on the grounds of public policy, the

privilege is absolute, and the wishes neither of the parties nor of the witness can prevail against it.

Questions which a witness is thus entitled to refuse to answer may be grouped under the following five heads:—

(i.) Questions tending to incriminate the witness;
(ii.) Questions tending to prove the witness's adultery;
(iii.) Questions relating to communications between husband and wife;
(iv.) Questions relating to communications with a legal adviser for the purposes of litigation;
(v.) Questions excluded on grounds of public policy (*a*).

### 1. *Criminating Questions.*

No man is bound to criminate himself: *nemo tenetur seipsum prodere*. Hence, a witness, whether a party to the suit or not, cannot be compelled to answer any question, whether put *viva voce* or in the form of a written interrogatory (*b*), the answer to which may expose, or tend to expose, him to a criminal charge, penalty (*c*), or forfeiture of any kind. This rule is recognised and expressed by the Law of Evidence Amendment Act, 1851, which after making the parties to civil actions and suits competent and compellable witnesses on behalf of either party, enacts that nothing in the Act shall render any person compellable to answer any question tending to criminate himself or herself (*d*). This rule of protection is not confined to what may

(*a*) Certain documents are also privileged from disclosure; see *post*, p. 273 (public) and p. 288 (private).
(*b*) *Martin* v. *Treacher*, 16 Q. B. D. 507.
(*c*) As to what is an action for a penalty, see *Saunders* v. *Wiel*, [1892] 2 Q. B. 321.
(*d*) 14 & 15 Vict. c. 99, s. 3.

tend to subject a witness to penalties by the laws of England (*e*). If the witness, after claiming privilege, is compelled to answer, his evidence will not be admitted against him on a subsequent trial for the criminal offence (*f*).

The protection must always be claimed on oath, *i.e.*, the party claiming it must pledge his oath that the answer to a question or the production of a document would tend to criminate him (*g*).

The rule then is that a witness will not be compelled to answer a question if the Court be of opinion that the answer *might* tend to criminate him (*h*). In *R.* v. *Boyes* (*i*), COCKBURN, C.J., in delivering the judgment of the Court, said:—

"To entitle a party called as a witness to the privilege of silence the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question; there being no doubt, as observed by Baron ALDERSON in *Osborne* v. *London Dock Co.* (*k*), that a question which might appear at first sight a very innocent one might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril" (*l*).

In that case it was held that, as the witness had been pardoned for the offence in question, and therefore could not be prosecuted in the ordinary way, he could not plead

(*e*) *U. S. A.* v. *McRae*, L. R. 3 Ch. 79. But see *King of the Two Sicilies* v. *Wilcox*, 1 Sim. (N.S.) 331.

(*f*) *R.* v. *Garbett*, 1 Den. 236.

(*g*) *Webb* v. *East*, 5 Ex. D. at p. 112; *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q. B. 124.

(*h*) *R.* v. *Garbett*, *supra*.

(*i*) 1 B. & S. 311; Cockle, 211.

(*k*) 10 Ex. 698.

(*l*) The above statement of the law was approved and adopted by the Court of Appeal in the case of *Ex parte Reynolds*, 20 Ch. D. 294.

the privilege. It was objected on his behalf that, as a pardon was no bar to an impeachment, he remained liable to prosecution in that manner; but this plea was rejected on the ground that there was no "reasonable ground to apprehend danger" in that way.

A witness cannot refuse to go into the box on the ground that any material question that could be asked him would tend to criminate him, and that he would refuse to answer it. The privilege can be claimed only by the witness himself after he has been sworn and the objectionable question put to him (*m*); and the witness must pledge his oath that he believes the answer will tend to criminate him. If he assigns a reason for not answering, which in the opinion of the Court is insufficient, he will be compellable to answer. He can claim his privilege at any time, and does not waive it altogether by omitting to claim it at an earlier opportunity (*n*). A judge ought to caution a witness, where a privilege exists, that he is not bound to answer (*o*).

There seems to be some doubt as to how far a witness is privileged as to answering questions tending to criminate his or her wife or husband (*p*). In *R.* v. *All Saints, Worcester* (*q*), Lord ELLENBOROUGH held that a wife was competent to answer questions criminating her husband, and that the answers were not excluded on the ground of public policy; but BAYLEY, J., was of opinion that a wife who threw herself upon the protection of the Court would not be compelled to answer. There is no doubt that a wife cannot be compelled to answer any question which may expose her husband to a charge of felony (*r*).

(*m*) *Boyle* v. *Wiseman*, 10 Ex. 647.
(*n*) *R.* v. *Garbett*, 1 Den. at p. 258.
(*o*) *Per* MAULE, J., in *Fisher* v. *Ronalds*, 12 C. B. 762; cf. *Paxton* v. *Douglas*, 16 Ves. 242.
(*p*) See Taylor, Ev. 1052; Phillipps, Ev. I., 72; Starkie, Ev. 204; Roscoe, N. P. 169.
(*q*) 6 Man. & S. 194.
(*r*) *Cartwright* v. *Green*, 8 Ves. at p. 410.

If the privilege is that of the witness himself, and not that of another person, as in the case of legal professional privilege (*s*), he may waive it and answer at his peril (*t*).

The privilege extends to cases in which an answer might subject the witness to penalties or forfeitures (*u*); but he cannot refuse to answer any question, relevant to the issue, on the ground that his answer would show that he owed a debt, or would otherwise expose him to a civil action (*x*).

Some difficulties arise in the application of the general rule in consequence of the special limitations that have been put on it by several statutes, which have enacted expressly that a witness cannot refuse to answer matters to which they refer, on the ground that the answers would criminate him; but that such answers shall not be used against him in a criminal proceeding arising out of the same transaction. By the Larceny Act, 1861 (*y*), s. 85, nothing in the previous provisions therein affecting fraudulent agents, factors, bankers, attorneys, trustees, officers of companies, etc., is to entitle any such person to refuse to answer questions or interrogatories in any civil proceeding or bankruptcy investigation; and the Bankruptcy Act, 1890 (*z*), s. 27, provides 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 any proceeding in respect of any

(*s*) See *post*, p. 233.

(*t*) *Paxton* v. *Douglas*, *supra*.

(*u*) *Cates* v. *Hardacre*, 3 Taunt. 424; cf. *Pye* v. *Butterfield*, 5 B. & S. 829; Cockle, 213; and *Mexborough (Earl of)* v. *Whitwood Urban District Council*, [1897] 2 Q. B. 111, where, in an action to enforce a forfeiture of a lease, it was held that the plaintiff could not obtain discovery on the issue relating to forfeiture.

(*x*) 46 Geo. III. c. 37.

(*y*) 24 & 25 Vict. c. 96.

(*z*) 53 & 54 Vict. c. 71.

of the misdemeanours referred to in s. 85 of the Larceny Act. But a statement of affairs prepared by a debtor under s. 16 of the Bankruptcy Act, 1883 (*a*), is not within s. 27 of the Act of 1890, and can be used in evidence against him on subsequent criminal proceedings (*b*). By the Merchandise Marks Act, 1887 (*c*), s. 19 (2), nothing in the Act is to entitle any person to refuse to make a complete discovery or to answer any question or interrogatory in any action, but such discovery or answer is not to be admissible in evidence against such person in any prosecution for an offence against the Act. Again, by the Corrupt and Illegal Practices Prevention Act, 1883 (*d*), s. 59, no person called as a witness respecting an election before any Election Court is to be excused from answering questions relating to any offence at or connected with such election, on the ground that the answer might criminate or tend to criminate himself, or on the ground of privilege, provided that a witness who answers truly all questions which he is required to answer is to be entitled to a certificate of indemnity stating that he has so answered, and an answer to questions put by or before an Election Court is not to be admissible against the witness in any civil or criminal proceeding, except for perjury in respect of such evidence. This provision applies also to the examination of witnesses before election commissioners. An analogous provision is contained in the Explosive Substances Act, 1883 (*e*), s. 6 (2).

A person charged with an offence and electing to give evidence for the defence under the Criminal Evidence Act, 1898 (*f*), by s. 1 (e) thereof "may be asked," and is, of course, compellable to answer, "any question in

(*a*) 46 & 47 Vict. c. 52.
(*b*) *R.* v. *Pike*, [1902] 1 K. B. 552.
(*c*) 50 & 51 Vict. c. 28.
(*d*) 46 & 47 Vict. c. 51.
(*e*) 46 & 47 Vict. c. 3.
(*f*) 61 & 62 Vict. c. 36; see Appendix.

cross-examination notwithstanding that it would tend to criminate him as to the offence charged."

Under the Bankruptcy Acts a bankrupt is liable to be examined touching his trade, dealings, and estate. The Bankruptcy Act of 1883 provides—

"(1) Where the Court makes a receiving order it shall hold a public sitting, on a day to be appointed by the Court, for the examination of the debtor, and the debtor shall attend thereat, and shall be examined as to his conduct, dealings, and property. . . . (7) The Court may put such questions to the debtor as it may think expedient. (8) The debtor shall be examined upon oath, and it shall be his duty to 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" (*g*).

The statements made by a debtor upon such examination are of course not admissible in evidence against anyone except himself (*h*); but they are admissible against him, even if incriminatory, in any subsequent proceedings, whether under the Bankruptcy Acts or not (*i*), with the limitation enacted by s. 27 of the Bankruptcy Act, 1890 (*k*). The statements can be proved not only by the transcript of the notes of the examination, but by the parol evidence of anyone present at the examination, even though they have not been read over to or signed by the debtor (*l*).

As the debtor cannot refuse to answer any questions which the Court may put or allow to be put to him, it is obviously the duty of the Court to be careful not to allow questions to be put the answers to which might be incriminatory, unless such questions fairly relate to the "conduct, dealings, or property" of the debtor.

(*g*) 46 & 47 Vict. c. 52, s. 17.
(*h*) *In re Brünner*, 19 Q. B. D. 572; *New, Prance and Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19.
(*i*) *In re A Solicitor*, 25 Q. B. D. 17; see *R.* v. *Erdheim*, [1896] 2 Q. B. 260.
(*k*) See *ante*, p. 224.
(*l*) *R.* v. *Erdheim*, *supra*.

There are several other statutes giving various degrees of protection to witnesses whom they compel to answer questions.

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

Equity carried the general rule further than common law, for not only is a witness not compelled to answer any question which would subject him to a criminal charge, or to any pains or penalties, but he is not compelled to answer any question which would subject him to ecclesiastical censure (*q*), or to a forfeiture of interest. But the protection does not extend to cases where the answer would prove the witness guilty of great

(*m*) See Taylor, Ev. 1060; Best, Ev. 121; Phillipps, Ev. II., 493 Starkie, Ev. 207.
(*n*) *R.* v. *Holmes*, L. R. 1 C. C. R. 334; Cockle, 203.
(*o*) *R.* v. *Riley*, 18 Q. B. D. 481.
(*p*) *Dodd* v. *Norris*, 3 Camp. 519.
(*q*) *Redfern* v. *Redfern*, [1891] P. 139.

moral turpitude, unless it would subject him to penal consequences.

But when privilege is claimed under this head, it does not necessarily last for ever. When the reason for the privilege ceases, the privilege will cease also; and therefore, if a penalty or forfeiture would enure for the benefit of a plaintiff and he waives the same, or when the time for suing for a penalty has expired, a witness is compellable to answer, notwithstanding the consequences, as also he is if by contract he is bound to answer (*r*). So also a witness is compellable to answer if the only person entitled to sue for the penalty or enforce the forfeiture is dead (*s*); as also when the offence has been pardoned (*t*.)

### 2. *Admissions of Adultery.*

No witness in any proceeding instituted in consequence of adultery, whether a party to the suit or not, is 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 (*u*).

This rule is operative only in suits instituted in consequence of adultery. It does not protect a person coming forward as a witness to disprove an act of adultery, from being cross-examined as to other acts of adultery, provided they are charged in the pleadings either specifically or generally (*x*). The protection can be claimed by the witness only (*y*), and if it is not

(*r*) Wigram on Discovery, 83.
(*s*) *Anon.*, 1 Vern. 60.
(*t*) *R.* v. *Boyes*, 30 L. J. Q. B. 301; Cockle, 211.
(*u*) The Evidence Further Amendment Act, 1869. This has already been dealt with, *ante*, p. 200.
(*x*) *Brown* v. *Brown*, L. R. 3 P. & D. 198.
(*y*) *Hebblethwaite* v. *Hebblethwaite*, L. R. 2 P. & D. 29.

claimed the evidence is admissible. Apart from the provisions of the Act of 1869, parties to proceedings instituted in consequence of adultery are now in respect of examination and cross-examination on the same footing as other witnesses. In *Allen* v. *Allen* (*z*) the Court of Appeal was disposed to hold, but did not hold, that the judge was wrong in refusing to allow the co-respondent to cross-examine the respondent, and yet in his summing-up contrasting the evidence given by the one with the evidence given by the other. As they held the judge wrong in the latter matter, they thought it unnecessary to "express a concluded opinion" on the former, which is to be regretted, as the point still appears to be left open.

Recently, upon the hearing of an issue, directed for the purpose of determining the status of a child, born of the respondent during wedlock, the co-respondent in previous divorce proceedings was called as a witness, and a question was put to him as to his adultery. It was held that he was bound to answer the question, as the proceedings were "not in consequence of adultery, but as following from the fact that a divorce has been obtained" (*a*).

Of course a witness is protected by section 3 of the Act from answering questions put by interrogatory, as well as oral examination. But further than this, in the Probate, Divorce and Admiralty Division, no discovery either by interrogatory or affidavit of documents will be allowed which is addressed solely to the issue of adultery (*b*).

### 3. *Matrimonial Communications.*

No witness can in any case be compelled to disclose any communication made to him or her by

(*z*) [1894] P. 248.
(*a*) *Evans* v. *Evans*, [1904] P. 378.
(*b*) *Redfern* v. *Redfern*, [1891] P. 139.

his wife or her husband during marriage, whether such communication was of a confidential nature or not (*c*); whether the witness is a party to the action or not; and (apparently) whether the marriage is still subsisting or not (*d*).

This was an accepted rule of the common law, although there is little express authority for it. But it is now clearly recognised by statute; in civil cases by the Evidence Amendment Act, 1853 (*e*), which provides:—

"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."

And in criminal cases by the Criminal Evidence Act, 1898 (*f*), which provides—

"Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage."

There may, perhaps, be some doubt as to whether the privilege applies after the marriage has ceased by dissolution or death. The statutory provisions above referred to mention "husband" and "wife" only, not widows or widowers or divorced persons. But such persons were generally considered to be within the privilege before the statutes (*g*), and would seem to be so now, as there is nothing restrictive in the words used by the statutes.

The communications, in order to be privileged, must have been made during marriage. A communication

(*c*) *O'Connor* v. *Majoribanks*, 4 Man. & G. 435.
(*d*) *Monro* v. *Twistleton*, Peake, Add. Ca. 221.
(*e*) 16 & 17 Vict. c. 83, s. 3.
(*f*) 61 & 62 Vict. c. 36, s. 1 (d).
(*g*) *O'Connor* v. *Majoribanks*, 11 L. J. C. P. 267; *Monroe* v. *Twistleton*, Peake, Add. Ca. 221; see Taylor, Ev. 643; Roscoe, N. P. 169; Phillipps, Ev. 67.

made to a man by a woman to whom he was afterwards married must be disclosed. And third persons can, it would seem, give evidence of statements made between husband and wife which they heard. Thus, witnesses present when a statement was made by a husband to his wife have been allowed to prove the statement (*h*).

### 4. *Communications with Members of the Legal Profession.*

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

The privilege applies to any communication between solicitor and client, whether made before or during litigation, or without reference to any litigation, provided they are professional communications passing in a professional capacity.

This privilege extends to all information and evidence obtained by a legal adviser himself, or by his direction, even though obtained by the client himself, if it were obtained for the purpose of some actual or contemplated litigation, and whether actually communicated to the legal adviser or not.

Without the protection afforded by this rule, no man would dare to consult a professional adviser with a view to his defence or to the enforcement of his rights (*i*).

When once the relation of solicitor and client, or of

(*h*) *R.* v. *Smithies*, 5 C. & P. 332; *R.* v. *Simons*, 6 C. & P. 540.
(*i*) *Per* Lord BROUGHAM, in *Bolton* v. *Corporation of Liverpool*, 1 Myl. & K. 94.

counsel and client, has been established, then this rule operates, and neither solicitor nor counsel can be compelled, or will be permitted (*k*), without the consent of the client, to make any disclosure or admission of any fact which can be fairly presumed to have been communicated by the client, with reference to the matter in issue, under an implied promise of secrecy. It makes no difference whether there is at the moment litigation impending or existing or not, or whether the communication was necessary for the purposes of such litigation or not, if the client honestly believed that it was necessary to make the communication (*l*).

The law on this subject was thus stated by JESSEL, M.R., in *Wheeler* v. *Le Marchant* (*m*) :—

> "The actual communication to the solicitor by the client is of course protected, and it is equally protected whether it is made by the client in person or is made by an agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction. Again, the evidence obtained by the solicitor or by his direction or at his instance, even if obtained by the client, is protected, if obtained after litigation has been commenced or threatened, or with a view to the defence or prosecution of such litigation. So, again, a communication with a solicitor for the purpose of obtaining legal advice is protected, though it relates to a dealing which is not the subject of litigation, provided it be a communication made to the solicitor in that character and for that purpose."

Where a witness, at his private examination in the liquidation of a company, was represented by a solicitor, who had had in his possession documents belonging to the company, which had been wrongfully handed to him by a servant of the company, it was held that his privilege as a solicitor excused his answering from whom he received such documents (*n*).

When a communication is once privileged it is

(*k*) *Wilson* v. *Rastall*, 4 T. R. 759.
(*l*) *Per* MARTIN, B., in *Cleave* v. *Jones*, 6 EX. 573.
(*m*) 17 Ch. D. 682; and see *Minet* v. *Morgan*, L. R. 8 Ch. 361.
(*n*) *Re London & Northern Bank, Hoyle's Case*, 50 W. R. 386.

"always privileged" (*o*). That is to say, the privilege continues for the purpose of future litigation (*p*), notwithstanding a change of solicitors, or that the solicitor is struck off the rolls (*q*), or the solicitor becomes personally interested (*r*), or the client dies (*s*). The privilege is the privilege of the client, and may be waived by him, but no presumption adverse to him arises from his not waiving it (*t*). The solicitor cannot waive it without the consent of his client. No waiver arises from the client calling the solicitor as a witness, unless he is examined in chief as to the privileged matter (*u*).

Although a solicitor cannot refuse to divulge the name of his client (*x*), he can refuse to divulge his client's address when communicated to him confidentially (*y*). The privilege does not terminate with the relationship, so when a solicitor has ceased to act for a client he will be restrained by injunction from divulging what he has learnt from his old client to any new one (*z*); and when a solicitor is personally defendant in an action, he cannot be compelled to answer interrogatories so as to disclose facts and information which came to his knowledge as solicitor for a client in another action (*a*).

So, too, the privilege extends to all knowledge obtained by a solicitor which he would not have obtained if he had not been consulted professionally by his client (*b*); but

(*o*) *Bullock* v. *Corry*, 3 Q. B. D. 356, *per* COCKBURN, C.J.; *Calcraft* v. *Guest*, [1898] 1 Q. B. 761, *per* LINDLEY, L.J.

(*p*) *Bullock* v. *Corry*, *supra*.

(*q*) *Cholmondeley* v. *Clinton*, 19 Ves. 268.

(*r*) *Chant* v. *Brown*, 7 Hare, 79.

(*s*) See *Bullivant* v. *Attorney-General for Victoria*, [1901] A. C. 196.

(*t*) *Wentworth* v. *Lloyd*, 10 H. L. Cas. 589.

(*u*) *R.* v. *Leverson*, 11 Cox, 152; *Lyell* v. *Kennedy*, 27 Ch. D. 1.

(*x*) *Bursill* v. *Tanner*, 16 Q. B. D. 1.

(*y*) *Re Arnott*, 5 Morrell, 286.

(*z*) *Lewis* v. *Smith*, 1 M. & G. 417; see *Little* v. *Kingswood Collieries Co.*, 20 Ch. D. 733.

(*a*) *Procter* v. *Smiles*, 55 L. J. Q. B. 467, 527; cf. *Watson* v. *Jones*, [1905] A. C. 480.

(*b*) *Greenough* v. *Gaskell*, 1 Myl. & K. 101.

if a solicitor was aware of the fact from any other source before it was communicated to him by his client his knowledge is not privileged (*c*).

The rule of professional confidence is held to extend to all cases in which the solicitor or counsel has been confided in as such, but not to cases where the confidence was given before the relation was formed; or after it has ceased. In *Gainsford* v. *Grammar* (*d*), Lord ELLENBOROUGH said:—

"I fully accede to the doctrine laid down in *Cobden* v. *Kendrick* (*e*), and *Wilson* v. *Rastall* (*f*), which is no more than this, that communications by the party to the witness, whether prior or subsequent to the relation of client and attorney subsisting between them, are not privileged. But this relation may be formed before the commencement of any suit. The attorney may be retained, and confided in as such, in contemplation of a suit; and shall it be said that he is bound to disclose whatever has been revealed to him previous to the suing out of or the service of, the writ?" (*g*).

The privilege is also held to extend to the clerks of solicitors and barristers to whom communications have been made as such (*h*); and to an unprofessional agent employed by a solicitor's advice to obtain information for a client (*i*); but not to cases where the communication has been made to the solicitor (*k*), or his clerk (*l*), while they have not been acting in their professional character. It extends to communications to a solicitor who ultimately refuses a retainer (*m*), and to communications made to a solicitor under the mistaken impression that he had agreed to act in the matter (*n*). A person who is not a solicitor, in whom confidence has been

(*c*) Cf. *Lewis* v. *Pennington*, 29 L. J. Ch. 670.
(*d*) 2 Camp. at p. 10.
(*e*) 4 T. R. 431.
(*f*) 4 T. R. 759.
(*g*) Cf. *Clark* v. *Clark*, 1 M. & Rob. 3.
(*h*) *Taylor* v. *Forster*, 2 C. & P. 195; *Foote* v. *Hayne*, R. & M. 165.
(*i*) *Lafone* v. *Falkland Islands Co.* (No. 1), 4 K. & J. 34.
(*k*) *R.* v. *Brewer*, 6 C. & P. 363.
(*l*) *Doe* v. *Jauncey*, 8 C. & P. 99.
(*m*) *Cromack* v. *Heathcote*, 2 B. & B. 4.
(*n*) *Smith* v. *Fell*, 2 Curteis, 667.

placed under a mistaken idea that he is a solicitor, will not be compelled to disclose the communication (*o*).

Where two persons are engaged in a joint adventure, communications made during its continuance by one to the solicitor of the other are privileged (*p*). And although letters written between co-defendants *simpliciter* are not privileged, yet a letter written by one co-defendant to another, with directions to send it to the joint solicitor, is (*q*). Where two parties employ the same solicitor, a letter by one of them to him, containing an offer to be made to the other, may be given in evidence against the writer (*r*); but in such case the joint solicitor cannot disclose the title of either. Thus, where a borrower and lender employ the same solicitor, he cannot be called to prove the abstract of the borrower's title as against the borrower (*s*).

A person cannot, it is true, protect himself from disclosing what he knows about a matter merely by saying that he has told what he knows to his solicitor, but he cannot be compelled to divulge his knowledge, information, and belief on any matter of fact as to which he has no personal knowledge, but only a knowledge or information derived from privileged communications made to him by his solicitor or the agent of his solicitor (*t*). If, however, a person having obtained information from his solicitor verifies it for himself—as if being told by his solicitor that there is a tombstone in a particular place, he goes and looks at it—then his knowledge is no longer privileged.

When a statement has been made by either plaintiff or defendant, in the presence of the solicitor of the opposite

(*o*) *Calley* v. *Richards*, 19 Beav. 401.
(*p*) *Rochefoucauld* v. *Boustead*, 74 L. T. 783.
(*q*) *Jenkyns* v. *Bushby*, L. R. 2 Eq. 548.
(*r*) *Baugh* v. *Cradocke*, 1 M. & Rob. 182.
(*s*) *Doe* v. *Watkins*, 3 Bing. N. C. 421; cf. *R.* v. *Avery*, 8 C. & P. 596.
(*t*) *Lyell* v. *Kennedy*, 9 App. Cas. 81.

party, the solicitor may be called to prove it (*u*). No communications made to a solicitor by or on behalf of the opposing litigant can be confidential (*x*).

In an action for false imprisonment and malicious prosecution, it became a material question whether an entry in a book, by which the plaintiff acknowledged the receipt of money which the defendant had charged him with embezzling, existed at the time when the plaintiff was examined before the magistrates, or had been made, as the defendant alleged, by the plaintiff between the examination and the trial. The counsel, who had been concerned for the plaintiff before the magistrate, but who was not concerned for him on the trial, happened to be in Court on the latter occasion; and at the suggestion of JERVIS, C.J., after consulting CRESSWELL, J., he was called for the defendant, and asked whether the entry was in the book at the time of the examination before the magistrate. He gave evidence that it was not; and a verdict passed for the defendant. On a rule for a new trial on the ground that this evidence was improperly admitted, the Court held that it was properly admitted, because the witness was required only to disclose something which he had seen in Court and not what he had been told in his position as counsel (*y*).

Where a communication between a solicitor and his client appears to be of an irrelevant or unprofessional character, the solicitor will be compelled to disclose it; and therefore a solicitor will be compelled to state what his client has said to him on the matter in which the latter was not asking for legal advice, but only for information as to a matter of fact, even though that fact involved a question of law. Thus, in *Bramwell* v.

(*u*) *Griffith* v. *Davies*, 5 B. & Ad. 502; *Desborough* v. *Rawlins*, 3 Myl. & Cr. 515.
(*x*) *Per* COTTON, L.J., in *Lyell* v. *Kennedy*, 23 Ch. D. 405.
(*y*) *Brown* v. *Foster*, 1 H. & N. 736.

*Lucas* (*z*), an action by assignees to prove an act of bankruptcy, it was held that the solicitor to the bankrupt was not privileged from saying whether his client had asked his opinion, whether he (the client) could attend a meeting of his creditors without danger of being arrested. The Court held that the communication was not privileged, and Lord TENTERDEN said:—

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

It will be observed that this case, which has been much questioned (*a*), shows a tendency to confine the rule of privileged communication within a strict limit; as, with great deference to the learned judge, it may be submitted that the question put by the bankrupt to his attorney seems to be rather one of law than of fact, and is precisely that sort of legal question which ignorant clients put constantly to their solicitors.

When a solicitor is a party with his client to a fraud, no privilege attaches to the communications with him upon the subject (*b*). This is because the rule protecting communications between solicitor and client does not apply to all such communications, but only

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

(*a*) See Taylor, Ev. 662; Phillipps, Ev. I. 132; Phipson, Ev 187; *Greenough* v. *Gaskell*, 1 Myl. & K. 98; *Desborough* v. *Rawlins*, 3 Myl & Cr. 515; *Spenceley* v. *Schulenburgh*, 7 East, 357.

(*b*) *Russell* v. *Jackson*, 9 Hare, 392.

to those which pass in professional confidence, and the contriving of fraud forms no part of the professional occupation of a solicitor (*c*). This principle is not restricted to fraud, but extends to any illegal purpose (*d*). But to displace the *primâ facie* privilege there must be a definite charge of some sufficient illegality established to the satisfaction of the Court (*e*). It is not necessary that both the client and solicitor should be parties to the illegal transaction for the principle to apply (*f*). If the client's purpose is dishonest and the solicitor is innocent, the communication is not privileged (*g*). *À fortiori*, a communication made to a solicitor in furtherance of any criminal purpose does not come within the scope of professional employment, and therefore communications made to a solicitor by his client before the commission of a crime, for the purpose of being guided or helped to the commission of it, are not privileged, and this whether the solicitor was or was not aware of his client's intentions; if he was so aware, then the communication would not be in the course of any professional employment; if he was not aware, then there is no professional confidence. This was the *ratio decidendi* in *R.* v. *Cox* (*h*), which is a leading case on the subject, and was decided by ten judges. In delivering the judgment of the Court, STEPHEN, J., said:—

"We are greatly pressed with the argument that, speaking practically, the admission of any such exception to the privilege of legal advisers, as that it is not to extend to communications made in furtherance of any criminal or fraudulent purpose, would greatly diminish the value of that privilege. The privilege must, it was argued, be violated in order to ascertain whether it exists. The secret must be told in order to see whether it ought to be kept. We were earnestly pressed to lay down some rules as to the manner in which this consequence should be avoided. The

(*c*) *Per* Lord CRANWORTH in *Follett* v. *Jefferyes*, 1 Sim. (N.S.) at p. 17.

(*d*) *Russell* v. *Jackson*, *supra*: *per* TURNER, V.-C.; cited in the judgment in *R.* v. *Cox*, 14 Q. B. D. 153.

(*e*) *Bullivant* v. *Attorney-General for Victoria*, [1901] A. C. 196.

(*f*) *Charlton* v. *Coombes*, 4 Giff. 372.

(*g*) See *Williams* v. *Quebrada Rail. Co.* [1895] 2 Ch. 751.

(*h*) 14 Q. B. D. 153; Cockle, 217.

only thing which we feel authorised to say upon this matter is, that in each particular case the Court must determine upon the facts actually given in evidence or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime, for the purpose of being guided or helped in committing it. We are far from saying that the question whether the advice was taken before or after the offence will always be decisive as to the admissibility of such evidence. Courts must in every instance judge for themselves on the special facts of each particular case, just as they must judge whether a witness deserves to be examined on the supposition that he is hostile, or whether a dying declaration was made in the immediate prospect of death. In this particular case the fact that there had been a partnership (which was proved on the trial of the interpleader issue), the assertion that it had been dissolved, the fact that directly after the verdict a solicitor was consulted, and that the execution creditor was met by a bill of sale which purported to have been made by the defendant to the man who had been and was said to have ceased to be his partner, made it probable that the visit to the solicitor really was intended for the purpose for which, after he had given his evidence, it turned out to have been intended. If the interview had been for an innocent purpose the evidence given would have done the defendant good instead of harm. Of course, the power in question ought to be used with the greatest care not to hamper prisoners in making their defence, and not to enable unscrupulous persons to acquire knowledge to which they have no right, and every precaution should be taken against compelling unnecessary disclosures."

It was held that where a person had absconded with two wards of Court, his solicitor must produce the envelopes of the letters received from him, such envelopes not being privileged communications, and that, even if they were, a solicitor could not aid and abet in concealing from the Court of Chancery the residence of its wards (*i*).

The rule of privileged communications has been strictly confined by the English law to the cases which have been mentioned (*k*). It does not extend to communications made confidentially to friends (*l*), stewards (*m*),

(*i*) *Ramsbotham* v. *Senior*, L. R. 8 Eq. 575.

(*k*) *Jones* v. *Great Central Rail. Co.*, [1910] A. C. 4; approving *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644 (*per* JAMES, L.J., at p. 656). As to conversations "without prejudice," between the parties, see *post*, p. 293.

(*l*) *Wheeler* v. *Le Marchant*, 17 Ch. D. 675; Cockle, 214.

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

medical men (*n*), or patent agents (*o*). When a secret is entrusted to a person confidentially employed, the Court will restrain such person from making use of the secret, or divulging it to others (*p*). A pursuivant of the Herald's College is not a legal adviser for this purpose (*q*).

Communications to clergymen and priests are, strictly, not privileged (*r*); but judges have shown themselves indisposed to compel the disclosure of communications which have been made to clergymen as such. BEST, C.J., is reported to have said on one occasion that he would never compel a clergyman, if he objected, to disclose such communications (*s*); and in a case (*t*) where a woman was indicted for the murder of her child, ALDERSON, B., objected to hear the chaplain of the prison as a witness to conversations which he had had with the prisoner in his spiritual capacity. The learned judge said:—

"I think these conversations ought not to be given in evidence. The principle upon which an attorney is prevented from divulging what passes with his client is, because, without an unfettered means of communication, the client would not have proper legal assistance. The same principle applies to a person, deprived of whose advice the prisoner would not have proper spiritual assistance. I do not lay this down as an absolute rule, but I think such evidence ought not to be given."

The counsel for the prosecution said that after such an intimation he should not tender the evidence.

On this branch of the law, JESSEL, M.R., once said (*u*):

"The principle protecting confidential communications is of a very limited character. It does not protect all confidential

(*n*) *Duchess of Kingston's Case*, 20 How. St. Tr. at p. 613; *R.* v. *Gibbons*, 1 C. & P. 97; Cockle, 116; *Wheeler* v. *Le Marchant*, *supra*; *Lee* v. *Hamerton*, 12 W. R. 975.

(*o*) *Moseley* v. *Victoria Rubber Co.*, 55 L. T. 482.

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

(*q*) *Slade* v. *Tucker*, 14 Ch. D. 824.

(*r*) *Normanshaw* v. *Normanshaw*, 69 L. T. 468. There seems to be some difference of opinion on this matter; see a good discussion thereof in Best, Ev. 485; see also Stephen, Ev. 132, 204; Taylor, Ev. 647.

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

(*t*) *R.* v. *Griffin*, 6 Cox, C. C. 219.

(*u*) *Wheeler* v. *Le Marchant*, 17 Ch. D. 681; Cockle, 214.

communications which a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or of his honour, or of his fortune. There are many communications which, though absolutely necessary, because without them the ordinary business of life cannot be carried on, still are not privileged. The communications made to a medical man whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, and which must necessarily be made in order to enable the medical man to advise or to prescribe for the patient, are not protected. Communications made to a priest in the confessional, on matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected. Communications made to a friend with respect to matters of the most delicate nature, on which advice is sought with respect to a man's honour or reputation, are not protected. Therefore it must not be supposed that there is any principle which says that every confidential communication which it is necessary to make in order to carry on the business of life is protected. The protection is of a very limited character, and in this country is restricted to the obtaining the assistance of lawyers as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things necessary in the shape of communication to the legal advisers are protected from production or discovery in order that legal advice may be obtained safely and sufficiently."

Bankers are bound not to disclose the state of a customer's account, except upon a reasonable and proper occasion, and what is a reasonable and proper occasion is a question for the jury (*x*). But the banker of a contributory can be compelled to give evidence as to his account under s. 174 of the Companies (Consolidation) Act, 1908 (*y*).

It was recently held, in an action by a member of the Amalgamated Society of Railway Servants against a railway company for damages, that letters which had passed between the plaintiff and the society, giving the latter information which had led them to institute the proceedings, were not privileged (*z*).

### 5. *Disclosures Prejudicial to the Public Interest.*

There are many other matters upon which a witness will not be allowed, or will not be com-

(*x*) *Hardy* v. *Veasey*, L. R. 3 Ex. 107.
(*y*) 8 Edw. VII. c. 69.
(*z*) *Jones* v. *Great Central Rail. Co.*, [1910] A. C. 4.

pelled, to give evidence, on the general principle of public policy that to allow or compel the disclosure would be against the public interest.

Matters coming under this head cannot be exhaustively stated, but they will generally be found to fall under one or other of the following heads:—

(a) Affairs of State (*a*).

(b) Parliamentary and judicial proceedings.

(c) Matters involving indecency, or otherwise being offensive to the public.

### (a) *Affairs of State.*

A witness cannot be asked, and will not be allowed, to give evidence as to facts the disclosure of which will be prejudicial to a public interest.

On Hardy's trial for high treason (*b*), a witness for the Crown was asked, on cross-examination by Mr. Erskine, whether the person to whom he had communicated a report of the proceedings of the society to which the prisoner belonged, was a magistrate of any species or description, from a justice of the peace to a Secretary of State. It was held by EYRE, C.J., that he might say whether the communication was made to a magistrate or not. The witness said, "It was not to a magistrate." Mr. Erskine then asked, "Then to whom was it?" The Attorney-General objected to the question. EYRE, C.J., said:—

"It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against the prisoner; but there is a rule, which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channels by means of which that detection is made, should not be unnecessarily disclosed; if it can be made to

(*a*) As to the exclusion of public documents in the interests of the State, see *post*, p. 273.

(*b*) 24 How. St. Tr. at p. 815.

appear that really and truly it is necessary for the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me that it is within the ordinary course to do it, or that there is any necessity for it in this particular case."

The point was subsequently discussed before the other judges, and the majority concurred with EYRE, C.J., who thus laid down the rule:—

"My apprehension is that, among those questions which are not permitted to be asked, are all those questions which lead to the discovery of the channel by which the disclosure was made to the officers of justice; that it is upon the general principle of the convenience of public justice that they are not to be disclosed; that all persons in that situation are protected from the discovery; and that, if it is objected to, it is no more competent for the defendant to ask who the person was that advised him to make the disclosure, than it is to whom he made the disclosure in consequence of the advice—than it is to ask any other question respecting the channel of communication, or all that was done under it."

A member of the Privy Council cannot be made to disclose what happened at a meeting of the Council.

### (b) *Parliamentary and Judicial Proceedings.*

It was held by Lord ELLENBOROUGH (*c*) that a member of Parliament or the Speaker may be called on to give evidence of the fact of a member of Parliament having taken part or spoken in a particular debate; but that he cannot be asked what he then delivered in the course of the debate (*d*). It has also been held, that communications in official correspondence relating to matters of State cannot be produced as evidence in an action against a person holding an office, for an injury charged to have been done by him in exercise of the power given to him as such officer; not only because such communications are confidential, but because their disclosure might betray secrets of State policy (*e*).

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

(*d*) It should be noted that the debates in Parliament were not then allowed to be reported; see Odgers on Libel and Slander (4th edition), p. 308.

(*e*) *Anderson* v. *Hamilton*, 2 B. & B. 156, n.

The Director of Public Prosecutions cannot be asked to disclose the name of his informant upon a criminal trial or any subsequent civil proceedings arising out of it. On a criminal trial, if the judge sees that the strict enforcement of the rule would be likely to cause a miscarriage of justice, he may relax it *in favorem innocentiæ* (*f*).

Judges, arbitrators, and petty jurors are privileged from disclosing certain matters in which they have been judicially or professionally engaged.

A grand juror cannot be compelled, either in civil or criminal cases, to disclose what has passed before a grand jury. They are sworn to secrecy, and they may not disclose the evidence heard before them, or any other matter covered by their oath of secrecy (*g*). But where, in an action for malicious prosecution, a grand juror was called merely to prove that the defendant in the action was the prosecutor in the prosecution, he was permitted to give the evidence (*h*). It should be particularly observed that where a matter is privileged on the grounds of public policy, secondary evidence of it is inadmissible (*i*). It is otherwise, as we have seen (*k*), in the case of private privilege.

### (c) *Matters involving Indecency.*

Evidence may also be excluded on the ground of indecency (*l*); but only in civil cases. Thus, it is an established rule that parties shall not be permitted after marriage to say that they have had no connection during the marriage (*m*), and this is not altered by the

(*f*) See *per* BOWEN, L.J., in *Marks* v. *Beyfus*, 25 Q. B. D. 500.
(*g*) See Taylor, Ev. 669; Best, Ev. 483.
(*h*) *Sykes* v. *Dunbar*, 2 Selw. N. P. (1869 ed.) 1015; and see note (*c*) in *Freeman* v. *Arkell*, 1 C. & P. at p. 137.
(*i*) *Home* v. *Bentinck*, 2 B. & B. 130; *Stace* v. *Griffith*, L. R. 2 P. C. 428.
(*k*) See *ante*, p. 224.
(*l*) But see Best, Ev. 493.
(*m*) *R.* v. *Sourton*, 5 A. & E. 180. As to the exclusion of the

Evidence Further Amendment Act, 1869, except in regard to proceedings instituted in consequence of adultery (*n*). But although a wife cannot prove non-access in order to bastardise her issue (*o*), yet it appears that if that fact is proved by other evidence, she may be examined as to collateral facts, such as the name of an adulterer, or the time of a birth (*p*); and, although a man cannot be heard to say that a child born of his wife after marriage is illegitimate (*q*), yet when a question arises as to the pedigree of a child (*r*), a man reputed to be married can be heard to say that he was not married when that child was born. In criminal cases no objection can be taken to evidence on the ground of indecency; and in civil cases the rule is restricted to such as involve considerations of domestic morality; or cases in which the admission of such evidence would only tend to outrage conventional propriety. Although neither wife nor husband can give evidence of non-access after marriage, yet a husband can give evidence of non-access before marriage (*s*). And although neither husband nor wife can give evidence of non-access during marriage, yet to rebut the presumption of the legitimacy of a child born during separation, evidence of the conduct of the husband and wife is admissible, and as part of such evidence letters written by the husband or wife are admissible (*t*).

public while such evidence is being given, see *Malan* v. *Young*, 6 T. L. R. 38; *D.* v. *D.*, [1903] P. 144; Ann. Pract. [1910] I., 507.

(*n*) See *ante*, p. 200.
(*o*) *Atchley* v. *Sprigg*, 33 L. J. Ch. 345.
(*p*) *R.* v. *Luffe*, 8 East, 193; *Legge* v. *Edmonds*, 25 L. J. Ch. 125.
(*q*) *Burnaby* v. *Baillie*, 42 Ch. D. 294.
(*r*) *Murray* v. *Milner*, 12 Ch. D. 845.
(*s*) *The Poulett Peerage Case*, [1903] A. C. 395.
(*t*) *The Aylesford Peerage Case*, 11 App. Cas. 11.

## CANADIAN NOTES.

### CRIMINATING QUESTIONS (*a*).

The refusal to answer a question touching the case referred to in s. 115 of the Ontario Liquor Licence Act was held to mean any question which might be lawfully put, and which a witness was otherwise bound to answer; and a witness on the prosecution of an hotel keeper for selling liquor on Sunday, who declined to answer whether he, the witness, was at the hotel on the day in question, on the ground that his answer would tend to criminate him, and was committed to jail by the magistrate until he consented to answer, was ordered to be discharged. *Re Askwith*, 31 O. R. 150.

Upon the trial of an action for libel, s. 5 of the Ontario Witnesses and Evidence Act, as now enacted by 4 Edw. VII. c. 10, s. 21, would be applicable, and the defendant would not be excused from answering proper questions because the answers might tend to criminate him; and Consolidated Rule 439 (1250) puts a party on examination for discovery in the same position he would be in if he were being examined as a witness at the trial. He is, therefore, not excused from answering any question that is properly put to him, on the ground that the answer to it may tend to criminate him, and if he objects to answer on that ground, his answer is within the protection of s. 5. *Chambers* v. *Jaffray et al.*, 12 O. L. R. 377.

(*a*) This subject is further dealt with under Chapter II. of Book IV., in connection with the procedure for discovery.

In an action against an unincorporated club for a declaration that they were using their premises as a common betting house, contrary to the provisions of the Criminal Code, it was held that the Evidence Act of Ontario, R. S. O., 1897, c. 73, s. 5, applied, and that the president of the club was not bound to produce the membership roll of the club, he having stated under oath that its production might lead to a criminal prosecution against him. The refusal of the roll was also justifiable on the ground that the forfeiture of the defendant's charter was claimed in the action. *Attorney-General, Ontario* v. *Toronto Junction Recreation Club*, 7 O. L. R. 248.

In an investigation before the police magistrate, on a charge of conspiracy, the evidence was tendered of certain stenographers who had taken evidence before a committee of the House of Commons, as to the same matter, but was objected to, and rejected, on the ground that the examination before the committee was inquisitorial, meaning thereby that the witness was obliged to answer all questions, whether they tended to criminate him or not. On an application for a *mandamus* to compel the magistrate to receive the evidence it was held that the Court could not issue a *mandamus*, the ruling of the magistrate being one of a judicial character, and the Court could not control the judgment of the magistrate, but ROSE, J., was of opinion that the magistrate should have received the evidence, Parliament having ordered the prosecution. The magistrate subsequently acted on the suggestion of Mr. Justice ROSE. *R.* v. *Connolly*, 22 O. R. 220.

The owner of a judgment, alleged to have been fraudulently obtained, may refuse to answer questions respecting it. *Brown* v. *Hopper*, 3 Man. 86.

*Professional Confidence.*

A solicitor, when questioned as a witness with regard to matters involving his client's interests, should decline

to answer unless directed, or at least permitted, by the Court, and where a different course was taken, it was held, in *Livingstone et al.* v. *Gartshore*, 23 U. C. Q. B. 166, on a motion for a new trial, that it might be deemed a surprise upon the client.

The defendant's counsel, in *Harris* v. *McLeod et al.*, 14 U. C. Q. B. 164, an action on a promissory note, desired to ask the plaintiff's attorney what his client had told him about the note when he gave instructions for the suit. It was held that such evidence was rightly rejected.

A letter passing between a solicitor and his client, who was the common grantor of the plaintiff and defendant, in respect of the property in dispute, and which had passed into the possession of the defendant from the executor of the client after his decease, was held not to be privileged from production. (Decision of the Master in Chambers, Ontario.) *Platt* v. *Buck*, 4 O. R. 421.

In an action to establish the last will of a testator, who was illegitimate and had died without issue, the statements of the testator to his solicitor, in reference to the making of and provisions in a will, were held admissible in evidence. The doctrine of privileged communications as between solicitor and client exists for the benefit of the client and his representatives in interest, not for that of the solicitor. *Stewart* v. *Walker*, 6 O. L. R. 495.

*How Privilege Claimed.*

A witness claiming privilege must swear to belief that it will tend to criminate. In *Power* v. *Ellis*, 6 S. C. R. 1, the plaintiff brought an action for money taken from his wife by the agent of a bank from which plaintiff had

stolen money. When giving his evidence in the case he was asked on cross-examination a number of questions designed to connect him with the theft. He declined to answer, without stating any reason, and the judge interposed, saying, "I decide that witness, if he believes the question if answered by him will tend to criminate him in stealing from the National Park Bank, is not bound to answer." It was held that the defendant was entitled to have the oath of the witness that he believed the answer would tend to criminate him. "The privilege of protection belongs to the witness; he may, in the discretion of the judge, be cautioned; but it is for the witness to claim the protection of the Court on the ground that the answer will tend to criminate himself, and if there appears reasonable ground to believe that it will do so, or rather, if there are no other circumstances in the case to induce the judge to believe that the answer would not have the tendency, he is not compellable to answer." *Per* RITCHIE, C.J., at p. 7 of 6 S. C. R.

Sect. 5 of the Canada Evidence Act, 56 Vict. c. 31, which abolishes the privilege of not answering criminating questions, and provides that no evidence so given shall be receivable in evidence in subsequent proceedings against the witness, other than for perjury in respect thereof, applies to any evidence given by a person under oath, though he may not have claimed privilege. MEREDITH, J., dissenting. *Reg.* v. *Williams*, 28 O. R. 583, not followed. *The Queen* v. *Hammond*, 29 O. R. 211.

If a witness, when called upon to testify, does not object to do so, on the ground that his answers may tend to criminate him, they are receivable against him, except in the case provided for by s. 5 of the Canada Evidence Act, 1893, as amended, in any criminal proceeding against him thereafter, but if he does object he is protected. *R.* v. *Clarke*, 3 O. R. 176.

*Matters involving Indecency.*

The facts of seduction, pregnancy and illness were held in *Evans* v. *Watt*, 2 O. R. 166, to be provable by the daughter seduced, in an action for seduction, but it was held that she might refuse to answer the question who was the cause of the pregnancy if she asserted that the child was born in wedlock. This case was considered in the subsequent case of *Mulligan* v. *Thompson*, 23 O. R. 54, an action for the seduction of a married woman, in which it was held that the non-access of the husband and seduction by the defendant might be proved by her own evidence.

On a second trial, the wife not having been allowed on the first trial to testify to the illegitimacy of a child born in wedlock, it was attempted to prove the illegitimacy by admissions of the defendant that he was the father of the child. *Held*, that no evidence could be given to rebut the presumption of legitimacy. *Ryan and Wife* v. *Miller*, 22 U. C. Q. B. 87.

In an action for seduction a witness for the defence testified to having had connection with the girl. The jury were told that this witness had a right to refuse to answer such questions. *Held*, a misdirection, *McCreary* v. *Grundy*, 39 U. C. Q. B. 316.

On a prosecution for rape, the prisoner having admitted connection but claimed that it was with the consent of the prosecutrix, a question was put to the prosecutrix whether she had not had connection with other men named. Counsel for the prosecution objected to the question and it was disallowed. The Supreme Court of Canada held, unanimously, that the question should have been allowed, even assuming that the witness could have refused to answer it as a matter of privilege. But as to this the authorities were in conflict. It is pointed out by STRONG, J., that formerly there existed in

England a reason for according to a witness an absolute privilege from answering such a question, inasmuch as a party guilty of an act of incontinence could have been made liable to penal consequences by a prosecution in the Ecclesiastical Court. "This reason seems never to have had any force in the Province of Quebec, and it has long ceased to exist in England, though in 1812, when *Reg.* v. *Hodson* was decided, it was applicable and appears to have been one of the grounds of the decision. Baron Wood there held the witness not bound to answer the question as it tended to criminate her." The subsequent case of *R.* v. *Holmes* treats the question merely as one going to the credit of the witness on which her answer is not subject to contradiction. The ruling of the Supreme Court of Canada was that the question could be asked, although the judge had discretion to tell the witness that she was not bound to answer, not, it seems, on the ground that she had any absolute privilege from answering, but that in cases of cross-examination to credit it is in the discretion of the judge to prevent undue annoyance to the witness. The disallowance of the question, it was held, might have prejudiced the prisoner, and in the absence of any right of new trial the prisoner must be discharged. *Laliberté* v. *The Queen*, 1 S. C. R. 117.

In *McMahon* v. *Skinner*, 2 U. C. Q. B. 272, in an action for seduction, where the female seduced had denied, on her examination at the trial, that she had criminal intercourse with others besides the defendant, the defendant could only be allowed to show, in answer to that, that to the knowledge of his witnesses the statement was not true. He could not be permitted to ask them whether they had themselves had connection with her. The ground for this decision seems to have been, in part, that the evidence only went to the mitigation of damages, and that the evidence given to the extent allowed had had that effect, the verdict being for only a shilling.

# CHAPTER VI.

## PROOF OF PUBLIC DOCUMENTS.

In the first place, every document tendered in evidence must be relevant to some issue in the action. Many documents which a layman might deem material are not evidence at all in the law courts. A written statement made by one party is not evidence against the other, unless it be shown to have been in some way recognised or adopted by him. Statements contained in a letter written to a party by a third person are not evidence against the recipient, unless he has made them so by answering the letter or acting upon it in some other way (*a*); still less are they evidence against the other party. A private memorandum drawn up by a witness for his personal convenience is not evidence at all, though the witness may sometimes use it for the purpose of refreshing his memory (*b*). But a document which was irrelevant when the pleadings were opened may become relevant as the case proceeds. Thus, as we have seen (*c*), cross-examination will often let in a document which till then was inadmissible. And though a document which a witness, called by one party, uses merely for the purpose of refreshing his memory is generally not

(*a*) *Wright* v. *Doe*, 4 Bing. N. C. 489; Cockle, 45.
(*b*) See *ante*, pp. 169, 170.
(*c*) See *ante*, p. 138.

evidence against the other party in the action, yet the counsel for that other party may make such document evidence if he thinks fit (*d*).

Next, if the document be not admitted, it must be proved. The method of proving a public document differs materially from that which is necessary in the case of a private document. It, however, resembles the proof of a private document in two particulars: the original document must be produced, unless the circumstances are such as to render secondary evidence of it admissible (*e*); and it must be properly stamped, if a stamp be required by law, otherwise it cannot be read in evidence without payment of a penalty (*f*). The proof of public documents has been much simplified by modern legislation. In this chapter we shall deal with public documents only, leaving private documents until the next chapter.

It is not always easy to determine whether a particular writing is a public or a private document. But a public document is defined by Lord Blackburn in *Sturla* v. *Freccia* (*g*), as "a document that is made for the purpose of the public making use of it, and being able to refer to it . . . where there is a judicial or quasi-judicial duty to inquire."

The term is generally understood to include all such documents as Acts of Parliament and Parliamentary papers, bye-laws, all records whether judicial or non-judicial, the process of any Court of

(*d*) See *ante*, p. 138.
(*e*) As to when secondary evidence is admissible, see *post*, p. 360.
(*f*) As to when a stamp is required, see *post*, p. 294.
(*g*) 5 App. Cas. pp. 643, 644.

law, probates of wills and letters of administration, papers belonging to or issued by the departments of State, Royal Commissions, municipal corporations and trading companies, entries in all public registers, Royal proclamations, and all other acts of State.

In Lord Blackburn's definition of a public document, cited above, the word "public" is not to be taken in the sense of meaning the whole world. "An entry in the books of a manor is public in the sense that it concerns all the people interested in the manor (*h*). And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be 'public' within that sense" (*i*).

But if a document be prepared by a Government official for a temporary purpose only, it is not a "public document." Thus, a survey of Walmer Castle taken in the year 1816 by the direction of the then Lord Warden of the Cinque Ports, and an estimate made by the King's engineer for the reparation of Walmer and other castles, though produced from the Record Office, were held not admissible in evidence as "public documents," on the ground that they were not, and were not intended to be, records affecting the King's property or revenues, but were to serve temporary purposes only, and in no way affected Crown property, Crown revenues, or Crown grants when the respective purposes were served (*k*).

In order to avoid the necessity for conveying public records up and down the country many statutes have been passed, which make copies of registers and other public and official documents

(*h*) But see *Beaufort* v. *Smith*, 4 Ex. 450, and *post*, p. 346.
(*i*) *Sturla* v. *Freccia*, 5 App. Cas. at p. 643.
(*k*) *Mercer* v. *Denne*, [1905] 2 Ch. 538.

admissible in evidence, to the same extent as the originals would be admissible, provided such copies be duly authenticated in the manner prescribed. These copies are of four kinds:—

(i.) An examined copy; *i.e.*, a copy which someone, who is called as a witness, swears he has compared with the original, and found to be correct and complete. He must either himself have compared the copy word for word with the original or have examined the copy while another person read the original aloud to him; the other person need not be called.

(ii.) A certified copy or certificate; *i.e.*, a copy which some public officer, officially in charge of the original, certifies to be a true copy; he need not be called as a witness if he has properly sealed or stamped or otherwise authenticated the copy.

(iii.) An office copy; *i.e.*, a copy made in the office of the High Court of Justice by an officer having custody of the original.

(iv.) A copy printed by the official printer, under the direction of either House of Parliament or any department or officer of State.

An office copy of a record is admitted in evidence upon the credit of the officer without proof that it has been actually examined, and it has always been regarded, even at common law, as equivalent to the record itself, when it was tendered in evidence in the same Court and in the same cause (*l*). It has, however, acquired a far wider admissibility by virtue of the Rules of the

(*l*) *Per* Lord MANSFIELD, in *Den* v. *Fulford*, 2 Burr. 1179.

Supreme Court, 1883, for Order XXXVII., r. 4, provides 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 and parties, to the same extent as the original would be admissible."

Every copy, whatever its nature, must be complete and accurate, and not contain abbreviations which are not in the original (*m*), and it must appear on the face of it that the original was in the custody of the proper officer at the time when the copy was taken (*n*).

The party who wishes to give evidence of the contents of any public document must take care to obtain the proper kind of copy which is made admissible by the particular statute. Such copy is in fact raised to the rank of primary evidence. If he relies on any certificate of birth, death or marriage, or of the conviction or acquittal of any person who was charged with the commission of a crime, he must also be prepared with evidence to show that the person named in such certificate is the person of that name mentioned in the proceedings; this is called "evidence of identity."

Most public documents can be proved by either an examined or a certified copy, for the Evidence Act, 1851 (*o*), enacts as follows:—

"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

(*m*) *R.* v. *Christian*, Car. & M. 388.
(*n*) See further as to copies, *post*, p. 363 *et seq.*
(*o*) 14 & 15 Vict. c. 99, s. 14. This Act virtually supersedes the Documentary Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 1, so far as it refers to public documents.

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 any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words."

Official documents signed by a Secretary of State, entries from the books of the commissioners of excise or customs, registers of municipal or parliamentary electors, and many other non-judicial public documents are provable in the manner provided by this section, and are then evidence of the matters they purport to declare; provided they appear to have been obtained from proper custody, *i.e.*, from a place where it is reasonable to presume they would be deposited, if authentic (*p*).

So charters, letters patent, grants from the Crown, pardons and commissions may now be proved either by originals, or by examined or by certified copies. But note that this enactment permits the substitution of a certified or an examined copy for the original only in cases in which the original, if produced, would be evidence.

Whenever, therefore, it is proposed to tender an examined or certified copy of a public document in the place of an original, the practical question is, whether the original is such a public document as is intrinsically evidence *per se* (*q*).

There are still, it seems, cases in which the originals of documents, apparently of a public nature, must be produced, and where neither certified nor examined copies are admissible (*r*). Hence, whenever a doubt exists as to whether a document is public or private,

(*p*) *Sturla* v. *Freccia*, 5 App. Cas. 641; *Mercer* v. *Denne*, [1905] 2 Ch. 538.
(*q*) *Linzee* v. *Linzee*, 29 L. J. P. & M. 128.
(*r*) See *post*, p. 253.

the prudent course will be to be provided with the original.

The kinds of public documents which are of most practical importance will now be considered.

*Acts of Parliament and Parliamentary Papers.*—Acts of Parliament are either public or private. Every Act passed since 1850 is a public Act, unless the contrary is expressly provided by the Act itself (*s*). English public Acts need no proof in English courts of law; our judges are supposed to be familiar with their terms. But judges, as well as counsel, always refresh their memory by referring to a King's printer's copy. If there be ground for supposing the printed copy inaccurate, reference should be made to the Parliament Roll (*t*). By 41 Geo. III. c. 90, s. 9, the Statutes of England and of Great Britain, printed and published by the King's printer, shall be received as conclusive evidence in the Irish Courts; and the Statutes of Ireland, prior to the Union, so printed and published, shall be received in like manner in any Court of civil or criminal jurisdiction in Great Britain.

Private, local, and personal Acts (*u*) (which do not contain a clause making them public Acts), Royal proclamations (*u*), the journals of either House of Parliament (*x*), orders or regulations in Council (*y*), and proclamations, orders, or regulations issued by the Lord Lieutenant of Ireland, acting alone or with the advice of the Irish Privy Council (*z*), are proved by copies purporting to be printed by the King's printer (*a*) without proof that they were in fact so printed.

(*s*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 9.
(*t*) *Price* v. *Hollis*, 1 M. & S. 105.
(*u*) Documentary Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 3; see Appendix.
(*x*) Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9), s. 3.
(*y*) Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), Schedule, see Appendix.
(*z*) Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9), s. 4.
(*a*) Or Government printer, or printer authorised by His Majesty,

Proclamations, orders and regulations issued by Government departments are proved in the manner set out in the Schedule to the Documentary Evidence Act, 1868 (*b*).

Except in the Judicial Committee of the Privy Council colonial statutes are not judicially noticed, and require proof. Formerly they had to be proved by examined copies under the Documentary Evidence Act, 1851 (*c*), or certified copies under the Colonial Laws Validity Act, 1865 (*d*), but they are now also provable by copies purporting to be printed by the Government printer to the colony in question (*e*).

Foreign official documents, which cannot be produced here, may be proved by examined copies (*f*).

*Records and other Judicial Proceedings: Supreme Court.*—A record is usually proved by an office copy (*g*) or by an examined copy. But where the existence of a record is directly in issue the record itself (*h*), if producible, must be produced; and in order to do so the order of a judge or master is necessary (*i*). Again, if a prisoner is charged with committing perjury on an affidavit or in a deposition, the original affidavit or deposition must be produced (*j*): so if he be indicted for forging any judicial document.

or a person designated by a similar title or His Majesty's Stationery Office, or, in the case of Royal proclamations and the journals of either House, by the printer to either House of Parliament.

(*b*) Documentary Evidence Act, 1868, see Appendix; Documentary Evidence Act, 1895 (58 Vict. c. 9); Post Office Act, 1908, s. 36.

(*c*) 14 & 15 Vict. c. 99.

(*d*) 28 & 29 Vict. c. 63, s. 6; see *R.* v. *Governor of Brixton Prison*, [1907] 1 K. B. 696.

(*e*) Evidence (Colonial Statutes) Act, 1907 (7 Edw. VII. c. 16), s. 1.

(*f*) *Burnaby* v. *Baillie*, 42 Ch. D. 292.

(*g*) Order XXXVII., r. 4.

(*h*) *E.g.*, in answer to a plea of *nul tiel record*, although in practice an exemplification or even an examined copy is generally received.

(*i*) Order LXI., r. 28.

(*j*) *R.* v. *Cox*, 4 F. & F. 42; *R* v. *Boynes*, 1 Car. & K. 65.

Judicial notice is taken of the following matters:—

The signature of a judge or of a master of the Supreme Court, attached to any judicial document (*k*).

The seal of the Central Office (*l*).

The seals of district registries (*m*).

The seals and signatures of commissioners for oaths and other persons authorised to administer oaths under the Commissioners for Oaths Act, 1889 (*n*).

All documents admissible in evidence of any particular in any Court of justice in Ireland (*o*).

In proceedings under Part IV. of the Companies (Consolidation) Act, 1908, of the signature of all officers of the High Court in England and Ireland, and of the Court of Session in Scotland, and of the registrar of the Court having stannaries jurisdiction, and also of the seals and stamps of the offices of those Courts, when appearing on any document made under the same Part of the Act or any official copy thereof (*p*).

The seal of a notary public in any part of His Majesty's dominions, but not of a foreign notary public (*pp*). It may be remarked that the certificate of a notary public of a protest abroad of a foreign bill of exchange is evidence of that fact, but as a rule notarial or consular certificates are not evidence of facts certified, *e.g.*, the mere production of the certificate of a notary public stating that a deed had been executed before him will not in any way dispense with the proper evidence of the execution of the deed (*q*).

If evidence of the judgment of an English Court be required for use in a foreign or colonial Court, the office

(*k*) Documentary Evidence Act, 1845, s. 2 (as altered by the Judicature Act, 1873).
(*l*) Order LXI., r. 7.
(*m*) Judicature Act, 1873, s. 61.
(*n*) 52 Vict. c. 10, s. 6; *Ex parte Magee*, 15 Q. B. D. 332.
(*o*) 14 & 15 Vict. c. 99, s. 10.
(*p*) Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 225.
(*pp*) Order XXXVIII., r. 6; *In re Davies* [1910] W. N. 212.
(*q*) *Nye* v. *Macdonald*, L. R. 3 P. C. 343.

copy must be certified under the hand of a master, and it is often further authenticated by the Great Seal, with the signature of the Lord Chancellor.

And Order LXI., r. 7, further enacts 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 document."

*Inferior Courts.*—All summonses and other process issuing out of any County Court, purporting to be sealed by the seal of the Court, are, in England, received without any further proof (*r*). Orders of other inferior Courts, if of record, will be subject to the usual rule, and generally be proved by a certified exemplification (*s*). If the Court is not of record, the books containing the proceedings must be produced and proved by the proper officer, who should be subpœnaed to attend with them; but if he does not attend, or if he refuses to produce the book or document containing the order, secondary evidence cannot, it seems, be given, but the officer may be attached (*t*).

*Convictions* formerly had to be proved by production of the records, but 28 Vict. c. 18, s. 6, allows "a certificate containing the substance and effect of the indictment and conviction, purporting to be signed by the clerk of the Court" in which the prisoner was convicted, or his deputy, to be put in and read. This is now done if the prisoner does not admit his previous conviction. Convictions before magistrates are proved by examined copies which are made out, on application, by the clerk of the peace. In many cases also, under particular statutes, copies certified by the proper officer are sufficient evidence. Thus, a conviction or acquittal at Assizes or Quarter

(*r*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 180.
(*s*) *Woodcraft* v. *Kinaston*, 2 Atk. 317.
(*t*) *R.* v. *Llanfaethly*, 2 E. & B. 940; Cockle, 158.

Sessions can be proved by a certificate given by the clerk of the Court under s. 25 of the Common Law Procedure Act, 1854, stating the substance and effect of the indictment and conviction, without the formal parts; a conviction or acquittal at petty sessions by a similar certificate under s. 18 of the Prevention of Crimes Act, 1871 (*u*). Any proceeding in an action in the High Court of Justice can now be proved by the production of an office copy, stamped with the seal of the Central Office; no signature or other formality need be proved if the copy be stamped with the proper seal (*x*). The bye-law of a municipal corporation is proved by the production of a written or printed copy authenticated by the corporate seal (*y*).

*Bankruptcy Proceedings.*—The proof of bankruptcy proceedings is now regulated by ss. 28, 30 and 132—138 of the Bankruptcy Act, 1883 (*z*). Section 132 provides that a copy of the *London Gazette* containing any notice inserted therein in pursuance of this Act, shall be evidence of the facts stated in the notice, and also 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 (*a*) in all legal proceedings of the due making and the date of the order. The effect of this section is to make the advertisement conclusive evidence, not only as regards the persons who were parties to the bankruptcy proceedings, but also as against other persons (*e.g.*, the holder of a bill of sale executed by the bankrupt), of the validity of the adjudication and of the date thereof, but the advertisement has no such effect in proceedings taken for the

(*u*) 34 & 35 Vict. c. 112. Evidence of identification must also be given.

(*x*) Order XXXVII., r. 4; Order LXI., r. 7.

(*y*) 45 & 46 Vict. c. 50, s. 24; and see 10 Vict. c. 27, s. 90.

(*z*) 46 & 47 Vict. c. 52; sections 132—138 are set out in the Appendix.

(*a*) See *Ex parte Learoyd; In re Foulds*, 10 Ch. D. 3.

purpose of questioning or annulling an adjudication (*b*). By s. 28 (4), the report of the official receiver is made *primâ facie* evidence of the statements therein contained for the purposes of that section. It has been decided that it is also *primâ facie* evidence for the purposes of s. 18 (*c*).

*Charitable Trusts.*—The Charitable Trusts Recovery Act, 1891 (*d*), s. 5 (1), provides that for the purposes of any action, petition, or proceeding instituted by the Board of Commissioners under the Act, the printed reports of the Charity Commissioners

"shall be admissible as *primâ facie* evidence of the documents and facts therein stated; provided that either party intending to use any such report as evidence shall give notice of such intention in the prescribed manner to the other party."

*Foreign and Colonial Judgments* and other judicial records are now proved in the manner provided by the Evidence Act, 1851 (*e*). This Act is only intended to simplify proof of such matters, and does not in any way alter the previous law. These proceedings may, therefore, still be proved by examined copies (*f*).

The Act does not apply to Scotland (*g*). Any document of record in Scotland may be proved by secondary evidence. Thus, a will may be proved by a certified copy of the will, accompanied by the Scotch equivalent of a probate (*h*).

*Probate Copy of a Will.*—The probate copy of a will is in the nature of a public document; for it records the act of the Court in admitting the will to probate. Moreover, a copy of the probate can be seen by anyone at Somerset House on payment of a shilling.

It constitutes the proper legal proof of title in an

(*b*) *Ex parte Geisel*, 22 Ch. D. 436.
(*c*) *Ex parte Campbell*, 15 Q. B. D. 213.
(*d*) 54 Vict. c. 17.
(*e*) 14 & 15 Vict. c. 99, s. 7; see Appendix.
(*f*) *Appleton* v. *Braybrook*, 6 M. & S. 34.
(*g*) 14 & 15 Vict. c. 99, s. 18.
(*h*) *Halkett* v. *Earl of Dudley*, [1907] 1 Ch. 590.

executor to his testator's personalty, and is conclusive against all the world (*i*). It ranks, therefore, as primary evidence. It is a copy of the will, sealed with the seal of the Probate Division, and attached to a certificate which states that the will has been proved and registered, and that administration of the goods of the deceased has been granted to one or more of the executors named therein. The will itself, so far as it deals with personalty, is not evidence (*k*), except where the Court is called upon to construe a disputed will, when the Court may and often does look at the original, as, for instance, to inspect an alteration or interlineation (*l*). And in such a case, where an English translation of a foreign will has been admitted to probate, the Court can look at the foreign original or a certified copy of it (*m*). If the probate be lost, it may either be proved by an examined copy, or the Court will grant an exemplification, but not another probate (*n*); or a certified copy of the entry in the act book, under 14 & 15 Vict. c. 99, s. 14, is sufficient. The act book itself is also evidence, without accounting for the non-production of the probate (*o*), and under 14 & 15 Vict. c. 100, s. 14, an unstamped copy of the act book has been received as evidence of probate, to prove an executor's title (*p*). It is still doubtful if the provisions of this Act apply to Scottish wills. In *Halkett* v. *Earl of Dudley* (*q*), PARKER, J., held that it did not; but even if it did, this would not abrogate the common law. Where no act book is kept, or other record of probates, it appears that the will itself, indorsed with the appointment of the executor, will be evidence (*r*).

(*i*) *Allen* v. *Dundas*, 3 T. R. 125.
(*k*) *Pinney* v. *Pinney*, 8 B. & C. 335.
(*l*) *Turner* v. *Hellard*, 30 Ch. D. 390.
(*m*) *In re Cliff's Trusts*, [1892] 2 Ch. 229.
(*n*) *Shepherd* v. *Shorthose*, 1 Stra. 412.
(*o*) *Cox* v. *Allingham*, Jacob, 514.
(*p*) *Dorret* v. *Meux*, 15 C. B. 142.
(*q*) [1907] 1 Ch. 590, at p. 604.
(*r*) *Doe* v. *Mew*, 7 A. & E. 240.

Similar rules apply to letters of administration (*s*).

As to wills of personal estate, the rule is that (except in proceedings for the protection of the assets) no notice can be taken of an alleged will of personal estate, unless it has been proved in an English Probate Court or in a Colonial Court having concurrent jurisdiction with the English Probate Court, or, having been proved in a Colonial Court, a copy has been deposited with and sealed by a Court of Probate in the United Kingdom under s. 2 of the Colonial Probates Act, 1892 (*t*). In a case where the main question was as to the liability to legacy duty of the personal estate of a testator whose will had been proved in Her late Majesty's Supreme Court for China and Japan at Shanghai, and not in England, CHITTY, J., held that he would look at the Shanghai probate, because the Shanghai Court has, from its constitution, all such jurisdiction with respect to the property of British subjects as for the time being belongs to the Court of Probate in England (*u*); but in a subsequent case, where a petitioner asked for payment out of a sum of money to which he was entitled under an appointment by will, PEARSON, J., held that the probate of the will in the Supreme Court of New Zealand was not sufficient for him to act upon, but that an English probate was necessary. He distinguished the last-mentioned case on the ground of the difference in the nature of the jurisdiction of the Shanghai Court from that of the New Zealand Court (*v*).

Of a will of personalty the probate granted by the proper Court is the proper evidence. In fact, as a rule, the original will cannot be read (*x*).

In the case of a will relating to lands, or any description

(*s*) *Noell* v. *Wells*, 1 Lev. 235.
(*t*) 55 Vict. c. 6; see Appendix.
(*u*) *In re Tootal's Trusts*, 23 Ch. D. 532.
(*v*) *Ex parte Limehouse Board of Works, In re Vallance*, 24 Ch. D. 177.
(*x*) *Pinney* v. *Pinney*, 8 B. & C. 335.

of realty, it was necessary formerly to produce the original will, as the Spiritual Court had no jurisdiction over anything but personalty (*y*); but now a devise of real estate may be proved by the probate, or a sealed office copy from the Probate Division. In this case the person tendering the evidence must give ten days' notice before trial to the other party, who may, in four days after receipt of such notice, give a counter-notice that he disputes the validity of the devise, and that the original must be produced (*z*). Even in the absence of a counter-notice the probate is only *primâ facie* evidence (*a*). Where a will relating to land in England had been proved in the Supreme Court of the Colony of Victoria, HALL, V.-C., accepted letters testimonial under the seal of that Court as sufficient evidence for the purposes of a preliminary judgment in a partition action. He intimated, however, that the further proof might be insisted on at a later stage of the action, although probably at the cost of the party insisting (*b*).

*Non-Judicial Records.*—By the 1 & 2 Vict. c. 94, the Master of the Rolls is made superintendent of the general records of the realm, and is empowered to make rules for the admission of such persons as ought to be admitted to the use of such records: and he is authorised personally, or by deputy, to allow copies to be made of such records. By s. 13, a certified copy of any record, sealed with the seal of the Record Office, is evidence in every case in which the original record would be admissible; and by s. 12, any person desirous of procuring such a copy may do so at his own cost by permission of the Master of the Rolls; but such copy shall be admissible to prove the record, only after examination and certificate,

(*y*) *Doe* v. *Calvert*, 2 Camp. 389.
(*z*) 20 & 21 Vict c. 77, ss. 64, 65.
(*a*) *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612.
(*b*) *Waite* v. *Bingley*, 21 Ch. D. 674.

under seal, by the Deputy Keeper of the Records, or one of the assistant record keepers.

Neither the seal, nor the stamp, nor the official character of the officer, need be proved to make any certified copy admissible (*c*), and if the official be merely an officer *de facto*, and not *de jure*, the copy is still admissible (*d*).

By the Documentary Evidence Act, 1845 (s. 1), it is enacted that, whenever by any Act then in force or thereafter to be in force,

"any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any Court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, and the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence."

*Documents belonging to a corporation* are not strictly of a public nature; but they may be conveniently dealt with here. Corporation books are evidence to prove entries of a public character (*e*), but not to prove transactions of the corporation with the public (*f*). They appear to be evidence in the nature of admissions between members of the corporation (*g*); but not of the rights and privileges of the corporation against strangers (*h*). Where such books are tendered as evidence, under s. 14 of the Evidence Act, 1851 (*i*), they must appear to be of

(*c*) 8 & 9 Vict. c. 113, s. 1.
(*d*) *R.* v. *Parsons*, L. R. 1 C. C. R. 24.
(*e*) *Marriage* v. *Lawrence*, 3 B. & Ald. 144.
(*f*) *Gibbon's Case*, 17 How. St. Tr. at p. 810.
(*g*) *Hill* v. *Manchester, etc. Water Works Co.*, 2 B. & Ad. 544.
(*h*) *Mayor of London* v. *Lynn*, 2 H. Bl. 214, n.
(*i*) 14 & 15 Vict. c. 99; see also Assurance Companies Act, 1909, s. 21 (in Appendix).

such a public nature as the Act intends; for neither examined nor certified copies will be allowed in lieu of the originals unless they are rendered admissible by this statute.

By the Municipal Corporations Act, 1882 (*k*), s. 22:—

"(5) 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.

(6) 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 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."

*Bye-laws* are public documents in the locality within which they are in force; they are generally regulated by particular statutes or charters. They appear to be within the spirit of the Documentary Evidence Acts and the Evidence Act, 1851 (*l*). Section 124 of the Companies Clauses Consolidation Act, 1845 (*m*), which empowers statutory companies to make bye-laws upon certain topics, enacts that such

"bye-laws shall be reduced into writing, and shall have affixed thereto the common seal of the company; and a copy of such bye-laws shall be given to every officer and servant of the company affected thereby."

And s. 127 of the same Act provides that the production of a written or printed copy of the bye-laws of the company, having the common seal of the company affixed

(*k*) 45 & 46 Vict. c. 50.

(*l*) For the powers to make bye-laws, see 56 & 57 Vict. c. 73, s. 8 (Parish Councils); 38 & 39 Vict. c. 55, ss. 182—188; 53 & 54 Vict. c. 59, ss. 20, 23, 44 (District Councils); 45 & 46 Vict. c. 50, ss. 23, 24; and 51 & 52 Vict. c. 41, s. 16 (Borough and County Councils); 45 & 46 Vict. c. 50, s. 23; 62 & 63 Vict. c. 14, s. 5 (2), and Second Schedule (Part II.) (London Borough Councils).

(*m*) 8 & 9 Vict. c. 16.

thereto, shall be sufficient evidence of such bye-laws in all cases of prosecution under the same.

In a civil action, *e.g.*, as to the carriage of goods by a railway company, any bye-law can be proved by an examined copy, for it is a public document within s. 14 of the Evidence Act, 1851 (*n*).

By the Municipal Corporations Act, 1882 (*o*), s. 24—

"The production of a written copy of a bye-law made by the council under this 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 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."

It has been held that such copy is sufficient evidence, also that all conditions precedent to its becoming a valid operative bye-law, such as the fixing of a copy thereof for forty days on the town hall before it can come into force have been complied with (*p*).

By the Salmon Fishery Act, 1873 (*q*), s. 45—

"The production of a written or printed copy of any bye-law purporting to have been confirmed, authenticated by the common seal of the board, shall be conclusive evidence of the existence and due making of such bye-law in all legal proceedings, and the production of a copy of any newspaper or newspapers containing the notice of the making of any such bye-law shall be taken and received in all legal proceedings as evidence that all things required by this Act for the making and publication of the bye-law therein advertised have been duly done, performed, and published."

The proceedings of public companies are governed by the Companies (Consolidation) Act, 1908 (*r*).

It may be observed that where a document is tendered, purporting to be sealed by the seal of a company or corporation, the genuineness of the seal must be proved by

(*n*) *Motteram* v. *Eastern Counties Rail. Co.*, 7 C. B. (N.S.) 58.
(*o*) 45 & 46 Vict. c. 50.
(*p*) *Robinson* v. *Gregory*, [1905] 1 K. B. 534.
(*q*) 36 & 37 Vict. c. 71.
(*r*) 8 Edw. VII. c. 69. For the material sections of this Act, see the Appendix.

some one who knows it (*s*), unless it be the seal of the Corporation of London (*t*), or the seal of the Apothecaries' Company, which prove themselves (*u*).

### *Public Registers.*

*Births, Marriages, and Deaths.*—Parish registers are in the nature of records (*x*), and can, therefore, be proved under the Act of 1851 (*y*), by copies purporting to be signed by the incumbent (*z*), who, and not the parish clerk (*a*), is the proper custodian of these registers.

The register of baptisms is no evidence of the date of birth (*b*), but it is some evidence of age, as the child must have been born before that date (*c*). Evidence of the identity of the person or persons in question with those named in the register is necessary, as the register itself is no evidence of identity (*d*).

Marriages can be solemnised in dissenting chapels if they are duly registered for that purpose. The marriage must take place in the registered building, with open doors, between the hours of eight in the morning and three in the afternoon, within three calendar months from day of entry of notice, in presence of the registrar (or his deputy, or, if the Marriage Act of 1898 (*e*) has been adopted, in the presence of the "authorised person") and two or more credible witnesses besides the minister, if any. If the Act has been adopted, the "authorised

(*s*) *Moises* v. *Thornton*, 8 T. R. 307.
(*t*) *Doe* v. *Mason*, 1 Esp. 53.
(*u*) 14 & 15 Vict. c. 99, s. 8.
(*x*) *Per* Lord MANSFIELD, in *Birt* v. *Barlow*, 1 Doug. 172.
(*y*) 14 & 15 Vict. c. 99, s. 14.
(*z*) *In re Hall*, 9 Hare, Appendix, XVI.
(*a*) *Doe* v. *Fowler*, 19 L. J. Q. B. 151.
(*b*) *In re Wintle*, L. R. 9 Eq. 373.
(*c*) *R.* v. *Weaver*, L. R. 2 C. C. R. 85; *Glenister* v. *Harding*, 29 Ch. D. 992.
(*d*) *Birt* v. *Barlow*, 1 Doug. 172; *Sayer* v. *Glossop*, 2 Ex. 409.
(*e*) 61 & 62 Vict. c. 58.

person" can give a certificate of the due solemnisation of the marriage (*f*).

By the Naval Marriages Act, 1908 (*g*), where one of the parties to a marriage intended to be solemnised in England is an officer, seaman, or marine borne on the books of one of H.M. ships at sea, the captain or other officer commanding may publish the banns or receive notice of the intended marriage and give a certificate accordingly.

By the 52 Geo. III. c. 146, s. 7, verified copies of all registers of baptisms and burials are to be sent yearly by all ministers to the registrar of their diocese; and by the 6 & 7 Will. IV. c. 86, s. 38, the Registrar-General is to cause to be sealed or stamped with the seal of his office, all certified copies of entries given in his said office; and all certified copies of entries purporting to be sealed or stamped with the seal of the said register office are to be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry; and no certified copy purporting to be given in the said office is to be of any force or effect which is not sealed or stamped as aforesaid. Non-parochial registers deposited with the Registrar-General are made evidence by 3 & 4 Vict. c. 92, extended by 21 & 22 Vict. c. 25. Copies purporting to be sealed with the seal of the office are receivable in civil cases by the 3 & 4 Vict. c. 92, s. 9, subject to the regulations of s. 11 as to notice; but in criminal cases the original register or record must be produced (s. 17), and it may be used in evidence in civil cases (s. 12).

Certified copies of Scotch parochial registers are evidence in English Courts on questions of pedigree relating to persons resident and domiciled in Scotland (*h*). A marriage in the Isle of Man was recently

(*f*) 61 & 62 Vict. c. 58, s. 7.
(*g*) 8 Edw. VII. c. 26.
(*h*) *Lyell* v. *Kennedy*, 14 App. Cas. 437. As to Scotch marriages since 1856, see 19 & 20 Vict. c. 96. As to Irish marriages, 7 & 8

proved by production of the special licence granted by the bishop, supplemented by the evidence of the petitioner (*i*). Marriages between Christians in British India are proved by producing a certificate of the marriage from the India Office (*k*). And baptisms there may be proved in the same manner (*l*).

By the Registration of Burials Act, 1864 (*m*), register books kept under the Act, or copies, are evidence of the burials entered therein.

By s. 38 of the Births and Deaths Registration Act, 1874 (*n*), it is provided that an entry or certified copy of an entry of a birth or death under the Registration Acts, 1836 and 1874, is not to be evidence of a birth or death unless it purports to be signed by some person professing to be the informant, and to be a person required by law to give information to the registrar concerning the birth or death, or purports to be made on a coroner's certificate, or in pursuance of the provisions of the Act as to registration of births and deaths at sea. An entry made under the Act of 1836 is evidence not merely of the fact but of the date of birth (*o*).

*Patents and Designs.*—The register of patents (*p*), and the register of designs (*q*) are *primâ facie* evidence

Vict. c. 81, as amended by 26 Vict. c. 27; 33 & 34 Vict. c. 110; and 36 & 37 Vict. c. 16. As to marriages by British subjects outside the United Kingdom before British consuls, see Foreign Marriages Act, 1892 (55 & 56 Vict. c. 23). As to the marriage in England of a foreigner with a British subject, see Marriage of Foreigners Act, 1906 (6 Edw. VII. c. 40). The last-mentioned Act does not apply where both parties are Jews who marry according to Jewish rites.

(*i*) *Rohmann* v. *Rohmann*, 25 T. L. R. 78.

(*k*) *Westmacot* v. *Westmacot*, [1899] P. 183; *Braid* v. *Braid*, 25 T. L. R. 646; *Ratcliff* v. *Ratcliff*, 1 Sw. & T. 467.

(*l*) *Queen's Proctor* v. *Fry*, 4 P. D. 230.

(*m*) 27 & 28 Vict. c. 97.

(*n*) 37 & 38 Vict. c. 88.

(*o*) *In re Goodrich*, *Payne* v. *Bennett*, [1904] P. 138.

(*p*) Patents and Designs Act, 1907 (7 Edw. VII. c. 29), ss. 28 (3); 52 (3).

(*q*) *Ibid.*, s. 64.

of any matters by statute directed or authorised to be inserted or entered therein respectively. Judicial notice is to be taken of the seal of the Patent Office (*r*).

Printed or written copies or extracts, purporting to be certified by the Comptroller, and sealed with the seal of the Patent Office, of or from patents, specifications, and other documents in the Patent Office, and of or from registers and other books kept there, are evidence in all Courts, without further proof or production of the originals (*r*), and a certificate, purporting to be under the hand of the Comptroller, as to any entry, matter, or thing which he is authorised by the 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 (*s*).

*Trade Marks.*—The Trade Marks Act, 1905 (*t*), provides as follows:—

By s. 40, the fact that a person is registered as proprietor of a trade mark shall be *primâ facie* evidence of the validity of the original registration and of assignments and transmissions thereof.

By s. 41, the original registration shall, after seven years, be taken to be valid in all respects, unless it was obtained by fraud, or unless the trade mark offends against the Act.

By s. 50, printed or written copies or extracts of or from the register, purporting to be certified by the Registrar and sealed with the seal of the Patent Office, shall be evidence, without further proof or production of the originals.

By s. 51, a certificate purporting to be under the hand of the Registrar, as to any entry, matter, or thing which he is authorised to make or do, shall be *primâ facie*

(*r*) *Ibid.*, s. 79.
(*s*) *Ibid.*, s. 78.
(*t*) 5 Edw. VII. c. 15.

evidence of the entry and its contents and of the matter or thing.

By s. 52 (1), all documents purporting to be orders made by the Board of Trade and to be sealed with its seal and signed by its secretary or person authorised, shall be received in evidence without further proof.

By s. 52 (2), a certificate signed by the president of the Board of Trade, that an order or act is that of the Board shall be conclusive of the fact certified.

*Copyright.*—The Copyright Amendment Act, 1842 (*u*), s. 11 (*x*), enacts, that a register of the proprietorship in the copyright of books and assignment thereof, and in dramatic and musical pieces, and licences affecting such copyright, shall be kept at the Hall of the Stationers' Company. A certified copy under the hand of the proper officer, impressed with the stamp of the company, of any such entry, is made in all Courts *primâ facie* proof of such proprietorship or assignment of copyright or licence, and, in cases of dramatic or musical pieces, the copy is *primâ facie* proof of the right of representation or performance.

The International Copyright Act, 1886 (*y*), provides, by s. 7, that—

"Where it is necessary to prove the existence or proprietorship of the copyright of any work first produced in a foreign country to which an Order in Council under the International Copyright Acts applies, an extract from a register, or a certificate, or other document stating the existence of the copyright, or the person who is the proprietor of such copyright, or is for the purpose of any legal proceedings in the United Kingdom deemed to be entitled to such copyright, if authenticated by the official seal of a minister of State of the said foreign country, or by the official seal or the signature of a British diplomatic or consular officer acting in such country, shall be admissible as evidence of the facts named therein, and all Courts shall take judicial notice of every such official seal

(*u*) 5 & 6 Vict. c. 45.

(*x*) These provisions are incorporated by reference into the International Copyright Act, 1844 (7 & 8 Vict. c. 12), and into the Copyright of Works of Art Act, 1862 (25 & 26 Vict. c. 68); see *Lucas* v. *Cooke*, 13 Ch. D. 872.

(*y*) 49 & 50 Vict. c. 33.

and signature, . . . and shall admit in evidence, without proof, the documents authenticated by it."

And sub-s. (2) of s. 8 of the same Act provides that—

"Where a register of copyright in books is kept under the authority of the government of a British possession, an extract from that register purporting to be certified as a true copy by the officer keeping it, and authenticated by the public seal of the British possession, or by the official seal or the signature of the governor of a British possession, or of a colonial secretary, or of some secretary or minister administering a department of the government of a British possession, shall be admissible in evidence of the contents of that register, and all Courts shall take judicial notice of every such seal and signature, and shall admit in evidence, without further proof, all documents authenticated by it."

Section 15 of the Newspaper Libel and Registration Act, 1881 (*z*), provides that—

"Every copy of an entry in or extract from the register of newspaper proprietors, purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract without proof of the signature thereto or of the seal of office affixed thereto, and every such certified copy or extract shall in all proceedings, civil or criminal, be accepted as sufficient *primâ facie* evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown."

*Register of Voters and Poll Books.*—The Parliamentary Registration Act, 1843 (*a*), provides (s. 79) that the register of voters under that Act shall be conclusive evidence that the persons named therein continue to have the qualifications which are annexed to their names. It has been held that, though the Ballot Act, 1872 (*b*), has repealed s. 98 of the former Act, the register is conclusive not only on the returning officer, but also on every tribunal which has to inquire into elections, except only in the case of persons "prohibited from voting by any statute or the common law of Parliament" (*c*).

(*z*) 44 & 45 Vict. c. 60.
(*a*) 6 & 7 Vict. c. 18.
(*b*) 35 & 36 Vict. c. 33.
(*c*) *Stowe* v. *Jolliffe*, L. R. 9 C. P. 734.

*Shipping Registers, etc.*—The Merchant Shipping Act, 1894 (*d*), contains provisions as to the admissibility in evidence and the mode of proof of registers, entries therein and in log-books, declarations under the Act, and Board of Trade documents. These provisions will be found in the Appendix.

*Bills of Sale* (*e*) must be registered (*f*) in the Bills of Sale Department of the Supreme Court (*g*); and by s. 16 of the Bills of Sale Act, 1878, an office copy or extract of any registered bill of sale, and affidavit of execution filed therewith, shall in all Courts and before all arbitrators and other persons, be admitted as *primâ facie* evidence thereof and of the fact and date of registration as shown thereon.

It would seem, however, that the production of a certificate of registration of a bill of sale, even though it states that the affidavit of execution has been duly filed, does not preclude the necessity of producing an office copy of the bill of sale (*h*); and although, probably, a copy of the affidavit need not be produced, still it is better to produce both.

Many other statutes provide for the registration of matters of public concern and make duly authenticated extracts evidence of the contents of the registers. They include:—

The Naturalization Act, 1870 (*i*);

The Medical Acts (*k*);

The Friendly Societies Act, 1896 (*l*);

(*d*) 57 & 58 Vict. c. 60.

(*e*) For the definition of the term "bill of sale," see ss. 4, 5, 6, and 7 of the Bills of Sale Act, 1878.

(*f*) Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), s. 8.

(*g*) R. S. C., 1883, Order LXI., r. 1.

(*h*) *Emmott* v. *Marchant*, 3 Q. B. D. 555.

(*i*) 33 Vict. c. 14, ss. 11, 12; see Appendix.

(*k*) 21 & 22 Vict. c. 90, ss. 15, 27, 32 (medical practitioners); 41 & 42 Vict. c. 33, ss. 5, 329 (dentists); 44 & 45 Vict. c. 62, ss. 9, 17 (veterinary surgeons); 31 & 32 Vict. c. 121, s. 13 (chemists and druggists); 55 Geo. III. c. 194, s. 21; 14 & 15 Vict. c. 99, s. 8 (apothecaries).

(*l*) 59 & 60 Vict. c. 25; see Appendix.

The Collecting Societies, etc. Act, 1896 (*m*), and The Inclosure Acts (*n*).

It is important to observe that whenever it is the duty of a public official, either at common law (*o*), or by statute, to record certain facts in any book which is intended "to be kept as a register to be referred to ever after," the book is admissible in evidence to prove, not only that such official made those entries, but also that the facts which he recorded in that book are true. And this rule extends to every public document, whether a register or not, which is "made for the purpose of the public making use of it and being able to refer to it." "In public documents made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry of a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not" (*p*). "The principle . . . is . . . that it should be a public inquiry, a public document, and made by a public officer" in the discharge of a public duty (*q*).

A survey and report made by a surveyor in 1816, in discharge of a duty imposed upon him by the 8th section

(*m*) 59 & 60 Vict. c. 26; see Appendix.

(*n*) 8 & 9 Vict. c. 118, ss. 2, 146; 45 & 46 Vict. c. 38, s. 48; and 52 & 53 Vict. c. 30, s. 2. For Dictionaries, etc., see *ante*, p. 146; for Histories, Maps, Unofficial Peerages, etc., see *post*, p. 349. As to the Law List, Medical Register, etc., see *ante*, p. 145.

(*o*) See *per* Lord BLACKBURN in *Sturla* v. *Freccia*, 5 App. Cas. at p. 644.

(*p*) *Per* PARKE, B., in *Irish Society* v. *Bishop of Derry*, 12 Cl. & F., p. 668.

(*q*) *Per* Lord BLACKBURN in *Sturla* v. *Freccia*, 5 App. Cas. at p. 643.

of the statute 34 Geo. III. c. 75, upon the occasion of a sale of Crown lands, and produced out of the proper custody, is admissible in evidence as a public document (*r*) within the decision in *Sturla* v. *Freccia* (*s*).

It would be otherwise if the document were prepared only for a temporary purpose (*t*).

"The mere fact that a document intended for a temporary purpose is found after a long lapse of years in the archives of a Government office does not constitute it of the authority of a register" (*u*).

The rolls of a court baron or of a customary court are evidence between the lord and his copyholders or free tenants. They are the public documents, by which the inheritance of every tenant is preserved, and the records of the manor court, which was anciently a court of justice, relating to all property within the manor (*x*).

So in *A.-G.* v. *Antrobus* (*y*) a tithe map and award, which is produced from proper custody and has been acted upon, is admissible to show whether or not there was a public road across the fields shown on it, because it is prepared by Commissioners acting under statutory powers, as to matters which concern all the parish. "The Act requires these things to be done, not in a corner but upon notice in all the most public places . . . (and constitutes) public evidence that at the time the owner . . . knew the facts" (*z*). But it is not evidence on any matter not within the scope of the authority of the Commissioners. Again, a report by a committee to

(*r*) *Evans* v. *Merthyr Tydfil Urban District Council*, [1899] 1 Ch. 241.
(*s*) 5 App. Cas. 623.
(*t*) *Mercer* v. *Denne*, [1905] 2 Ch. 538.
(*u*) *Per* Lord WATSON in *Sturla* v. *Freccia*, 5 App. Cas. at p. 649; and see *Evans* v. *Taylor*, 7 A. & E. 617.
(*x*) *Per* JOYCE, J., in *Heath* v. *Deane*, [1905] 2 Ch. 86, at p. 91.
(*y*) [1905] 2 Ch. 188; and see *Smith* v. *Lister*, 64 L. J. Q. B. 154.
(*z*) *Per* STUART, V.-C., in *Giffard* v. *Williams*, 38 L. J. Ch., p. 604.

the executive government of a foreign State as to the qualifications of a particular individual for a particular post under that government, although acted on by it, is not evidence of facts stated therein concerning his nationality, place of birth, etc. (*a*).

### *Privilege of Public Documents.*

Although the party who relies upon a public document may be prepared to lay before the Court the original or such secondary evidence of it as has been raised by statute to the rank of an original, nevertheless it is in the power of the head of any public department of State, whether a party to the action or not (*b*), to represent to the judge that in his opinion it would be prejudicial to the interests of the State that the document should be produced in open Court; and thereupon the judge will order that the document shall not be put in evidence. It follows that the contents of the document cannot be proved in any other way, for if the original is privileged from production on the ground of public policy, the same public policy requires that no secondary evidence of it shall be given (*c*).

The objection against disclosing such evidence must be taken by the head of the public department of State, who alone is able to judge whether the disclosure of such evidence will or will not be injurious to the public service (*d*). It is not for the judge at the trial to decide

(*a*) *Sturla* v. *Freccia*, 5 App. Cas. 623; and see *Mercer* v. *Denne*, *supra*.

(*b*) *Admiralty Commissioners* v. *Aberdeen Steam Trawling Co.*, [1909] S. C. 335.

(*c*) *Home* v. *Bentinck*, 2 B. & B. 130; *Stace* v. *Griffith*, L. R. P. C. 420, 428; *Dawkins* v. *Lord Rokeby*, L. R. 8 Q. B. 255.

(*d*) *Beatson* v. *Skene*, 5 H. & N. 838.

that question (*e*). The strict rule on the point is that—

> "The Court is entitled to have the pledge and security of the head officer of State to give the reason for the non-production of those documents which it is objected to produce, and to demand that he shall come into the witness box, and there say that he is the head of the department, and objects to such and such documents being produced, specifying them, on the ground of public policy" (*f*).

But as a rule the judge does not trouble the head of the department to attend in court in person, provided a representative from the office attends on his behalf and satisfies the judge that the mind of the responsible head of the department has been brought to bear on the question, and that he has decided that the production of the document would be injurious to the public service (*g*). Thus, in an action against an admiral in the Royal Navy to recover damages for a collision caused by his flagship, Sir R. PHILLIMORE refused the plaintiffs permission to inspect reports of the collision made by the admiral to the Lords of the Admiralty, the secretary to the Admiralty having made an affidavit that their production would be prejudicial to the public service (*h*). So Lord CAMPBELL held (*i*) that a witness can refuse to produce a letter which he obtained from a Secretary of State, to whom it had been addressed in his public character, and who forbids its production.

Where an officer in the army sued a superior officer for defamation, the alleged libel being contained in evidence given by the latter before a military Court of inquiry, the House of Lords held that such evidence was

(*e*) *Hughes* v. *Vargus*, 9 T. L. R. 551; *Williams* v. *Star Newspaper Co.*, 24 T. L. R. 297.

(*f*) *Per* GROVE, J., in *Kain* v. *Farrer*, 37 L. T. at p. 470.

(*g*) See *In re Joseph Hargreaves, Ltd.*, [1900] 1 Ch. 347.

(*h*) *The Bellerophon*, 44 L. J. Adm. 5; and see *Hennessy* v. *Wright*, 21 Q. B. D. 509.

(*i*) *Sykes* v. *Dunbar*, 2 Selw. N. P. (1869 ed.) 1015; *Stace* v. *Griffith*, L. R. 2 P. C. 420.

not only privileged from being the subject of an action for libel, but was wholly inadmissible, since the proceedings of the Court, being delivered to the commander-in-chief, and held by him on behalf of the Sovereign, ought not to be produced except by the command or permission of the Crown (*k*).

It has been stated as the rule that if no objection is taken at a trial to produce such a document by the person in whose custody it is, it would be the duty of the judge to intervene and to refuse to allow it to be produced (*l*). But this rule must not be strained too far. Thus, in an action (*m*) for penalties against a man upon the ground that he had acted as a parish committee man, being at the same time a collector of the property tax, a clerk to the commissioners of the property tax was called, and directed to produce his books, to prove the defendant's appointment. The witness refused on the ground that he had been sworn, on his own appointment, not to disclose anything he should hear in that capacity respecting the property tax, except with the consent of the commissioners, or by force of an Act of Parliament; but Lord ELLENBOROUGH said:—

"I clearly think the oath contains an implied exception of the evidence to be given in a court of justice, in obedience to a writ of subpœna. The witness must produce the book, and answer all questions respecting the collection of the tax, as if no such oath had been administered to him."

When a document otherwise privileged is made public the privilege ceases, *e.g.*, if a document is used in Court; but only if it is so used that it is effectually made public (*n*).

(*k*) *Dawkins* v. *Lord Rokeby*, L. R. 7 H. L. 744.
(*l*) *Per* SMITH, L.J., in *Chatterton* v. *Secretary of State for India*, [1895] 2 Q. B. 195.
(*m*) *Lee* v. *Birrell*, 3 Camp. 337.
(*n*) See *Goldstone* v. *Williams, Deacon & Co.*, [1899] 1 Ch. 47.

## CANADIAN NOTES.

### JUDICIAL PROCEEDINGS.

Where the defendant offered in evidence a record roll in a previous action between the same parties, which had been filed only half an hour before it was so tendered in evidence, it was held that the judge was right in rejecting it. The facts were that the record had been put into the hands of the prothonotary at his table in court, and had never been brought into his office, but he had been requested to mark it filed when it was given to him, which he did, and he had never compared or examined it. The trial had begun on October 23rd, and the record had first come into existence on October 25th. To allow such a record to be received "would be permitting the manufacture of facts arising after the parties put themselves upon the jury as to the case as it stood when issue was joined." *Murdoch* v. *Grant*, Thomson, N. S. 100.

Plaintiff sought to prove the termination of proceedings in his acquittal before the County Court Judge's Criminal Court, by the production of the original record, signed by the judge under the Speedy Trials Act, and produced and verified by the Clerk of the Peace, in whose custody it was, or else by being allowed to put in a copy thereof, certified by that officer. It was held that either one of these modes would be sufficient, and the judgment of the trial judge dismissing the action for want of evidence of the termination of the proceedings was set aside, and a new trial ordered. *O'Hara* v. *Doherty*, 25 O. R. 347.

In proof of the termination of proceedings in an action for malicious prosecution, the plaintiff produced in evidence the original indictment, endorsed "No Bill." It was held that this was not sufficient, but that a record should have been regularly drawn up and an examined copy produced. *McCann* v. *Preneveau*, 10 O. R. 573.

In an action for malicious prosecution the only evidence of the termination of the proceedings in plaintiff's favour was the statement of a witness, the counsel in the cause, that he had been present on the hearing of the appeal from the magistrate's decision, and that the same had been reversed. The witness on cross-examination said he did not know whether the judges made entries on their dockets of the judgments they delivered in summary and appeal cases, of which this was one, but he believed they made minutes. It was held that the evidence was inadmissible to prove the reversal of the magistrate's decision, and the termination of the proceedings. The Supreme Court of Nova Scotia had held that as there was no law requiring the decision of the judge to be reduced to writing, the moment it was pronounced in court the suit was terminated and an action for malicious prosecution could at once be brought, so far as this requisite was involved. *Gunn* v. *Cox*, 3 S. C. R. 296.

In an action for malicious prosecution, in which it became necessary to prove the termination of the proceedings, the following opinion was expressed by ROSE, J., on the question whether the termination of the proceedings could be proved by parol evidence: "While it is unnecessary to determine the question now raised, I may say that as far as I have considered it, I am not at all convinced that where what is to be proved is a formal proceeding in court, with a formal determination thereof, involving questions of law and of fact, anything short of a most formal admission, either on the record or in open

court, can dispense with evidence by a record on the proceedings formally made up. It is probable that no party on examination for discovery will possess the knowledge to enable him to make such admission, even if statements thus obtained could be received as evidence of the fact to be proved. And so the question will probably not arise for determination." The indictment was produced bearing the following endorsement: "I direct verdict of not guilty to be entered, after hearing owner and his agents and such evidence as the Crown admitted could not be added to with a view to incriminate. J. A. BOYD, Chancellor." It was held that the indictment so endorsed and produced was not, under the circumstances, sufficient evidence of the termination of the prosecution, and that the formal record of acquittal should have been produced. *Hewitt* v. *Cane*, 26 O. R. 133.

In *Appleby* v. *Secord*, 20 N. B. 403, it was held that the only way in which a suit could properly be proved was by the proceedings themselves or the admission of the party against whom the evidence was offered, and if it was material to show what was in dispute and what was decided, the record must be produced. It could not be shown by the evidence of a person who was present at the trial.

Judgments may be proved at *nisi prius* by producing the original roll as well as by exemplification, but the clerk should not produce such roll without proper authority. *Paterson* v. *Todd*, 24 U. C. Q. B. 296.

A continuance roll found in the proper office and entered and filed there by the proper officer, is a record of the court, although not compared with the papers filed in the cause. Parol evidence cannot be received to contradict the roll. *Draper*, U. C. K. B. 398 (1831).

The production of the original indictment is insufficient to prove an indictment for felony, but a record

must be made up with the proper caption. *Henry* v. *Little et al.*, 11 U. C. Q. B. 296.

On the trial of an indictment for perjury it appeared that no information had been laid, but the constable had a warrant which he read to the accused; the latter made no objection to the manner in which he had been brought before the magistrate, and in which the charge had been laid. His trial was proceeded with, and in giving his evidence he committed perjury. There being no information or other formal record, the charge and the proceedings thereon, so far as material, were proved in the only way in which they were capable of being proved, namely, by oral evidence of the magistrate and his clerk, each speaking with the aid of his notes taken at the trial. This was held to be the best evidence possible under the circumstances, and therefore sufficient. The case thus differed from *Rex* v. *Drummond*, 10 O. L. R. 546, in which, on the trial for perjury, the indictment or formal record in the murder case was not produced, nor was the certificate under section 691 of the code, as it then was, put in, and it was held that the evidence had not been produced. *Rex* v. *Yaldon*, 17 O. L. R. 179.

In *De Hart* v. *De Hart*, 26 U. C. C. P. 489, the probate produced had a memorandum at the foot thereof, namely, "Xd. W. G. Deputy Registrar," and at the end of the last page, and annexed thereto, was a certificate properly stamped with the seal of the Court and duly signed and certified of the probate being a true copy of the will. *Held*, that the probate produced was a copy stamped with the seal of the surrogate Court granting the same within the meaning of the statute and was therefore *primâ facie* sufficient (1876).

The only proof of a will, proof of which was required, in an action for the recovery of land, was a copy of the probate from the registry office, with the affidavit of verification attached. It was held that this was not proper

evidence of the will, no notice having been given under R. S. O., 1887, c. 61, s. 38. *Barber et al.* v. *McKay et al.*, 17 O. R. 562.

Where a probate is used as evidence under the statutes of Upper Canada, c. 16, it is evidence of the testator's death, as well as of the will. *Davis et al.* v. *Van Norman*, 30 U. C. Q. B. 437.

Letters of probate, issued by the proper surrogate Court, were held, in *Sproul* v. *Watson*, 23 O. A. R. 692, notwithstanding the Devolution of Estates Act, only *primâ facie* evidence, as far as real estate was concerned, of the testamentary capacity of the testator.

A county court judge's order to arrest was held to have been well proved under R. S. O. c. 62, s. 28, by the production of a copy, certified as such, under the hand of the clerk of the Court, but it was held that the affidavit on which the *capias* issued, filed in that court, was not duly proved by the production of a copy of the affidavit, similarly certified, and with a seal attached, apparently that of the Court, but not referred to or described in the certificate. *Timmins* v. *Wright*, 45 U. C. Q. B. 246 (1880).

It was held in *Wetmore* v. *Harding*, 18 N. B. 338, that a clerk of the peace was not bound to produce the records of the sessions in his possession as such clerk in compliance with a *subpœna duces tecum*.

*Foreign Judgments and Proceedings.*

In an action of debt on a judgment rendered in an inferior Court in the United States, it was proved that the Court had no seal, but the judge's book was produced containing the judgment, and his handwriting and signature proved, which was held sufficient evidence of the judgment. *Kirby et al.* v. *Elliott et al.*, 13 U. C. Q. B. 367.

On a plea of *res judicata*, the writ of summons in the previous action being specially endorsed was proper evidence for the Court that the previous judgment embraced the same claim as that sued for in the subsequent action. *Mumford* v. *Acadia Powder Co., Ltd.*, 37 N. S. R. 375.

In *R.* v. *Wright*, 17 N. B. 363, where it was sought to put in evidence copies of proceedings in a foreign court, under the Act 19 Vict. c. 41, s. 5, it was held that one certificate was sufficient and that each document need not be separately certified. The statement in the certificate that there were no other papers on file in the cause would not invalidate the certificate if valid in other respects.

In an action on a judgment recovered in the Tenth Judicial District of California, the plaintiff put in evidence an exemplification, under a seal which purported by the impression to be that of the Fourteenth District, and the certificate of the clerk of the Court verifying it was stated to be under the seal of his office, not the seal of the Court. *Held*, that the proof was insufficient. *Junkin* v. *Davis et al.*, 22 U. C. Q. B. 369.

In an action brought on a foreign judgment, the objections were—first, that it did not appear that the Court was one of record, and secondly, that the exemplification was not under the seal of that Court, first, because the clerk's certificate stated it to be the seal of his office, and secondly because on the seal it was apparent that it was not the seal of the Tenth, of which it purported to be, but of the Fourteenth District. It was held that the exemplification proved the Court to be one of record, but that the seal on its face appearing to be of the Fourteenth District and purporting to be of the Tenth Judicial District, and no extraneous evidence being offered to remove the ambiguity, it was not sufficiently proved. *Junkin* v. *Davis et al.*, 6 U. C. C. P. 408.

It was held in *Hughitt* v. *Saxton*, 42 U. C. Q. B. 49, that the objection taken in *Woodruffe* v. *Walling*, 12 U. C. R. 501, had been met by the proof of a foreign judgment, the certificate clearly showing, on its face, that the person certifying it was the clerk of the Supreme Court and that the seal attached was the seal of that Court.

In the case of *Woodruff* v. *Walling*, 12 U. C. Q. B. 501, above referred to, to prove a judgment of the Supreme Court of the State of New York, at Watertown in the county of Jefferson, a copy of the roll was produced certified by the county clerk, under the seal of the county. It was held that this was insufficient. The copy was not authenticated under the seal of the Court, but under the seal of the county. If the certificate had come from a person purporting to be the officer of the Court, and under a seal purporting to be the seal of the Court, the statute would have made it evidence without further proof but it could not be assumed that the county seal was the seal of the Court.

An English certificated bankrupt claimed privilege from arrest in the province of Nova Scotia for any debt provable under his bankruptcy in England. It was held that the order of discharge or certificate from the London Court of Bankruptcy was sufficient evidence of the bankruptcy to entitle him to his discharge here. *Mills* v. *Smith*, 2 Oldright, 328.

On an application for the discharge of a prisoner committed for extradition under an order of a county court judge of Kent on a charge of murder, it was held by WILSON, C.J., that under the Acts in force in 1881, a certified copy of an indictment for murder found by the grand jury of Erie County, State of New York, U.S., was of itself sufficient evidence to justify the committing of such prisoner for extradition. *Per* OSLER, J., that such indictment was evidence for any purpose. *Per*

GALT, J., that if the case had turned on the indictment alone, he would have hesitated to accept it as conclusive against the accused. In the result the application for the discharge of the prisoner was refused. *R.* v. *Brown*, 31 U. C. C. P. 484.

*Proof of Convictions, etc.*

It was held in *Ex parte Edgar*, 31 N. B. 128, that the time of laying the first information under the Canada Temperance Act was not provable by a statement of that fact in the magistrate's certificate of the previous conviction.

In a prosecution for a third offence, under the Canada Temperance Act, it is sufficient to put in certificates of the previous conviction, without otherwise identifying the defendant as the party named therein. Identity of name is evidence of identity of person. *Ex parte Dugan*, 32 N. B. 98.

Identity of name is some evidence of identity of person. In a prosecution under the Liquor Licence Act of Ontario, it became necessary to prove a previous conviction, and the certificate thereof was put in evidence. BRITTON, J., said that this would not be sufficient evidence of identity if section 982 of the code were applicable to the case, but, under the Liquor Licence Act the certificate was made evidence, and when produced, if it had in it the same name as that of the person convicted, he thought that was some evidence of identity, whether much or little depended upon circumstances. If it was a very common name the evidence would be slight, if an unusual name, it would be cogent, but the question of identity was solely for the magistrate, and as the certificate afforded some evidence, the Appeal Court could not interfere. *R.* v. *Leach*, 17 O. L. R. 643.

Under the Liquor Licence Act of Ontario, it is not necessary that the proof of a prior conviction should be

by production of a formal record of a conviction, or by certificate thereof, other satisfactory evidence being, by statute, declared to be sufficient. The magistrate in this case was the same by whom the defendant had been formerly convicted, and all that appeared on the record was that the licence inspector had proved the identity of the prisoner with the person formerly convicted.

*Per* MEREDITH, C.J.: "I think the statute was passed to prevent just such objections as this prevailing. Having regard to the loose way in which proceedings are very often conducted in the magistrates' courts, provision is made that, besides the formal conviction or certificate, other satisfactory evidence is to suffice. I think we must take it that the magistrate looked up his record, the previous conviction having been made before him. The evidence of Dexter, the inspector, supplied all that was wanted, that the defendant was the same person who had been previously convicted." *R.* v. *McGarry*, 31 O. R. 486.

In *Ex parte Phillips*, 26 N. B. 397, a certificate of a previous conviction for selling liquor under the Canada Temperance Act, s. 115, was held sufficient evidence to prove the fact of such conviction. It was also held that such certificate might be given by the magistrate who tried the subsequent offence.

The Canada Temperance Act provided that the number of previous convictions could be proved by the production of a certificate under the hand of the convicting justices or magistrates, or officer, or of a clerk of the peace. It was contended that this certificate, therefore, applied only to the proof of the number of convictions, but did not prove a conviction which could only be proved by a certified copy of the conviction.

*Per* ROSE, J.: "Such certified copy of conviction would be a convenient mode of proving the conviction,

but I cannot see the convenience or necessity of providing that the number may be proved by a certificate if the prior conviction itself must be proved by a certified copy. Such certified copy would show the number, *i.e.*, whether first, second or third, and a conviction to prove such number would be a useless thing." *R.* v. *Kennedy*, 17 O. R. 159.

*Registered Documents.*

It was held in *Lovejoy* v. *McDiarmid et al.*, 17 N. B. 275, that a certified copy of a bill of sale was not admissible in evidence under 21 Vict. c. 3, s. 7 (*see* Con. Stat. N. B. c. 46, s. 7), without proof of the execution of the original.

The production of a registered original of an instrument, with the registrar's certificate upon it was made *primâ facie* evidence of the due execution by statute R. S. O. c. 136, s. 63. It was held that this Act applied, notwithstanding the instrument contained a material alteration. It had been held that the registrar should have refused to receive and register the document, but the Appeal Court held that this was a mistake. "I think the learned judge overlooked, at the moment, that although the rule was at one time as he ruled, that has been changed, and the rule now is that alterations and interlineations in a deed are presumed to have been made before execution. . . . The rule is adopted in the case of deeds that a deed cannot be altered after execution without fraud or wrong, and fraud or wrong is never assumed without some proof, and the law presumes *primâ facie*, that any alteration apparent on it, was made at such a time and under such circumstances as not to constitute an offence." *Per* BURTON, C.J.O. *Graystock* v. *Barnhart*, 26 O. A. R. 545.

A certificate purporting to show the registered conveyances of land from the county registrar's office under

the hand of the deputy registrar, was held in *Gamble* v. *McKay*, 7 U. C. C. P. 319, not admissible evidence of title under 13 & 14 Vict. c. 19, s. 4. "It is quite clear," said Draper, C.J., "that this certificate was inadmissible under the statute which relates to copies of any official documents, etc., but does not extend to copies of deeds or memorials in a registry office, and still less to a paper like that produced which is at best an imperfect abstract, or possibly a copy from portions of the index of the registry book. The certificate which is made evidence under the registry acts is of a very different character. It relates to acts done by the officer."

Under the provisions of the Revised Statutes of Nova Scotia, it was enacted that the certificate of registry endorsed on any deed, etc., and signed by the registrar, shall be taken and allowed in all courts as evidence of the registry. It was held that the mere production of the paper purporting to be a certificate was not sufficient. It was necessary to shew that it had been signed by the proper officer. *Gould* v. *MacGregor*, 1 R. & G. N. S. R. 339.

A certified copy of a patent, taken from the books in the provincial registrar's office, and signed by the deputy registrar, is not sufficient as primary evidence instead of an exemplification. "This," said ROBINSON, C.J., "is an attempt, the first that I know of, to rest upon evidence of an inferior degree, that is, a mere certified copy from the registrar's book, without its being identified under the Great Seal, and without any attempt being made to lay a foundation for the reception of parol evidence. *Prince* v. *McLean*, 17 U. C. Q. B. 463.

A party who has lost his patent for land, will not be allowed to give parol evidence of its contents; he must produce an exemplification of the patent. *McCollum* v. *Davis*, 8 U. C. Q. B. 150.

*Protests, Plans, etc.; Other Documents.*

Any public document filed in the public office of the Government may be proved by an examined copy. So held in *McLean* v. *McDonnell*, 1 U. C. Q. B. 13.

In *Murray* v. *Duff et al.*, 33 N. B. 351, it was held by TUCK, J., that under the Act of Assembly, 55 Vict. c. 11, s. 2, N. B., a will proved before a notary public, and recorded during the lifetime of the testator, was properly admitted in evidence.

The registered memorial of a will twenty years old, executed by the devisee, when possession of the land has been consistent with the registered title, is good evidence of the devise therein contained. *McDonald* v. *McDougall*, 16 O. R. 401.

In *Doe* d. *Strong* v. *Jones*, 7 U. C. Q. B. 385, the Court was of opinion that an admitted copy of the field notes from the Crown Lands Office might be received in evidence (1850).

In an action on a promissory note payable at Ogdensburg, in the State of New York, it was held that the production of a protest of a notary of that State was no evidence of the facts therein stated, the statute of Canada under which a protest was made *primâ facie* evidence of those facts only applying to protests made by notaries of Upper and Lower Canada. *Griffin* v. *Judson*, 12 U. C. C. P. 430.

A conveyance executed by a municipality is not a public document within the meaning of the Documentary Evidence Act, 8 & 9 Vict. c. 113, s. 1. *Morice* v. *Baird*, 6 Man. 241.

It was held in *Queen* v. *McGowan*, 17 N. B. 191, that the return of the Commissioners of Highways, properly made and filed, was evidence of the laying out of a street.

Where an ancient allotment book of a township, though referring to a writ of partition and plans purporting on their face to be copies, come out of the proper custody, and have for a long period of time been recognised by the proprietors of the township as muniments of their title, they will be receivable as evidence if proof be adduced that search has been made for the originals which cannot be found. *Songster* v. *Payzant*, Thomson, N. S. 408.

The Witnesses and Evidence Act of Nova Scotia, Revised Statutes, 1900, c. 163, s. 201, making admissible in evidence plans on file in the Crown Land Office, is one that must be strictly construed. The statute referred to provides for the admission in evidence of a duplicate original of a grant from the Crown, deposited in the Crown Lands Office, certified by the Commissioner of Crown Lands, or a copy from the registry so certified, and proceeds to enact, that "if any such duplicate original contains a reference to any plan, and there is on file in such department a plan corresponding to the description, or meeting the requirements of said duplicate original, such plan shall be deemed to be the plan referred to in such duplicate original, notwithstanding the same is not annexed to such duplicate original."

In the judgment of the Court, the dangerous character of this legislation was strongly commented upon. *Per* TOWNSHEND, J.: "It is to my mind, a dangerous and objectionable amendment, opening the door to fraud and uncertainty. It makes a radical change in the law of evidence, the whole consequences of which cannot easily be foreseen."

The judge received a certified copy of the plan in question, for which there was no provision in the statute, and the verdict was set aside. "To admit as evidence a copy of any plan picked up in the Crown Land Office,

without any knowledge as to how, when, or for what purpose it was made, would be too flagrant a violation of first principles." *Bartlett* v. *Nova Scotia Steel Co., Ltd.*, 37 N. S. R. 259.

In an action of trespass for cutting and removing a wharf, a plan was offered by defendant which was admitted to have come from the Crown Land Office and was signed by the Surveyor-General, but as to which there was no other proof. There was no evidence on the plan to connect it with any of the parties to the suit.

The judgment of RIGBY, J., refers to the case of *Walker* v. *Bayers*, 3 N. S. R. 270, in which it was held that two plans which came from the Crown Land Office, which had been there for thirty years, but of which neither the origin nor the history was given, nor was it shown that they were regarded in the office as authentic, were properly rejected. The plan offered in evidence here was, therefore, held rightly to have been rejected. *Esson* v. *Wood*, 4 R. & G. 276.

Sworn copies of exhibits filed in the Crown Office cannot be received in evidence. The originals should be produced. *Molson et al.* v. *McDonnell*, 5 U. C. Q. B. O. S. 441. (7th Will. IV.)

The description of a lot prepared for and used by the Crown Lands Department in framing the patent which grants the lot by number or letter only, was held in *Kenny* v. *Caldwell*, 21 O. A. R. 110, admissible evidence to explain the metes and bounds of that lot. The plan of survey of record in and adopted by the Crown Lands Department governs on a question of the location of a road when the surveyor's field notes do not conflict with the plan, and no road has been laid out on the ground. *Ibid.*

A plan was produced from the registry office sworn to be that furnished by the Commissioner of Crown

Lands. It was headed "Cardiff," the name of the township, and at the bottom was written, "Department of Crown Lands, Ottawa, November, 1866. A. Russell, Assistant Commissioner," whose signature was proved. *Held*, sufficiently certified and receivable in evidence. *Nicholson* v. *Page*, 27 U. C. Q. B. 318 (1868).

*Held*, in *Beard et al.* v. *Steele*, 34 U. C. Q. B. 43, that under 34 Vict. c. 14, Ont., the due taking of a commission, executed in Montreal, was sufficiently proved by an affidavit made before the notary public there, and not before the mayor or chief magistrate as required by Consolidated Statutes, U. C. c. 32, s. 21.

*Privilege of Public Documents.*

In an action for libel and slander, the plaintiff's counsel insisted on the production of an anonymous letter written by the defendant to the Ontario Government relating to the licensing of the plaintiff's hotel. The head of the department attended and declined to produce the letter on the ground that its production would be injurious to the public service. It was held that the question whether the production of such a document was injurious to the public service must be determined, not by the judge, but by the head of the department having the custody of the paper, and the production of the document ought not to have been compelled. *Bradley* v. *McIntosh*, 5 O. R. 227.

## CHAPTER VII.

### PROOF OF PRIVATE DOCUMENTS.

We have dealt with public documents. The proper method of proving a private document depends upon two considerations:—

(i.) Is the document thirty years old?

(ii.) Is it such a document as the law requires to be attested? that is, Must the signature be witnessed by one or more persons who also subscribe their names in order to authenticate the signature?

If the document is less than thirty years old and is not required by law to be attested, the person tendering it must prove the handwriting. If the document is less than thirty years old and is required by law to be attested, the person tendering it must prove its due attestation. If the document be thirty years old or more, the person tendering it may prove that it is produced from a proper custody, and in that case will not be required to prove its execution.

#### I. *Private Documents less than Thirty Years Old which are not required by Law to be Attested.*

The mere fact that documents happen to be attested does not matter, if they are not bound by law to be attested (*a*). Proof of the signature of

(*a*) Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 26; Criminal Procedure Act, 1865 (28 Vict. c. 18), s. 7.

the parties is sufficient. The party tendering such a document must produce the original, unless the circumstances are such as to render admissible secondary evidence of its contents; and that original must be duly stamped if a stamp be required by law (*b*). Then he has only to prove the handwriting if this has not been admitted.

Let us assume that his case is that the document in question was written or signed by A. Besides calling A. as a witness, he can prove that this is so in four ways:—

(a) By calling anyone who saw A. write or sign the document in question;

(b) By calling anyone who ever saw him write anything, even if only *once* (*c*);

(c) By calling anyone who has written to A. and received back letters in the disputed handwriting purporting to come from A. (*d*), or who is otherwise acquainted with the handwriting (*e*);

(d) By comparing the document in question with any proved or admitted writing of A.'s (*f*).

If A. be a party to the action, interrogatories may be administered to him before the trial to obtain admission of such other documents (*g*), or, if A. be in court at the trial, he may, it seems, be then and there required to write something which the Court and jury may compare with the document (*h*) in dispute (*i*).

Where the handwriting of any part of a document

(*b*) As to when a stamp is required, see *post*, p. 294.
(*c*) *Garrells* v. *Alexander*, 4 Esp. 37.
(*d*) *R.* v. *Slaney*, 5 C. & P. 213.
(*e*) *Doe* v. *Suckermore*, 5 A. & E. 703; Cockle, 165.
(*f*) Common Law Procedure Act, 1854, s. 27; 28 Vict. c. 18, s. 8; and see *ante*, p. 46.
(*g*) *Jones* v. *Richards*, 15 Q. B. D. 439.
(*h*) *Doe*, d. *Devine* v. *Wilson*, 10 Moo. P. C. at p. 530.
(*i*) As to the evidence of experts in handwriting, see *ante*, Book I., Chap. II.

provable by a copy is in dispute, the original must be produced (*k*).

### II. *Private Documents Less than Thirty Years Old which are required by Law to be Attested.*

Wills, certain appointments under powers, bills of sale, and some other documents, are void in law unless attested (*l*). Therefore the attestation of such documents must be strictly proved (*m*).

The party tendering such a document must produce the original, unless the circumstances are such as to render secondary evidence admissible (*n*); and such original must be duly stamped if a stamp be required by law. Then he has only to prove that the signature to the document was duly attested.

If there be an attesting witness, alive, sane, and within the jurisdiction of the Court, he must be called. If there are several attesting witnesses, it is enough to call one only, even though more than one witness is required by law to attest the document (*o*); if all the attesting witnesses are either dead, insane or without the jurisdiction, it is sufficient to prove the handwriting of any one of them.

An attesting witness to a deed need only see it delivered: it is not necessary that he should see it signed. To a will, however, the two attesting

(*k*) *Auriol* v. *Smith*, 18 Ves. 198.
(*l*) See Book II., Chap. III.
(*m*) *Abbot* v. *Plumbe*, 1 Doug. 216; Cockle, 168.
(*n*) As to when secondary evidence is admissible, see *post*, p. 360.
(*o*) There is an exception to this in the case of the proof of a will in solemn form; the executor there can be compelled to call both witnesses: *Coles* v. *Coles*, L. R. 1 P. & D. 70.

witnesses must subscribe at the same time and in the presence of each other and of the testator (or at least probably in sight of the testator); and the testator must either have signed it or acknowledged that the signature to it is his, in the presence of them both; though they need not know that the paper is his will.

Under the common law, whenever a writing was attested, the witnesses, or one of them, had to be called to prove the due execution of the instrument; and it was not competent to a party to prove it even by the admission of the person by whom it was executed; but now it is no longer necessary to prove by the attesting witness any instrument, to the validity of which attestation is not requisite, and such instrument may be proved by admission like any other document. This is so, both in civil (*p*) and criminal proceedings (*q*). Nevertheless it is still apparently the practice on *ex parte* applications in lunacy that a deed should be proved by the attesting witness or by proof of his signature if it can be obtained; if not, the document may be proved as if unattested (*r*). So, too, it has been held that on *ex parte* applications a deed cannot be proved, except by the attesting witness (*s*); but this is strictly confined to *ex parte* applications (*t*).

But an attesting witness need never be called to prove an instrument which is more than thirty years old; or when the original is withheld by an adverse party, who refuses to produce it after notice (*u*); or when the adverse party, in producing it after notice, claims an

(*p*) Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 26.
(*q*) Criminal Procedure Act, 1865 (28 Vict. c. 18), s. 7.
(*r*) *In re Rice*, 32 Ch. D. 35.
(*s*) *In re Reay's Estate*, 1 Jur. (N.S.) 222.
(*t*) *Worthington* v. *Moore*, 64 L. T. 338.
(*u*) *Poole* v. *Warren*, 8 A. & E. 588.

interest under it (*x*); or when the adverse party has recognised the authenticity of the instrument by acts which amount to an estoppel.

Where an instrument requires to be attested by several witnesses, it may be proved by calling any one of them (*y*), except in the case of wills, which, under certain circumstances, can be proved only by the production of all the producible witnesses (*z*). An instrument which is required to be attested by several witnesses may be proved by evidence of the handwriting of one of such witnesses, coupled with proof of his identity, as soon as the absence of all the witnesses has been explained satisfactorily, but not otherwise (*a*).

To prove a will of land against the heir, all the witnesses must be called (*b*), unless one of them is dead, or abroad, or insane, or has not been heard of for many years, when his evidence will be dispensed with, or unless the heir admits it, when the Court will establish it without declaring it to be well proved; but where the action is by the heir against the devisee, the latter is not required to produce all the witnesses (*c*).

In all other cases, to prove a will it is sufficient to call one of the witnesses who can speak to the attestation (*d*), and who can testify either that he saw the testator sign, or that he heard him acknowledge to the witness, or in his presence, that the will was his (*e*). The witnesses must also have subscribed either actually in the presence of the testator, or so near to him that, although he did not see them sign, he might have seen them without

(*x*) *Pearce* v. *Hooper*, 3 Taunt. 60; Cockle, 170.
(*y*) *Holdfast* v. *Dowsing*, 2 Str. 1253.
(*z*) *Coles* v. *Coles*, L. R. 1 P. & D. 70; *Belbin* v. *Skeats*, 1 Sw. & Tr. 148.
(*a*) *Nelson* v. *Whittall*, 1 B. & Ald. 19; *Adam* v. *Kerr*, 1 Bos. & P. 360.
(*b*) *Bootle* v. *Blundell*, 19 Ves. 494.
(*c*) *Tatham* v. *Wright*, 2 R. & M. 1.
(*d*) Bull. N. P. 264.
(*e*) *Stonehouse* v. *Evelyn*, 3 P. Wms. 113.

moving from where he was. "It is enough if the testator might see, it is not necessary that he should actually see them signing; for at that rate if a man should turn his back or look off, it would vitiate the will." Thus, where the witnesses were in one room, and the testator in another; and the latter, although he did not see them sign, might have seen them through a window, the will was held good (*f*); but it will be otherwise if the testator could not have seen them without changing his position (*g*), or was insensible at the time (*h*). To obtain probate of a will it is of course necessary to call one of the attesting witnesses (*i*), although it is not necessary to call both (*k*); but if one is called and fails to prove the execution, the other must be called, if possible, although he may be known to be adverse to the party producing him (*l*); and if a witness to the will gives evidence against it, he may be contradicted by other evidence, or it may be shown that he has an adverse interest, and then he can be cross-examined as a hostile witness (*m*). When the attesting witness to a will (the attestation clause being insufficient) refuses to make an affidavit as provided for by rule 4 of the Probate Rules, 1862, the Court, under s. 24 of the Probate Act, 1857, may order that such witness be examined in open court (*n*). When probate of a will had been granted on the evidence of the two attesting witnesses, such probate was confirmed in subsequent proceedings although one of the witnesses testified against the will and the other was not called; the Court being of opinion that the one witness had been tampered with, and good reasons were

(*f*) *Shires* v. *Glascock*, 2 Salk. 688; *Casson* v. *Dale*, 1 Bro. Ch. 99.
(*g*) *Doe* v. *Manifold*, 1 M. & S. 294.
(*h*) *Right* v. *Price*, Doug. 241.
(*i*) *Bowman* v. *Hodgson*, L. R. 1 P. & D. 362.
(*k*) *Belbin* v. *Skeats*, 1 Sw. & Tr. 148.
(*l*) *Coles* v. *Coles*, L. R. 1 P. & D. 70.
(*m*) *Ibid.*
(*n*) *In the Goods of Sweet*, [1891] P. 400.

given for not calling the other (*o*). Where all the witnesses swear the will was not duly executed, other evidence is admissible to support it (*p*).

Where a witness, called to prove the execution of an instrument, sees his signature to the attestation, and says that he is therefore sure that he saw the party execute the deed, that is a sufficient proof of the execution of the instrument, though the witness adds that he has no recollection of the fact (*q*).

Where an attesting witness has become blind, he must still be called to give evidence from recollection (*r*). If the attesting witness be called, and can recollect nothing, then the execution of the deed may be proved in any other manner available (*s*).

### III. *Documents Thirty Years Old.*

In the case, however, of a document which is thirty years old, much less strictness is required. If a document bears a date, it will be presumed that it was signed or executed on that date (*t*); if it is undated, its date can be proved by oral evidence; and, even if it bears a date, oral evidence is admissible to show that it was signed or executed on some other date. Next, the party who tenders it must prove that the document is produced from a proper custody. For this purpose he must as a rule call a witness to show from what custody it has come (*u*). If a document thirty years old or

(*o*) *Pilkington* v. *Gray*, [1899] A. C. 401.
(*p*) See *Wright* v. *Rogers*, L. R. 1 P. & D. 678.
(*q*) *Per* Bayley, J., in *Maugham* v. *Hubbard*, 8 B. & C. at p. 16. Cockle, 195; cf. *Burling* v. *Pattison*, 9 C. & P. 579.
(*r*) *Rees* v. *Williams*, 1 De G. & Sm. 314.
(*s*) *Talbot* v. *Hodson*, 7 Taunt. 251.
(*t*) *Anderson* v. *Weston*, 6 Bing. N. C. 296; Cockle, 169.
(*u*) *Evans* v. *Rees*, 10 A. & E. 154.

more be produced from a proper custody, it will be presumed to have been signed or written by the person whose signature it bears or in whose writing it purports to be, and to have been duly executed and attested, if it purports so to be. No proof of any of these facts is required. The admissibility of such a document without such proof depends upon the custody from which it is produced. It must be a custody which is some guarantee of its genuineness, but need not be that in which the law would in strictness require it to be, so long as the document may be naturally or reasonably expected to be found in such custody (*x*). The judge in each case decides whether the custody is proper.

This rule has been made for the sake both of convenience and of necessity; as it is most difficult at times, and even occasionally impossible, to prove the due execution of ancient documents. The genuineness of the document is guaranteed by the custody from which it is produced.

In the case of *Bishop of Meath* v. *Marquis of Winchester* (*y*), TINDAL, C.J., said:

"These documents were found in a place in which, and under the care of persons with whom, papers of Bishop Dopping might naturally and reasonably be expected to be found, and that is precisely the custody which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper place of deposit. If documents continued in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than the proper place of deposit, that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious that whilst there can be only one place of deposit strictly and absolutely proper,

(*x*) *Meath* v. *Winchester*, 3 Bing. N. C. 183; Cockle, 171.
(*y*) 3 Bing. N. C., at p. 200.

there may be various and many that are reasonable and probable, though differing in degree, some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction, that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases. On the one hand, old grants to abbeys have been rejected as evidence of private rights, where the possession of them has appeared altogether unconnected with the persons who had any interest in the estate. Thus, a manuscript found in the Herald's Office, enumerating the possessions of the dissolved monastery of Tutbury, a manuscript found in the Bodleian Library, Oxford, and a grant to a priory brought from the Cottonian MSS. in the British Museum, were all held to be inadmissible, the possession of the documents being unconnected with the interests in the property. On the other hand, an old chartulary of the dissolved abbey of Glastonbury was held to be admissible because found in the possession of the owner of part of the abbey lands, though not of the principal proprietor. This was not the proper custody, which, as Lord REDESDALE observed, would have been the Augmentation Office; and, as between the different proprietors of the abbey lands, it might have been more reasonably expected to have been deposited with the largest; but it was, as the Court argued, a place of custody where it might be reasonably expected to be found."

It appears from this case, that it is not necessary that the custody should be that which is strictly proper: it is sufficient if it be one which may be reasonably and naturally explained (*z*), and one which affords reasonable assurance of the authenticity of the document (*a*).

Accordingly in this case it was decided that though a document relating to a see ought strictly to be in the custody of the present bishop, yet if the son or executor of the late bishop produce it, it will be admitted (*b*). So an expired lease may be produced from the custody either

(*z*) *Doe* v. *Samples*, 8 A. & E. 154; see *Meath* v. *Winchester*, *supra*.

(*a*) *Per* COLERIDGE, J., in *Doe* v. *Phillips*, 8 Q. B. 158; cf. *Bidder* v. *Bridges*, 54 L. T. 529. It would seem that this reasoning does not apply to maps which are offered for general sale. Cf. *R.* v. *Norfolk County Council*, 26 T. L. R. 269.

(*b*) *Meath* v. *Winchester*, *supra*.

of the lessor or the lessee: as it is an accident whether or not the tenant will deliver it up at the end of the term. The same doctrine applies to family Bibles. A New Testament containing entries of the births, deaths and marriages of a family, produced by a member thereof, and proved to have been in the possession of the family for a long time, is admissible in evidence without proof of handwriting (*c*). But it is not sufficient to produce an ancient grant to a priory from the British Museum merely, without showing that someone having a right to possession of it (as owning the property, etc.) lodged it there (*d*).

So a will which is thirty years old "proves itself" if it be produced from the proper custody (*e*). It is not necessary to call any of the attesting witnesses, although they appear to be living (*f*). This is so even though there are circumstances which might lead to the inference that the will had been cancelled (*g*). The thirty years are computed from the date of the will (*h*).

Moreover, ancient documents, which purport to be part of the transactions to which they relate as distinct from a mere narrative of them, and which are produced from a proper custody, not only prove themselves, but are received as evidence that those transactions actually occurred. This is so whether the rights in question be public or private, provided the controversy refers to a time so remote that it is unreasonable to expect a higher species of evidence. But the surrounding circumstances must be free from reasonable suspicion; and the deeds or other

(*c*) *Hubbard* v. *Lees*, L. R. 1 Ex. 255.
(*d*) *Bidder* v. *Bridges*, 54 L. T. 529.
(*e*) *Rancliff* v. *Perkins*, 6 Dow, 202.
(*f*) *Doe* v. *Walley*, 8 B. & C. 22.
(*g*) *Andrew* v. *Motley*, 12 C. B. (N.S.) 526.
(*h*) *M'Kenire* v. *Fraser*, 9 Ves. 5.

documents must be more than thirty years old, and must come from some custody in which they might naturally be found if authentic.

In *Roe* v. *Rawlings* (*i*), a paper was received which purported to be a statement made by a confidential agent, to a former tenant for life, of rent reserved in 1728, and had been endorsed as such by the latter. This document was handed down with other muniments of title to the plaintiff, who was tenant in tail in 1806, and it was then held to be evidence for him to show that the rent reserved by a tenant for life who had immediately preceded the plaintiff, was less than the rent originally reserved. Lord ELLENBOROUGH said:—

"Ancient deeds, proved to have been found amongst deeds and evidences of land, may be given in evidence, although the execution of them cannot be proved; and the reason given is, 'that it is hard to prove ancient things, and the finding them in such a place is a presumption they were fairly and honestly obtained, and reserved for use, and are free from suspicion of dishonesty.' This paper, therefore, having been found amongst the muniments of the family . . . accredited . . . and preserved . . . we think that it was evidence to be left to the jury of the amount of the ancient rent at the time it bears date."

In ejectment, where both plaintiff and defendant claimed through E., it was held that an ancient entry made by E.'s steward in his rent book was evidence as to the identity of the property (*k*). So, ancient terriers are received to prove the amount of vicarial tithes (*l*). In *Bishop of Meath* v. *Marquis of Winchester* (*m*) the main questions were, whether an ancient deed and also a case concerning the right of presentation to a living, stated for the opinion of counsel by a former Bishop of Meath in 1695, which were found among the family papers of his descendants, were evidence touching the

(*i*) 7 East, 279.
(*k*) *Doe* v. *Seaton*, 2 A. & E. 171.
(*l*) *Pearson* v. *Beck*, 8 Ex. 452.
(*m*) Cited *ante*, p. 283.

right of presentation as against the plaintiff in error. Both documents were held to be clearly admissible.

So, in *Doe* v. *Palman* (*n*), which was an action of ejectment, to prove that an ancient ancestor had been seised of the *locus in quo*, the lessor of the plaintiff produced from her muniment room the counterpart of an old lease, purporting to be granted by the ancestor, but executed only by the lessee, and it was held admissible, without proof that the lessee had actually enjoyed under it.

In *Malcolmson* v. *O'Dea* (*o*), it was laid down that the true ground for admitting a lease is that it shows an act or acts of ownership. Thus, the production from proper custody of an ancient lease granted by A., is evidence of an act of ownership over the *locus in quo* by A. at that date, and this is presumptive evidence that he was then owner in fee simple of such land (*p*). So, to prove a personal prescriptive right of fishery, as appurtenant to a manor, old licences on the court rolls, granted by the lords of the manor, are admissible (*q*). Old rent rolls or court rolls are received to prove rights to which they refer (*r*). Entries in old parish rate books are admissible as evidence to prove who were the owners or occupiers of the property at a previous time (*s*).

It is said, however, to be an established principle, that nothing said or done by a person, having at the time an interest in the subject-matter, shall be evidence either for him or persons claiming under him (*t*); and therefore in a settlement case (*u*), an old entry in a parochial book was held not to be evidence of the terms under

(*n*) 3 Q. B. 622; cf. *Malcolmson* v. *O'Dea*, 10 H. L. Cas. 593.
(*o*) 10 H. L. Cas. 593; followed in *Blandy-Jenkins* v. *Earl of Dunraven*, [1899] 2 Ch. 121.
(*p*) *Clarkson* v. *Woodhouse*, 3 Doug. 189; see *ante*, p. 119.
(*q*) *Rogers* v. *Allen*, 1 Camp. 309; *Malcolmson* v. *O'Dea*, *supra*.
(*r*) *Heath* v. *Deane*, [1905] 2 Ch. 86.
(*s*) *Smith* v. *Andrews*, [1891] 2 Ch. 678.
(*t*) *Per* ABBOTT, C.J., in *R.* v. *Debenham*, 2 B. & Ald. at p. 187.
(*u*) *Ibid.*

which a pauper resided in the parish. So, entries made by a deceased person, through whom the defendant claims, acknowledging the receipt of rent for the premises in question, are not evidence of title for the defendant (*x*).

## PRIVILEGE OF DOCUMENTS WHEN PRODUCED AT THE TRIAL.

So far it has been assumed that the party who desires to put a document in evidence is in possession of it. It often happens, however, that the document on which he relies is in the possession of his opponent. In that case he must give his opponent notice to produce it (*y*). But even though he may thus secure that the document shall be in court on the day of trial, nevertheless his opponent may object to it being read to the jury on one or more of the following grounds:—

(i.) That the document is wholly irrelevant and immaterial to any issue in the proceedings.

(ii.) That the document is a communication which passed between the objector and his solicitor, or came into existence for the use of his solicitor to enable him to conduct the case or advise the objector thereon.

(iii.) That the production of the document will tend to criminate him.

(iv.) That the document is a communication which passed between the objector and his wife (or her husband).

(*x*) *Outram* v. *Morewood*, 5 T. R. 123.

(*y*) As to the value and effect of a notice to produce, see *post*, p. 676.

(v.) That the document tendered in evidence was written "without prejudice," or is an answer to a document which was written without prejudice.

Again, it may be that the document on which a party relies is in the possession of some third person. If so, this third person should be served with a *subpœna duces tecum* (*z*)—that is, a summons bidding him bring certain specified documents into Court with him. The third person must obey the *subpœna* and produce the document when called upon so to do. But he can still object to its being read aloud in open Court on any of the grounds numbered (i.), (iii.) and (iv.), and perhaps also (v.), above.

Moreover, if the head of any Government department be called upon to produce any official document, he can state that in his opinion it would be prejudicial to the public interests that the document should be read aloud in open Court; and thereupon the judge will permit him to withhold it from publication (*a*). In all other cases it is for the judge to decide as to the validity of any objection to produce a document, whether made by a party or by a witness; and his decision on the point is final.

If one party has given the other notice to produce at the trial a document in his possession which that other succeeds in proving to be privileged from production, the first party may put in a copy of that document if he has one, or prove its contents by any other secondary evidence. But this rule does not apply when the document is privileged from production on the ground of public

(*z*) As to this *subpœna*, see *post*, p. 653.
(*a*) See *ante*, pp. 241, 273.

policy (*b*), nor, it is submitted, when it is written "without prejudice."

(i.) It is unnecessary to say anything as to the first objection; irrelevant matter will of course be excluded.

(ii.) In this case the privilege arises out of the professional relation which exists between a solicitor and his client (*c*).

Letters containing mere statements of fact are not privileged unless they are of a professional and confidential character (*d*). In *Lowden* v. *Blakey* (*e*) an advertisement submitted to counsel was held privileged. But a man cannot claim privilege for a deed simply on the ground that the solicitor obtained it from him in the course of litigation (*f*).

The litigation, contemplated or threatened, must be some specific litigation, and not litigation generally (*g*). Thus, where a solicitor, having been consulted in a matter as to which no dispute had arisen, applied to a surveyor for certain information to enable him to advise, it was held that the information was not privileged (*h*). But such litigation need not be with the particular adversary against whom the privilege is raised; and a document, privileged in one action, will be privileged in any subsequent action, whether the parties or issues are the same or not. So a written opinion given in a friendly way by an ex-Lord Chancellor to a friend has been held not to be privileged (*i*).

The privilege has been extended to communications between a client in Scotland and a Scotch solicitor practising in London (*k*); and the opinion of a Dutch lawyer,

(*b*) See *ante*, p. 273.
(*c*) *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644; *Collins* v. *L. G. O. Co.*, 63 L. J. Q. B. 428.
(*d*) *Per* KAY, L.J., in *O'Shea* v. *Wood*, [1891] P. 286.
(*e*) 23 Q. B. D. 332.
(*f*) *Per* Lord BLACKBURN, in *Lyell* v. *Kennedy*, 9 App. Cas., at p. 88.
(*g*) *Westinghouse* v. *Midland Rail. Co.*, 48 L. T. 462.
(*h*) *Wheeler* v. *Le Marchant*, 17 Ch. D. 675.
(*i*) *Smith* v. *Daniell*, L. R. 18 Eq. 649.
(*k*) *Lawrence* v. *Campbell*, 4 Drew. 485.

obtained by the defendants in an action with reference to their defence, has been held privileged (*l*). It has been held that when a solicitor writes letters to a third party for the purposes of a suit the answers are privileged (*m*); and letters passing between a country solicitor and his town agent are privileged (*n*). In an action by the payee of a promissory note against the maker, it appeared that the plaintiff had acted as attorney to the defendant, and, while holding that capacity, had obtained documentary evidence from the defendant, which he stated was wanted to assist her in preparing a case for counsel; and on this he relied to take the note out of the Statute of Limitations. It was held that the evidence was inadmissible for the plaintiff, PLATT, B., observing that it would never have been in the hands of the attorney except for the purpose of his preparing a case for counsel; and MARTIN, B., added:

"The client might be in error in thinking the communication necessary to be laid before counsel, but if she communicated it *bonâ fide*, considering it necessary, the communication was privileged and could not be divulged" (*o*).

If a solicitor improperly hands a document to a third party, the latter may give it in evidence (*p*). Where the effect of an opinion of counsel was set out in a statement of claim, it was held that the plaintiff must produce it for the inspection of the defendant (*q*), or be precluded from giving it in evidence at the trial. And if an opinion of counsel, or, indeed, any other privileged document, is made an exhibit to an affidavit, anyone entitled to see the affidavit is also entitled to see such opinion or other document (*r*), unless it is a document which comes into existence solely for the information of the Court (*s*).

(*l*) *Banbury* v. *Banbury*, 2 Beav. 177.
(*m*) *Simpson* v. *Barnes*, 33 Beav. 483.
(*n*) *Catt* v. *Tourle*, 19 W. R. 56.
(*o*) *Cleave* v. *Jones*, 21 L. J. Ex., at p. 108.
(*p*) *Per* PARKE, B., in *Cleave* v. *Jones*, 21 L. J. Ex., at p. 106.
(*q*) *Mayor of Bristol* v. *Cox*, 26 Ch. D. 678.
(*r*) *In re Hinchliffe*, [1895] 1 Ch. 117.
(*s*) *Sloane* v. *Britain Steamship Co.*, [1897] 1 Q. B. 185.

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

(iii.) The objection that the production of a document will tend to criminate the objector must be taken on oath (*u*). That it will expose him to a civil action is not sufficient (*x*). Claims of privilege on this ground have been already fully discussed under the head of "Privilege of Witnesses" (*y*).

(iv.) Neither husband nor wife can be compelled to disclose any document which has passed between them. Such communications are "held sacred" on grounds of "social policy" (*z*). And after the death of either, the privilege enures for the benefit of the survivor (*a*). This rule was expressly preserved as to civil cases by the Evidence Amendment Act, 1853 (*b*), and as to criminal cases by the Criminal Evidence Act, 1898 (*c*).

(v.) "Without prejudice." As we have seen (*d*), whatever a party to an action says with regard to the matters in issue in that action is relevant, and therefore admissible in evidence against him. But it would be manifestly unfair and hurtful to the public interests if it were impossible for parties to a dispute, whether an action is actually pending or not, to enter into negotiations with a view to compromise, without running the risk of having what they said or did given in evidence against them if the negotiations fail and the action proceed to trial.

(*t*) *Volent* v. *Soyer*, 13 C. B. 231.
(*u*) *Per* JESSEL, M.R., in *Webb* v. *East*, 5 Ex. D. at p. 112.
(*x*) *Tetley* v. *Easton*, 18 C. B. 643.
(*y*) See *ante*, p. 221.
(*z*) *Per* MANISTY, J., in *Wennhak* v. *Morgan*, 20 Q. B. D. at p. 639.
(*a*) *O'Connor* v. *Marjoribanks*, 4 Man. & G. 435.
(*b*) 16 & 17 Vict. c. 83, s. 3, *ante*, pp. 210, 211, 230.
(*c*) 61 & 62 Vict. c. 36, s. 1 (d), *ante*, pp. 211, 230.
(*d*) See *ante*, p. 101.

Accordingly, the law has laid down the rule (*e*) that after a dispute has arisen, a party may, if he chooses, guard himself against his statements, or those of his agents, being made a weapon against him afterwards—that is, as it is usually termed, he can intimate to the other party that all communications with him are to be "without prejudice." But he must do so clearly and distinctly or the general rule will still apply (*f*).

Thus, if a correspondence be opened between the parties, a letter written "without prejudice" prevents it being read at the trial (*g*); it prevents also the reply to it (*h*), and, indeed, all the rest of the correspondence (*i*) being read. And a letter so headed has even been held to cover letters which had already passed, where the writer clearly expressed his will that the whole of the correspondence should be privileged (*k*).

The same rule applies to conversations, and accordingly no evidence can be given of such a conversation, unless a break be clearly shown to have occurred which separates the matter sought to be proved from the part of the conversation which is clearly "without prejudice" (*l*).

Probably a person making a demand for the first time cannot prevent his demand being proved at the trial by stating that it is made without prejudice, for until the claim is not admitted there is no dispute, and the rule is intended only to enable negotiations to be entered into to settle an existing dispute.

A statement "without prejudice" cannot be given in evidence at the trial for any purpose without the consent

(*e*) *Walker* v. *Wilsher*, 23 Q. B. D. 335.
(*f*) *Wallace* v. *Small*, M. & M. 446; but see *Waldridge* v. *Kennison*, 1 Esp. 142.
(*g*) *Paddock* v. *Forrester*, 3 Man. & G. 903.
(*h*) *In re Harris*, 44 L. J. Bkcy. 33.
(*i*) *Paddock* v. *Forrester*, *supra*; *Walker* v. *Wilsher*, *supra*.
(*k*) *Peacock* v. *Harper*, 26 W. R. 109; see *Oliver* v. *Nautilus Steamship Co.*, [1903] 2 K. B. 639.
(*l*) *Thomson* v. *Austen*, 2 Dowl. & Ry. 361.

of both parties (*m*), and consequently the judge is not entitled to look at letters so protected for the purpose of deciding the issue as to costs (*n*). He may, of course, look at them to see if they are in fact marked "without prejudice" (*o*). But an incidental admission made in the course of the negotiations but having nothing to do with their subject may be proved (*p*); and, of course, if a settlement is arrived at, the statement can be put in if disputes or litigation subsequently occur as to the terms of the settlement itself (*q*); but it would seem that it cannot be made use of in order to prevent time running under the Statutes of Limitation (*r*).

The rule only applies in disputes between private individuals. Thus, a notice of intention to suspend payment of debts, which is an act of bankruptcy, may be proved by any creditor, even if headed "without prejudice," for not only is there no dispute, but the interests of the creditor will suffer if he does not avail himself of the act of bankruptcy, which he must prove (*s*). And, as an agreement between the prosecutor and a person accused of a felony is a criminal offence, the rule cannot apply to charges of felony, and probably does not apply to other criminal charges. It may, however, be that, in the case of a misdemeanour of the class which the parties are allowed to compromise (*t*), negotiations entered into "without prejudice" are privileged.

## STAMP OBJECTIONS.

Even though a document has been strictly proved and all objections to its production, whether pro-

(*m*) *Walker* v. *Wilsher*, 23 Q. B. D. 337.
(*n*) *Ibid.*
(*o*) *In re Daintrey*, [1893] 2 Q. B. 116.
(*p*) *Waldridge* v. *Kennison*, 1 Esp. 142.
(*q*) *In re River Steamer Co.*, L. R. 6 Ch. 822; *Holdsworth* v. *Dimsdale*, 19 W. R. 798.
(*r*) See *per* MELLISH, L.J., *In re River Steamer Co.*, *supra*.
(*s*) *In re Daintrey*, *supra*.
(*t*) Such as a simple assault.

ceeding from a party or from the witness producing it, have been overruled, still, in a civil case, it sometimes happens that the officer of the court may object to its being read on the ground that it is insufficiently stamped, or, worse still, that it is not stamped at all. The judge will decide whether the document requires a stamp, and if so, for what amount; he must decide this before the document can be read to the jury, and his decision on the point is final (*u*). No new trial can be granted on this ground. The objection can usually be removed by payment of the amount of the stamp required by law, together with a penalty of £10 and a fee to the officer who takes the objection, and where the unpaid duty exceeds £10, interest at the rate of 5 per cent. per annum upon the amount of the unpaid duty must also be paid (*x*). But in some cases the objection is fatal; a bill of exchange, for instance, cannot be stamped after it has been issued.

It is impossible in a book on the Law of Evidence to give even a brief outline of the law relating to stamps. For this we must refer the reader to the Stamp Act, 1891, which consolidates the previous enactments on the subject. We can here merely state the leading principles, so far as they affect the admissibility in evidence of written documents.

The general rule is, that no instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall (except in criminal proceedings) be

(*u*) Order XXXIX., r. 8.
(*x*) The Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 14, 15 (1); see Appendix.

pleaded or given in evidence, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

It is the duty of the officer of the Court, and not of counsel, to take the objection that any document is not stamped, or is insufficiently stamped. If, however, the document bears a stamp denoting that, in the opinion of the Commissioners of Inland Revenue, it either is not chargeable with any duty, or is duly stamped, no objection to it can be raised (*y*).

If a document is not a completed agreement but only an offer, it does not require a stamp; but when it amounts to an agreement, or is evidence of one, it must be stamped, if the subject-matter is above £5 (*z*). If a document exists, which either party alleges to be the agreement between the parties, the original must be produced, and if it prove to be not properly stamped it will be inadmissible (*a*). Such an agreement cannot be treated as a nullity, if it is produced and appears to be unstamped; and therefore it was held in *Delay* v. *Alcock* (*b*), that a County Court judge was wrong in allowing parol evidence to be given of an agreement contained in an unstamped writing. Where, however, a party succeeds in establishing his case by oral evidence, the opposite party cannot defeat it, by merely producing an unstamped written agreement. Thus, in *Magnay* v. *Knight* (*c*), where the plaintiff closed her case without anything appearing to show that there was a written agreement between her and the defendant as to the subject-matter of the action, the defendant was held not entitled to call for a nonsuit by producing a paper purporting to be an agreement, but unstamped.

(*y*) Stamp Act, 1891, s. 12.
(*z*) Cf. *Hegarty* v. *Milne*, 14 C. B. 627.
(*a*) *Buxton* v. *Cornish*, 12 M. & W. 426.
(*b*) 4 E. & B. 660.
(*c*) 1 Man. & G. 944; and see *Mason* v. *Motor Traction Co.*, [1905] 1 Ch. at p. 423.

When it is necessary to produce a writing, or to account for its absence, secondary evidence will not be received if it appears that the original required a stamp, and that it was unstamped (*d*); but a writing requiring a stamp will be presumed to have been properly stamped (*e*); and, as against a party refusing to produce a document after notice, there is a similar presumption (*f*); but such a presumption may be rebutted by evidence that the writing was not stamped and then no copy can be put in (*g*). If it is shown that a lost document was at one time unstamped, this fact alone will raise a presumption that it continued without a stamp (*h*). The Court will not sanction an agreement to waive the objection for want of a stamp (*i*).

When an instrument purports to have been stamped, but no stamp appears, or one partially effaced, the judge may receive the writing, if the want of the stamp or its erasures is satisfactorily explained to him (*k*). Where an instrument, so far as appears on the face of it, is properly stamped, the Court is entitled to look outside the instrument in order to settle whether it is properly stamped or not (*l*); except, of course, when it bears a denoting stamp under s. 12 of the Stamp Act, 1891.

An unstamped instrument, inadmissible as an agreement, may yet be admissible for some other purpose, *e. g.* to prove a collateral or independent fact. Thus, a cheque, drawn for a greater amount than the law then permitted having regard to the stamp which it bore, has been received to prove the receipt of money by a holder, but

(*d*) *Supra*, p. 296.
(*e*) *Hart* v. *Hart*, 1 Hare, 1; cf. *Pooley* v. *Goodwin*, 4 A. & E. 94.
(*f*) *Crisp* v. *Anderson*, 1 Stark. 35.
(*g*) *Crowther* v. *Solomons*, 6 C. B. 758.
(*h*) *Marine Investment Co.* v. *Haviside*, L. R. 5 H. L. 624.
(*i*) *Owen* v. *Thomas*, 3 Myl. & K. 353; and see *post*, p. 299.
(*k*) *Doe* v. *Combs*, 3 Q. B. 687.
(*l*) *Maynard* v. *Consolidated Kent Collieries Corporation*, [1903] 2 K. B. 121.

not to discharge the banker (*m*); an unstamped receipt to show that goods were sold to a third person, and not to the defendant (*n*); an unstamped agreement to show an illegal consideration for a debt (*o*); but it cannot be presented to a jury as evidence of any part of the substantial claim of a party (*p*). An unstamped document may be handed to a witness to refresh his memory, or to challenge it (*q*); and a document which requires a stamp for some purposes but not for others, will be admissible for such latter purposes, but for them only. Where a document is void as a receipt for want of a proper stamp, it may be made evidence of an account stated, or other outstanding accounts (*r*), or of a contract (*s*). An unstamped or unregistered assignment of a debtor's whole property may be given in evidence as an act of bankruptcy, although until stamped it cannot be received for the purpose of giving it effect or supporting any claim under it (*t*). A 10*s*. deed stamp on a mortgage is, however, insufficient to render it admissible as a deed for the purpose of showing that it passed the legal estate in the mortgaged property (*u*); and a promissory note insufficiently stamped with a penny receipt stamp cannot be given in evidence to prove the receipt of the money for which it is given (*x*).

When an instrument is inadmissible by reason of the stamp laws, the plaintiff may still recover on another cause of action, of which the instrument does not form a necessary part, *e.g.*, for money lent, using the promissory note as an acknowledgment of the debt (*y*); and when a

(*m*) *Blair* v. *Bromley*, 11 Jur. 617.
(*n*) *Miller* v. *Dent*, 10 Q. B. 846.
(*o*) *Coppock* v. *Bower*, 4 M. & W. 361.
(*p*) *Jardine* v. *Payne*, 1 B. & Ad. 670.
(*q*) *Birchall* v. *Bullough*, [1896] 1 Q. B. 325.
(*r*) *Matheson* v. *Ross*, 2 H. L. Cas. 301.
(*s*) *Evans* v. *Prothero*, 1 De G. M. & G. 572.
(*t*) *Ex parte Squire*, L. R. 4 Ch. 47.
(*u*) *Whiting to Loomes*, 17 Ch. D. 10.
(*x*) *Ashling* v. *Boon*, [1891] 1 Ch. 568.
(*y*) *Farr* v. *Price*, 1 East, 56.

receipt is unstamped, payment may be proved by oral evidence (*z*).

### *Appropriated Stamps.*

Section 10 of the Stamp Act, 1891, provides:—

"(1) A stamp which by any word or words on the face of it is appropriated to any particular description of instrument is not to be used, or, if used, is not to be available, for an instrument of any other description. (2) An instrument falling under the particular description to which any stamp is so appropriated as aforesaid is not to be deemed duly stamped, unless it is stamped with the stamp so appropriated."

### *Alteration of a Stamped Document.*

A material alteration in a writing requiring a stamp, after it has been made or executed, avoids the stamp, and renders a fresh stamp necessary; but it is otherwise if the alteration is immaterial, or according to the original intent of the parties (*a*). Thus, when the defect is unintentional, and the alteration makes the writing merely what it was intended originally to have been, it will not require to be restamped (*b*). Where a promissory note was made originally payable to the plaintiff, who complained that it ought to have been payable to order, it was held that, as between the parties to the note, the interlineation of the words, "or to order," did not render a new stamp necessary (*c*). So, when a bill is altered by the consent of parties before the bill has been issued, it will not require to be restamped; but when the bill has been issued, and the alteration is material and varies the essential character of the writing, so as to amount to a new contract, a new stamp will be required, notwithstanding the consent of the parties to the alteration (*d*).

(*z*) *Rambert* v. *Cohen*, 4 Esp. 213.
(*a*) *Master* v. *Miller*, 1 Sm. L. C. 796.
(*b*) *Cole* v. *Parkin*, 12 East, 471.
(*c*) *Byrom* v. *Thompson*, 11 A. & E. 31.
(*d*) *Bowman* v. *Nicholl*, 5 T. R. 537.

*Time of Objecting to the Want of Stamp.*

Where an objection is raised to an instrument for want of a stamp, the objection should be taken as soon as the instrument is tendered, and before it is received in evidence. If the instrument is received, and read without objection, it cannot afterwards be objected to for want of a stamp (*e*). It is doubtful whether a judge has not at least a discretionary power to reject a document which, after being put in, subsequently appears to be unstamped, or insufficiently stamped (*f*). Where a judge ruled that a document is inadmissible on account of the insufficiency of the stamp, it was formerly held that his decision was open to review (*g*); but by Order XXXIX., r. 8, of the R. S. C., 1883, it is provided that a new trial shall not be granted by reason of the ruling of any judge that the stamp on any document is sufficient, or that the document does not require a stamp. No appeal lies to the Court of Appeal from a similar ruling by the judge trying an action without a jury (*h*); nor is there any appeal to the High Court from the ruling of a County Court judge that a document tendered in evidence is sufficiently stamped (*i*).

Thus, where on the hearing of certain motions, which were acceded to by the Court, an undertaking was given at the Bar by counsel for the respondents, on the instructions of their solicitors, that unstamped documents tendered in evidence on behalf of the respondents should be duly stamped, and this undertaking was not fulfilled, the Court directed the order made on

(*e*) *Robinson* v. *Lord Vernon*, 7 C. B. (N.S.) 235.
(*f*) *Field* v. *Woods*, 7 A. & E. 114.
(*g*) *Sharples* v. *Rickard*, 2 H. & N. 57.
(*h*) *Blewitt* v. *Tritton*, [1892] 2 Q. B. 327.
(*i*) *Mander* v. *Ridgway*, [1898] 1 Q. B. 501; *Lowe* v. *Dorling*, 74 L. J. K. B. 794.

the motions to be drawn up without entering the unstamped documents, and made a four-day order on the solicitors to produce the documents to the registrar duly stamped (*k*).

(*k*) *In re Coolgardie Goldfields, Ltd.*, [1900] 1 Ch. 475.

## CANADIAN NOTES.

### DOCUMENTS, ADMISSIBILITY AND MODE OF PROOF.

The production of a deed, thirty years old, purporting to be executed under a power of attorney, does not prove the power. In *Jones et al.* v. *McMullen*, 25 U. C. Q. B. 542, the only proof of authority was the production of a paper purporting to be a copy of an unsealed power of attorney, dated in 1824, and received by the plaintiff's attorney from the son of the person appointed by it, since dead. This was held clearly insufficient.

Deeds purporting to be upwards of thirty years old were produced from the custody of the solicitors of plaintiffs in ejectment, who claimed as trustees, one of the solicitors being a plaintiff in the action. The plaintiffs claimed under these deeds through several mesne conveyances. The solicitor plaintiff had once recovered judgment in ejectment for the land in question as one of the three trustees. *Held*, that the deeds were produced from the proper custody to entitle them to be received in evidence as ancient documents. *Thompson* v. *Bennet*, 22 U. C. C. P. 393.

A memorial more than thirty years old of a lost deed is good evidence, upon its bare production, without calling or accounting for the subscribing witnesses. *Semble*, that this principle extends to any written document more than thirty years old, even to letters. After secondary evidence of the contents of a document has been received, it is too late to object that a proper search for the document itself had not been made. *Doe* e. d. *Maclem* v. *Turnbull*, 5 U. C. Q. B. 129.

In an action of ejectment a memorial over thirty years old, executed by the grantor, was held admissible evidence and sufficient proof of the deed, under 39 Vict. c. 29, s. 1, sub-ss. 3 and 7. *R.* v. *Guthrie*, 41 U. C. Q. B. 148.

In an action of ejectment the plaintiffs claimed title through two deeds, over thirty years old, in proof of which they showed one to have come from the custody of the former owner's agent, and the other to have been produced under a written order from the agent. It was held that this evidence was sufficient without calling the agent who had had charge of them. *Cook et al.* v. *Christie*, 12 U. C. C. P. 517.

The mere fact of the date of a will being thirty years old is not sufficient under all circumstances to prove that it is the real age of the writing, even if it comes from the proper custody, but some proof must be given of a concurrent possession of the property consistent with it, or of the existence of a will for thirty years. *Doe* e. d. *Stephens et al.* v. *Clement*, 9 U. C. Q. B. 650.

Where a document of date 1831, purporting to have been executed by father and son, was produced from the custody of a grandson of the former, and as having been kept with title papers in a box formerly in the custody of the grandson's brother and now in the custody of the grandson, and where a document of date 1840, purporting to be a will, was produced from the custody of a nephew of a person purporting to have signed it as a witness and as having been kept by him with other papers in a chest now in the nephew's custody, both documents were held admissible in evidence without proof of execution. *Patterson* v. *Patterson*, 3 Trueman, N. B. Eq., 106.

A map produced from the custody of the son of the original owner of a lot and sworn to be the map upon

which the township was originally sold, was held to have been properly admitted in evidence in an action of trespass. *Van Every* v. *Drake*, 9 U. C. C. P. 478.

*Attested Documents.*

An agreement was signed in the name of his principal by an agent. There were two subscribing witnesses, one of whom was proved to be dead and the other out of the province. The handwriting of both the witnesses was proved, and the defendant contended that the agreement was not sufficiently proved, but that it was necessary to prove the handwriting of the agent, because his name did not appear in the body of the instrument, but merely in the signature at the bottom, and not as principal, but as agent or attorney of the principal. It was held that there was nothing in the objection and that the document had been sufficiently proved. *Dickson* v. *Jarvis*, 5 U. C. Q. B. O. S. 694 (1839).

Where a will in testator's handwriting was found, with two signatures apparently those of attesting witnesses, who after due search could not be found, this being attributable to their being strangers whom the testator had called in under the mistaken idea that strangers were the best witnesses to have to a will, the surrogate judge, being satisfied as to the inability to procure proof by the witnesses, admitted the will to probate on other evidence. Post-testamentary letters of the testator were admitted among other pieces of evidence to enable the surrogate judge to decide that the will had been executed. *In re Young*, 27 O. R. 698.

The certificate of the execution of the deed by a married woman provided for by stat. 1 Will. IV. c. 2, as amended by Consolidated Statutes of Upper Canada, c. 85, s. 11, containing in substance all that the statute under which it is given requires, is evidence of the fact

of the examination. This was held in accordance with the ruling in *Jackson* v. *Robertson*, 4 U. C. C. P. 272.

WILSON, J., in delivering the judgment of the Court had said in *Jackson* v. *Robertson*, "It is said that the certificate has always been received as proof of the fact of examination, etc., though not expressly made evidence by the statute, like the certificates of registration endorsed by county registrars, and the practice has been so since the passage of these Acts, but it is proof of nothing beyond what the statute authorises to be certified." *Monk* v. *Farlinger*, 17 U. C. C. P. 41.

*Privilege. "Without Prejudice."*

A letter written by an insurance company to a claimant, after stating the amount which they thought claimant should accept, added, "This sum we consider not only reasonable, but liberal, and which we are liable for, without any prejudice to or waiver of any condition on the policy." It was held that this letter was properly admitted, for it was not stated to be without prejudice generally, nor was any objection taken to its reception at the trial, the defendants, by the letter, merely claiming that it should not be deemed a waiver of any condition in the policy, and both parties having acted on this view. *Hartney* v. *North British Fire Ins. Co.*, 13 O. R. 581.

In *Omnium Securities Co.* v. *Richardson*, 7 O. R. 182, BOYD, C., adopts the joint opinions of JAMES and MELLISH, L.JJ., in *In re River Steamer Co., Mitchell's Claim*, L. R. 6 C. P. 827, 232, saying: "A letter containing an offer written 'without prejudice' means, 'I make you an offer; if you do not accept it, this letter is not to be used against me.'" But in this case, the offer was accepted by the company, and it was held that the privilege was thus removed. See also 3 O. R. p. 584, where it was

held that, "Overtures of pacification and any other offers or propositions between ligitating parties expressly or impliedly made without prejudice are inadmissible in evidence on grounds of public policy, although the tendency of such negotiations, as a matter of fact, may be looked at."

All communications expressed to be written without prejudice, and fairly written for the purpose of expressing the writer's view on the matter of litigation or dispute, as well as overtures for settlement or compromise, and which are not made with some other object in view or wrong motive, are inadmissible in evidence. Such a letter was improperly admitted in *Pirie* v. *Wylde*, 11 O. R. 422, and as it could not be said that it had not prejudiced the case, a new trial was ordered.

Plaintiff claimed against the defendant railway company for an injury resulting from negligence of the company, and at one trial the jury disagreed. Defendant's solicitor wrote to the plaintiff, making a proposition, "of course without prejudice, further than I will state in this letter." The defendants, he said, believed that the plaintiff was not injured at all, but if he would put himself under the charge of three medical men named at Montreal, for six months, of which they would pay all expenses, and these gentlemen, or two of them, would say they believed he was hurt, defendants would waive every other defence, although claiming that they had grounds for further defence, and settle on such terms as agreed on, or as the medical men would name. This was declined, but a few days later, and after a jury had been sworn, an agreement was entered into of substantially the same character. The medical men failed to agree, and the case was again brought to trial. It was held that the letter and agreement were admissible to show on the plaintiff's part that he was claiming in good faith, as he had proved by submitting to the test

proposed, and that the defendants might have used them to show under what circumstances, and at whose expense, the plaintiff had been under treatment. It was held also that it was no objection to their admission that they were matters arising since the action. It was further held that although the letter was expressed in the beginning to be without prejudice, yet as the defendants afterwards declared in it their intention to use it as evidence to show the plaintiff's want of good faith, the plaintiff was entitled to show it and the subsequent agreement to repel any such imputation.

It should have been mentioned above, that in the letter from the defendant's solicitor, he added that this offer was made by the defendants, intending to use it, if refused, to show their sincerity and the plaintiff's reluctance to submit to a fair test. WILSON, J., dissented. *Clarke* v. *Grand Trunk Rail. Co.*, 29 U. C. Q. B. 136.

*Privilege of Solicitors as to Production of Document.*

A document by a solicitor of the plaintiff for the purpose of aiding him in forming an opinion as to the legal rights of the plaintiff in reference to a road about which a dispute with the defendant had arisen, was held to be privileged from production, in an action brought as the result of the opinion formed by the solicitor, although an action was not expressly contemplated when the solicitor was instructed to obtain the necessary information to give the opinion. *Township of Elmsley* v. *Miller et al.*, 10 O. L. R. 343.

## CHAPTER VIII

### Secondary Oral Evidence.

### (hearsay.)

We have defined Primary Evidence as that which its own production shows to be the best obtainable, and Secondary Evidence as that which on its production discloses the fact that there is or once was evidence in existence superior to itself. In other words, secondary evidence does not pretend to be original; it confesses that it is not the best evidence conceivable. But in certain circumstances it is admitted either for the sake of convenience, or for reasons of public policy, or because it is the best evidence obtainable.

It is a rule of law that the best evidence must be given. Or, in other words, the law requires the production of that evidence which is the best attainable of its class. The meaning of the rule is this, that the evidence tendered will not be received when it shows on the face of it, or when other circumstances admitted or proved show, that there is better evidence behind. Evidence obviously inferior will not be admitted, when evidence of a better and more original nature can be produced. The original document itself is clearly the best and primary evidence of its contents. The copy is secondary, and however indisputably it may be authenticated,

it is inadmissible in evidence if the original could be produced, unless its production is dispensed with by some statute or excused by the practice of the Court.

Secondary evidence may be either oral or documentary. Thus a deposition or any other report, spoken or written, of what a witness said in the box, is secondary oral evidence; while the copy of a letter or someone's verbal account of his recollection of its contents will be secondary documentary evidence. There is, however, a great difference in the rules which regulate the admissibility of secondary oral and secondary documentary evidence. In the case of secondary documentary evidence as soon as it is established that the original is lost or destroyed a copy can, as a rule, be proved; but it is not so with secondary oral evidence. The fact that a witness is not in court, that he is ill, insane, dead (*a*), or out of the jurisdiction, does not of itself make secondary oral evidence admissible. Merely accounting for the absence of a witness does not entitle either party to put in a report or draft of what he would probably say, if he were present; the witness must come into court and be examined and cross-examined on his oath.

Our Courts then admit secondary evidence of the contents of a document more readily than secondary evidence of an oral statement. This is because a document cannot change and cannot be cross-examined; hence an accurate copy of a document is almost as valuable as the original. But a witness can always say more, and can often be made to say less, than is written down in any statement of his evidence. Cross-examination will often effect important variations or disclose weak points in his evidence. It is therefore unfair to the opponent that the witness should not be cross-examined in the hearing of the jury which has to decide

(*a*) *Stobart* v. *Dryden*, 1 M. & W. 615; Cockle, 97.

the issue. Hence, as a general rule, if a witness be not forthcoming when he is called to enter the box, the party calling him must do without his evidence (*b*).

Secondary evidence of any oral statement is usually called hearsay. According to its literal meaning the word "hearsay" should be confined to oral evidence reported orally—but it is now used to cover all oral evidence reported, whether orally or in writing, and also any written statement in which a man, who is not called before the Court as a witness, narrates what he saw or heard.

The repetition by a witness of that which he was told by someone else who is not called as a witness is hearsay, and is therefore, as a general rule, inadmissible. A. cannot be called to state what he heard B. say. B. must be called to tell the Court himself what he knows about the matters in issue.

Where, however, the issue before the Court is, What did A. say?—as it is in an action of slander—there is no objection to a party calling witness after witness to prove what A. said; for this, then, is direct primary oral evidence of the fact in issue in the action. But if it is sought to establish that what A. said is true, then proof that A. said it is *primâ facie* inadmissible. If A. seeks to prove that B. is a thief, he cannot prove this by bringing all the world to say that they have been told so; what he has to prove is that B. *is* a thief. So a material admission by a party can always be proved; an admission is not hearsay (*c*).

(*b*) *Stephen* v. *Gwenap*, 1 Moo. & R. 120.
(*c*) See *post*, p. 421.

Every statement, then, is "hearsay" if it is in fact the statement of a third person who is not produced in Court. What a person states of his own knowledge is original evidence, but when he repeats, either verbally or in writing, what another person has told him, this is second-hand evidence. And, as a general rule, second-hand evidence is inadmissible.

The reasons for this rule are obvious. We can generally trust a witness who states something which he himself has either seen or heard; but when he tells us something which he has heard from another person, his statement is obviously less reliable and satisfactory. A multitude of probable contingencies diminish its value. The witness may have misunderstood or imperfectly remembered, or even may be wilfully misrepresenting the words of the third person; or the latter may have spoken hastily, inaccurately, or even falsely. Moreover, the person who is really responsible for the statement did not make it on oath (*d*); he was not cross-examined upon it, and the Court had no opportunity of observing his demeanour when he made it. It is a fundamental principle of our law that evidence has no claim to credibility unless it be given on oath, or what is equivalent to an oath, and unless the party to be affected by it has an opportunity of cross-examining the witness.

In *The Berkeley Peerage Case* (*e*), it was said by Sir JAMES MANSFIELD, C.J.—

"By the general rule of law, nothing that is said by any person can be used as evidence between contending parties, unless it is delivered upon oath in the presence of those parties. . . . Some inconvenience no doubt arises from such rigour. If material witnesses happen to die before the trial, the person whose cause they would have established may fail in the suit; but although all the bishops on the bench should be ready to swear to what they heard those witnesses declare, and add their own implicit belief of the truth of the declarations, the evidence would not be received."

(*d*) Even if the statement were made on oath it would equally be inadmissible. The oath must be taken in Court. *R.* v. *Eriswell*, 3 T. R. 707; Cockle, 99.

(*e*) 4 Camp. 414.

To the rule that hearsay is inadmissible there are many exceptions, for each of which good reason can be assigned. The following classes of hearsay evidence were always admissible at the common law :—

(i.) Declarations (*f*) against interest.
(ii.) Declarations made in the course of duty.
(iii.) Evidence in a former proceeding.
(iv.) Depositions.
(v.) Declarations as to public and general rights.
(vi.) Declarations in pedigree cases.
(vii.) Declarations by a patient as to his symptoms.
(viii.) A dying declaration is also hearsay; yet those who heard it are allowed in certain cases to state to the Court at the trial of an indictment for murder or manslaughter what the dying person said as to the cause of death. This matter has been discussed in an earlier chapter under the head of "Relevancy" (*g*).

Ancient grants, leases, charters, etc., are also sometimes classed as hearsay, because they are often accepted as evidence of the facts which they record. But we have dealt with them in the chapter on "Private Documents" (*h*).

### DECLARATIONS AGAINST INTEREST.

A declaration made by a person who is still alive, however relevant, is, as a rule, inadmissible;

(*f*) The word "declaration" includes both oral and written statements.
(*g*) See *ante*, p. 81.
(*h*) See *ante*, p. 287.

if he be a party to the action, any statement made by him against his interest can be put in evidence against him as an admission (*i*). But a statement made by a man who is now dead stands on a different footing. He cannot be called as a witness; he cannot be cross-examined; and the fact that the statement made by him told against his interest when he made it is some guarantee of its truth. Hence, any declaration, whether oral or in writing, made by a man who had a competent knowledge of the facts and who is now dead, is freely admitted, either for or against his estate, and even in favour of third persons in actions in which the representatives or descendants of the dead man have no concern—provided the statement, when made, told against either his pecuniary or his proprietary interest: that is, it must have affected his pocket or his title to some property (*k*). Moreover, when any part of an entry against interest is admissible in evidence, the whole of it is admissible, not merely the words which tell immediately against the interest of the deceased. For instance, if the deceased gave a receipt for money paid to him in discharge of a debt, the whole receipt can be read to the jury, not merely the word "paid" and the amount.

The leading case on this subject is *Higham* v. *Ridgway* (*l*). This was an action to set aside a recovery on the ground that the person who suffered it was an infant at the date of the recovery; hence it was material

(*i*) See *post*, pp. 430 *et seq.*
(*k*) *The Sussex Peerage Case*, 11 Cl. & F. 85.
(*l*) 10 East, 109; 2 Smith, L. C. (11th ed.) 327; cf. *Gleadow* v. *Atkin*, 1 C. & M. 410.

to decide the date of his birth. Evidence was given that the man-midwife, who attended the birth, was dead; and the books of the latter, who had kept them regularly, were offered in evidence. They contained an entry in the handwriting of the deceased of the circumstances of the birth, and the date. There was also a charge for attendance, against which the word "paid" was marked. It was held, that the entry was evidence of the time of the birth. Lord ELLENBOROUGH said:—

"The entry made by the party was to his own immediate prejudice, when he had not only no interest to make it, if it was not true, but he had an interest the other way, not to discharge a claim, which it appears from other evidence that he had."

BAYLEY, J., added:—

"All the cases agree, that a written entry by which a man discharges another of a claim which he had against him, or charges himself with a debt to another, is evidence of the fact which he so admits against himself; there being no interest of his own to advance by such entry. . . . The principle to be drawn from all the cases is, that if a person have peculiar means of knowing a fact, and make a declaration of that fact which is against his interest, it is clearly evidence after his death, if he could have been examined to it in his lifetime."

So, in a later case (*m*), the same learned judges received evidence of entries of charges made by a deceased attorney, who had prepared a lease, to show that the lease was executed at a time later than its apparent date. In this case the charges for preparing the lease seem to have been paid, but this did not appear upon the face of the entries. In the case of *In the Goods of Thomas* (*n*), Lord PENZANCE admitted as evidence of the execution of a will an entry made by a deceased solicitor in his ledger admitting payment of his charges for drawing it and attending its execution. A deceased solicitor's books are evidence if he charges himself therein with receipts on his client's behalf, as being against his interest, whether they were made in

(*m*) *Doe* v. *Robson*, 15 East, 32.
(*n*) 41 L. J. P. & M. 32.

the ordinary course of his business or not (*o*). In an action (*p*) brought against trustees for negligence in permitting the trust moneys to remain in the hands of C., a member of the firm of solicitors employed in connection with the trust, who had misappropriated them and then died, it was held that the books of the firm were inadmissible, as they were neither the books of the trustees nor the books of C., but of C.'s firm, there being no evidence that C. had written them himself, or that they were made by a clerk under his direction.

It has been held that declarations against pecuniary interest are admissible against third parties, even though the declarant himself received the facts on hearsay (*q*). Thus, in *Percival* v. *Nanson* (*r*), ALDERSON, B., said:—

"An entry in an attorney's bill of a service of notice on A. B. would be evidence of a service, although, such notice being generally served by an attorney's clerk, the attorney probably had no personal knowledge of such service."

POLLOCK, C.B., also said:—

"If an accoucheur puts down in his book the name of a lady whom he had delivered, and debits himself with the payment, such entry would be evidence of the name, although he may have known nothing of her name except from the information of others."

But it appears to be otherwise as to declarations against proprietary interest (*s*).

The declarant must be deceased at the time when the evidence is offered. Thus, in an action on a promissory note by an indorsee against the maker the defendant, to prove fraud and the plaintiff's cognizance of it, tendered declarations of the first indorsee, who was alive but was not called. They were rejected on the ground that it is clear that declarations of living third persons, in the

(*o*) *Wills* v. *Palmer*, 53 W. R. 169.
(*p*) *In re Fountaine*, [1909] 2 Ch. 382.
(*q*) *Crease* v. *Barrett*, 1 C. M. & R. 919.
(*r*) 7 Ex. 1.
(*s*) *Roe* d. *Trimlestown* v. *Kemmis*, 9 Cl. & F. 780.

absence of any community of interest, are not to be received to affect the title or interests of other persons, merely because they are against the interest of those who make them (*t*). Here there was no community or privity of interest between the plaintiff and the absent witness; but if that had existed, the evidence would have been admitted according to the principle laid down by BAYLEY, J., in *Spargo* v. *Brown* (*u*). So it has been held that the entries of a person against his interest are not evidence between third parties, if the declarant be alive, although it appears that he has absconded on a criminal charge, and that it was quite impossible to produce him as a witness (*x*).

An entry by a deceased person against interest will be good evidence, although it appears that persons are living and are not called, who are acquainted with the fact. Thus, entries by a deceased collector charging himself with the receipt of taxes were received as evidence against a surety that the money had been paid, although the persons who paid it were living and might have been called. An attempt was made in this case to exclude his evidence, because the entries were contained in a private note book, and not a public account book; but the distinction was overruled (*y*).

After the expiration of a long period the death of the declarant will be presumed (*z*), although in other cases it must be proved.

The declaration must be against either the "pecuniary" or the "proprietary" (*a*) interest of the declarant; no other interest will suffice. This was finally decided in *The Sussex Peerage Case* (*b*), where

(*t*) *Phillips* v. *Cole*, 10 A. & E. 111.
(*u*) 9 B. & C. at p. 938, and see *ante*, pp. 58, 59; and *Woolway* v. *Rowe*, 1 A. & E. 114; Cockle, 109.
(*x*) *Stephen* v. *Gwenap*, 1 M. & R. 120.
(*y*) *Middleton* v. *Melton*, 10 B. & C. 317.
(*z*) *Doe* v. *Michael*, 17 Q. B. 276.
(*a*) *Per* COCKBURN, C.J., in *R.* v. *Birmingham*, 1 B. & S. at p. 768.
(*b*) 11 Cl. & F. 85.

declarations as to the marriage of Lady Augusta Murray with the Duke of Sussex, made by the deceased clergyman who performed the ceremony, were tendered on the ground that they were declarations of a person who knew the facts, who was not interested in misrepresenting them, and who had an interest in being silent concerning them, because the unlawful celebration of the marriage might have subjected him to a prosecution. All the judges concurred in holding that the declaration must be adverse to some pecuniary interest in the declarant, and that even the fear of a prosecution was not a sufficient interest to let in a declaration as contrary to it. Lord CAMPBELL said:—

"As to the point of interest, I have always understood the rule to be, that the declaration, to be admissible, must have been one which was contrary to the interests of the party making it in a pecuniary point of view. I think it would lead to most inconvenient consequences, both to individuals and the public, if we were to say that the apprehension of a criminal prosecution was an interest which ought to let in such declarations in evidence" (*c*).

It is sufficient if the declaration is *primâ facie* against such interest. But that it was so in fact need not be proved by independent testimony (*d*).

A declaration is said to be against "proprietary" interest when it is made by anyone in possession of land and tends to limit his interest therein to any less estate than a fee simple; a person in possession is presumed, until the contrary is proved, to be owner in fee simple (*e*). Again, where, in order to establish a settlement, it was proved that the pauper's grandfather had occupied a house for four years in the appellant parish, and a book containing certain entries of payment of rent which were proved to be in his handwriting was produced, these entries were admitted in proof of the grandfather's settlement by renting a tenement on the ground that, the four

(*c*) And see *Smith* v. *Blakey*, L. R. 2 Q. B. 326; *Massey* v. *Allen*, 13 Ch. D. 558.
(*d*) *Taylor* v. *Witham*, 3 Ch. D. 605; Cockle, 123.
(*e*) *Peaceable* v. *Watson*, 4 Taunt. 16; Cockle, 125.

years' occupation being by itself *primâ facie* evidence of a seisin in fee, the proof of payment of rent would cut down the interest to a tenancy, and that therefore the evidence was against proprietary interest (*f*).

Where a deceased tenant, by a written instrument, acknowledged L. as his landlord, this was held to be evidence of L.'s title as against subsequent tenants who did not claim through the declarant (*g*). In an action of ejectment by A., the declaration by deed of a deceased receiver of rents and profits, that he held under A.'s ancestor, was held evidence against third parties of A.'s title (*h*). A declaration by a deceased occupant, that he managed an estate for a claimant, is evidence of the title of the claimant (*i*). In an action for specific performance of an agreement to take a lease, an entry of a deceased landlord in his own handwriting in his rent book of a promise to grant a lease to a tenant was held admissible in evidence against the tenant as being against the landlord's proprietary interest (*k*).

The declarations of a person in possession of property are admissible, after his decease, to cut down his title, not only as against those claiming under him, but also against strangers (*l*); but declarations of what he heard other persons say are not admissible (*m*). The same document may be proof of possession, and also admissible as a declaration against interest (*n*).

But neither the acts nor the declarations of deceased tenants, although against their interest, are any evidence against the reversioner; for a tenant cannot derogate from the title of his landlord; and, therefore, in a disputed

(*f*) *R.* v. *Birmingham*, 1 B. & S. 763; *R.* v. *Exeter*, L. R. 4 Q. B. 341.
(*g*) *Doe* v. *Edwards*, 5 A. & E. 95.
(*h*) *Doe* v. *Coulthred*, 7 A. & E. 235.
(*i*) *Baron de Bode's Case*, 8 Q. B. 208.
(*k*) *Connor* v. *Fitzgerald*, 11 Ir. L. R. 106.
(*l*) *Sly* v. *Dredge*, 2 P. D. 91.
(*m*) *Roe* d. *Trimlestown* v. *Kemmis*, 9 Cl. & F. 780.
(*n*) *La Touche* v. *Hutton*, Ir. R. 9 Eq. at p. 171.

right of common, the plaintiff was not allowed to give evidence of declarations made concerning it by a deceased former tenant of the farm, in respect of which the plaintiff claimed the right (*o*). The acceptance of an allotment under an award made by commissioners under an Inclosure Act by a person against his interest is evidence that the land allotted was waste of the manor (*p*).

The value of the declaration as evidence may be destroyed by proving *aliunde* that although *primâ facie* against the interest of the declarant it is really for his interest, or that it was made with an interest to pervert the facts (*q*).

It is also settled law that the declaration, or written statement, is evidence of all the facts which it contains, and that in such cases the difference between oral and written statements is not one of admissibility, but only of weight (*r*). According to PARKE, B., the entry in *Higham* v. *Ridgway* was evidence not only of the payment of the man-midwife's charges, but also of *partus cum forcipe* (*s*). So the statement of a deceased person that he occupied a house at £20 a year was admitted to prove not only the tenancy, but also his acquirement of a settlement of the annual value of £10.

In *Davies* v. *Humphreys* (*t*), which was an action for contribution by one of several makers of a promissory note against a co-surety, the plaintiff, to establish the suretyship, relied on a receipt indorsed on the note by the deceased payee acknowledging a part payment of £280 of the principal sum of £300; and adding, "the £300 having originally been advanced to E. H." (the defendant). This was held to be evidence of the

(*o*) *Papendick* v. *Bridgwater*, 5 E. & B. 166; Cockle, 125.
(*p*) *Gery* v. *Redman*, 1 Q. B. D. 161.
(*q*) *Taylor* v. *Witham*, 3 Ch. D. 605; Cockle, 123.
(*r*) *R.* v. *Birmingham*, 1 B. & S. 763; *Bewley* v. *Atkinson*, 13 Ch. D. 283.
(*s*) *Percival* v. *Nanson*, 7 Ex. 3.
(*t*) 6 M. & W. 153.

defendant's liability. PARKE, B., in delivering the judgment of the Court, said:—

"That the receipt was evidence of the fact of payment which it admitted in every case in which the proof of payment would be relevant, was not disputed; but it was denied that the whole entry would be admissible to show that the £300 was advanced to E. H. . . . but the entry of a payment against the interest of the party making it has been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it."

His lordship, after referring to *Higham* v. *Ridgway*, and *Doe* v. *Robson* (*u*), added:—

"Without overruling these cases (and we do not feel ourselves authorised to do so), we could not hold the memorandum in question not to be admissible evidence of the truth of the whole statement in it, and consequently to be evidence not merely that £280 was paid by the plaintiff to the payee, as for a debt due from E. H. as principal, but also of the fact that the debt was due from E. H. to him."

Thus, also, where a paper purported to be an entry, by a deceased receiver, of rents received from T. H., as one of three proprietors, it was held to be evidence that two other proprietors were equally interested with T. H. POLLOCK, C.B., drew an important distinction between entries made against interest, and entries made in the course of business:—

"If the entry is admitted as being against the interest of the party making it, it carries with it the whole statement; but if the entry is made merely in the course of a man's duty, then it does not go beyond those matters which it was his duty to enter" (*x*).

When there are entries in an account book which are admissible as being against interest, if there are other items in the book which are closely connected with such admissible entries, then not only may such entries be looked at, but the whole account of which they form an integral and essential part (*y*).

The status of the party making the entry or declaration

(*u*) 15 East, 32.
(*x*) *Percival* v. *Nanson*, *suprà*.
(*y*) *Hudson* v. *Owners of Barge Swiftsure*, 82 L. T. 389.

must sometimes be established before the entry is read, unless it be made by a person in a public character, in which case due appointment will be presumed (*z*). Thus agency must be proved, where the declaration was by an agent; and accounts of rents signed by a person styling himself clerk to a steward, but not proved *aliunde* to have been so employed, although they were found among family muniments, were rejected, because there was no other evidence given to show that the accounts affected the declarant in a pecuniary character (*a*). Proof of handwriting and other extrinsic evidence of authenticity will be unnecessary when entries have been made thirty years previously, and are produced from proper custody (*b*). It has been said that in the case of an entry against interest "proof of the handwriting of the party and his death is enough to authorise its reception; at whatever time it was made, it is admissible" (*c*). The first part of this *dictum* applies of course only to entries made within thirty years prior to the time when they are tendered.

In an action by the Corporation of Exeter for port duties, documents more than thirty years old, which purported to be the receipts of such duties by ancient receivers, but which were unsigned and in the third person, were admitted (*d*). So, the receipts of an ancient receiver of rents, brought from the muniment chest of the family, are admissible evidence (*e*). It will be observed that, in all the preceding cases where entries have been tendered, great stress has been laid on the circumstances of the custody from which they are produced.

It is not necessary in this class that the declaration

(*z*) *Davies* v. *Morgan*, 1 C. & J. 587.
(*a*) *De Rutzen* v. *Farr*, 4 A. & E. 53.
(*b*) *Wynne* v. *Tyrwhitt*, 4 B. & Ald. 376.
(*c*) *Per* PARKE, B., in *Doe* v. *Turford*, 3 B. & Ad. at p. 898.
(*d*) *Mayor of Exeter* v. *Warren*, 5 Q. B. 773.
(*e*) *Musgrave* v. *Emerson*, 10 Q. B. 326.

shall be made *ante litem motam* (*f*), though the fact that it is made after a controversy has arisen will, no doubt, diminish its value, so would evidence that the declarant had a motive for misrepresenting the facts which render the declaration, although apparently against his interest, really in his favour (*g*).

## Declarations Made in the Course of Duty.

Declarations made by a person, strictly in the course of a business or professional duty, if contemporaneous with the fact, are evidence, after his death, against third persons, of any fact which it was his duty so to record, but not of the surrounding circumstances.

Entries made in a ledger or diary in the ordinary course of business are not admissible in evidence if the writer be still alive, even though he has absconded or is kept away by the other side (*h*); though if he be called as a witness he may refresh his memory by referring to them. If, however, the writer of such an entry be dead, the entry is admissible on proof that it was the duty of the deceased to make such entry. It is a question for the judge and not the jury — as indeed are all questions of admissibility of evidence (*i*)—to decide

(*f*) *Whaley* v. *Masserene*, 8 Ir. Jur. (N.S.) 281.
(*g*) *Taylor* v. *Witham*, 3 Ch. D. 605.
(*h*) Under the Indian Evidence Act (Part I., Chap. II., s. 32) it is not necessary that the declarant should be dead; an entry made against his interest or in the ordinary course of his business is admissible, "if he be dead, or cannot be found, or has become incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable."
(*i*) *Bartlett* v. *Smith*, 11 M. & W. 483; Cockle, 4.

whether it was or was not the duty of the deceased to make such an entry.

There is, however, an important difference between a declaration made in the ordinary course of business and a declaration against interest. In the latter case, as we have seen, the whole of the entry is admissible; in the former case only so much as it was the *duty* of the deceased to make (*k*).

The leading case on this rule is *Price* v. *Earl of Torrington* (*l*). The short report of it in Salkeld is as follows: "The plaintiff, being a brewer, brought an action against the Earl of Torrington for beer sold and delivered; and the evidence given to charge the defendant was, that the usual course of the plaintiff's dealing was, that the draymen came every night to the clerk of the brewhouse and gave an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names; that the drayman was dead, but that this was his hand set to the book; and this was held good evidence of a delivery; otherwise of the shop book itself singly, without more." On the same principle, in *Pritt* v. *Fairclough* (*m*), after evidence had been given that it was the course of business in the plaintiff's office for a certain clerk, since deceased, to copy all letters, a letter book containing a copy made by that clerk of a letter which the defendant refused to produce, was held good secondary evidence. So, where it was material to show that a licence had been sent to A. by the plaintiff, evidence was given that it was the course of business in the plaintiff's office that such licences should be copied in the letter book and noted before they were sent, and the copy and noted memorandum,

(*k*) *Chambers* v. *Bernasconi*, 1 C. M. & R. 347; Cockle, 119.
(*l*) 1 Salk. 285; 2 Smith, L. C. 320.
(*m*) 3 Camp. 305.

in the handwriting of a deceased clerk, that the licence had been sent, were then received (*n*). Declarations by a deceased rector have also been admitted as evidence as to the custom of electing churchwardens in his parish (*o*).

In an action (*p*) of ejectment, the lessor of the plaintiff had instructed A. to serve the defendant with notice to quit. A. entrusted the commission to his partner B., who had not served such notices before. B. prepared three notices to quit (two of them being for service on other persons) and as many duplicates. He then went out, and on his return delivered to A. three duplicate notices (one of which was a duplicate of the notice to the defendant), indorsed by B. It was proved that the two other notices had been served on the persons for whom they were intended, that the defendant had subsequently requested A. that he might not be compelled to leave, and that it was the invariable practice for the firm's clerks, who usually served the notices to quit, to indorse, on a duplicate of such notice, a memorandum of the fact and time of service. It was held, on these facts, that the third duplicate was admissible to prove that the notice had been served on the defendant. PARKE, B., said :—

"It was proved to be the ordinary course of this office, that when notices to quit were served, indorsements like that in question were made; and it is to be presumed that the principal observed the rule of the office as well as the clerks."

The doctrine was also discussed in *Poole* v. *Dicas* (*q*), where it was held that an entry made in a bill book, in the course of business, by a notary's clerk, since deceased, of the dishonour of a bill which he had been instructed to present for payment, was evidence of the dishonour. And where a surveyor had been employed, in 1864, by a

(*n*) *Hagedorn* v. *Reid*, 3 Camp. 377.
(*o*) *Bremner* v. *Hull*, Har. & Ruth. 800.
(*p*) *Doe* v. *Turford*, 3 B. & Ad. 890 ; Cockle, 118.
(*q*) 1 Bing. N. C. 649.

local board, to survey ground for a drainage scheme, entries in his note book, made at the time of the survey, of levels and other figures, for the purpose of his report, were admitted in 1905 to show the line of the spring tides in 1864, he being dead (*r*).

In *Mercer* v. *Denne* (*s*) a survey of Walmer Castle taken in 1816 by direction of the Lord Warden, and an estimate for the repair of the castle, made by the King's engineer, were rejected, because there was nothing to show they were made contemporaneously with the doing of something it was the duty of the deceased official to record, nor what his instructions were, or what relation they bore to the documents, or what were the sources of the information on which the documents were based.

In all the above cases great importance was attached to the fact that the entries were immediately subsequent to, and virtually contemporaneous with, the transaction.

In *Doe* v. *Turford* (*t*), PARKE, B., said:—

"It is to be observed, that in the case of an entry against interest, proof of the handwriting of the party, and his death, is enough to authorise its reception; at whatever time it is made it is admissible; but in the other case [in declarations in the course of business], it is essential to prove that it was made at the time it purports to bear date: it must be a contemporaneous entry."

So, in *Poole* v. *Dicas* (*u*), TINDAL, C.J., said:—

"If there were any doubt whether the entry were made at the time of the transaction, the case ought to go down to trial again."

It has been held, according to circumstances, to be sufficient if the entry be made on the same day, or even on the following morning. But where not made until two days after the event it was held not contemporaneous (*v*). The entry, however, need not be made *ante litem motam*. It may often be a man's duty to

(*r*) *Mellor* v. *Walmsley*, [1905] 2 Ch. 164.
(*s*) [1905] 2 Ch. 358.
(*t*) 3 B. & Ad. 890.
(*u*) 1 Bing. N. C. 649.
(*v*) *The Henry Coxon*, 3 P. D. 156; Cockle, 119.

report to his employer that a controversy has arisen. Moreover, an entry made in the course of duty cannot be excluded merely because it tells in the declarant's favour. It may, nevertheless, be his duty to make it (*w*).

The entry must be an entry of a particular thing which it was the duty of the person making the entry to do, and it must also be his duty to record it (*x*). As BLACKBURN, J., said, in *Smith* v. *Blakey* (*y*):—

> "The rule as to the admission of such evidence is confined strictly to the entry of the particular thing which it is the duty of the person to do, and, unlike a statement against interest, does not extend to collateral matters, however closely connected with that thing. . . . it is an essential fact to render such an entry admissible, that not only it should have been made in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entry relates, and then to make a report or record of it."

The existence of the duty must first be proved and by other evidence (*z*). This is in accordance with the *dicta* of the judges in *Doe* v. *Turford* (*a*) and *Percival* v. *Nanson* (*b*), to the effect that an entry in the course of business, unlike an entry against interest, is evidence only of the facts which it was the duty as well as the custom of the deceased declarant to enter; and the same principle was laid down in *Chambers* v. *Bernasconi* (*c*).

For example, before the Births and Deaths Registration Act, 1836 (*d*), it was usual to prove a person's age by producing his baptismal certificate. This certificate contained, *inter alia*, the date of birth. The entry by the

(*w*) See, however, the *dicta* of Sir ROBERT PHILLIMORE, in *The Henry Coxon*, *suprà*.
(*x*) *Smith* v. *Blakey*, L. R. 2 Q. B. 326; *Trotter* v. *Maclean*, 13 Ch. D. 574.
(*y*) L. R. 2 Q. B., at p. 332.
(*z*) *Bright* v. *Legerton*, 2 De G. F. & J. at p. 614; *The Henry Coxon*, *suprà*.
(*a*) 3 B. & Ad. 898; Cockle, 118.
(*b*) 7 Ex. 3.
(*c*) 1 C. M. & R. 347; Cockle, 119.
(*d*) 6 & 7 Will. IV. c. 86.

vicar of the date of birth was not admissible because it was not his duty to enter that; all the certificate proved was that the child was alive at the date of its baptism. So since the Births and Deaths Registration Act it is usual to enter in the register the name of the father; but this is no evidence of paternity; for it is not the duty of the registrar to enter the father's name.

Again, where an action was brought for an illegal arrest, and it was material to ascertain where the arrest was made, but X., who made the arrest, was dead, and it was sought to put in as evidence an entry made by X. at the time which stated the place; it was held that such entry was only admissible to prove the fact and date of the arrest; but not the place, as it was not the duty of X. to make any entry as to the place (*e*).

But where the solicitor of the plaintiff had been instructed to serve on the defendant a notice to quit, and it was the usual practice of the solicitor's clerks to indorse on such notices a memorandum of the fact and time of service, and the clerk who served the notice to quit on the defendant had died before the action came on for hearing, it was held that the memorandum was admissible, as it was the duty of the clerk to make such indorsement (*f*).

Personal custom is not equivalent to a duty; it creates no responsibility towards any other person. Therefore, entries in the books of a deceased solicitor or bills of costs delivered by him are not admissible on the ground that it was his duty to keep proper books, or that they were made out in the course of his duty (*g*). They may, however, be admissible in evidence for other reasons,

(*e*) *Chambers* v. *Bernasconi*, *supra*.
(*f*) *Doe* v. *Turford*, 3 B. & Ad. 890; Cockle, 118.
(*g*) The contrary was once held by Lord ROMILLY, in *Rawlins* v. *Richards*, 28 Beav. 370; but his decision cannot be relied upon, after what has been said by the judges in *Bright* v. *Legerton*, 2 De G. F. & J. at p. 617; *Hope* v. *Hope*, [1893] W. N. 21; *Ecroyd* v. *Coulthard*, [1897] W. N. 25.

as, for instance, if they are against the interest of the declarant (*h*). On this principle, the account books of deceased tradesmen, made by themselves, are not evidence for their executors to charge a debtor. So in Ireland, entries in registers kept in Roman Catholic chapels have been held inadmissible (*i*). An entry in a deceased stockbroker's day book was held inadmissible to prove that certain shares were purchased for the client, it not being the duty of the stockbroker, as between himself and his client, to keep the book (*k*).

It has long been settled that, when the entry has been made on hearsay, it will not be received (*l*). In an action for goods sold, where the only evidence of delivery was an entry made by a witness, by the direction of a deceased foreman, who was not present when the goods were delivered, but who, in the course of business, had himself been informed of the delivery by the person whose duty it was to deliver the goods, and who was also dead, the entry was rejected (*m*). In the case of *The Henry Coxon* (*n*), Sir ROBERT PHILLIMORE said :—

> "It seems to me that the authorities point to this, that entries in a document made by a deceased person can only be admitted as evidence when it is clearly shown that the entries relate to an act or acts done by the deceased person, and not by third parties."

Declarations made in the course of a duty are equally admissible whether they are oral or in writing. Thus, a verbal statement made by a police constable to his inspector, in the course of his duty, was held admissible after the constable's death (*o*). But evidence will not be received of oral statements subsequently made in order to contradict, nor even to explain, a written entry

(*h*) See *ante*, pp. 306 *et seq.*
(*i*) *Ennis* v. *Carrol*, 17 W. R. 344.
(*k*) *Massey* v. *Allen*, 13 Ch. D. 558.
(*l*) *Mercer* v. *Denne*, [1905] 2 Ch. 538.
(*m*) *Brain* v. *Preece*, 11 M. & W. 773.
(*n*) 3 P. D. 158; Cockle, 119; cf. *Ryan* v. *King*, 25 L. R. (Ir.) Ch. 184.
(*o*) *R.* v. *Buckley*, 13 Cox, 293; Cockle, 120.

which has been made in the course of business. Thus, in *Stapylton* v. *Clough* (*p*), to prove service of a notice to quit, a duplicate notice, indorsed with the day of service, and signed in the course of duty by a deceased agent, was tendered; but it was also sought to explain and vary the particulars of the indorsement, by evidence of subsequent oral declarations made by the deceased. It was held, that the indorsement must be received as it stood; and Lord CAMPBELL said:—

"I agree with what I am reported to have said in *The Sussex Peerage Case*, that there is no distinction between verbal and written declarations made in the course of a duty, so far as regards their admissibility; but to deduce from this doctrine that whatever is said subsequently to the time of making the entry respecting the transaction may be admitted in evidence, would lead to the greatest injustice."

Entries in the business books of a party, though made in the course of duty, are not at common law admissible in evidence on his behalf (*q*), though they may afford very useful material for his cross-examination. It is however, provided by Order XXXIII., r. 3, of the R. S. C., 1883, that, where an account is directed to be taken, the Court may direct that, in taking the account, the books of account in which the accounts required to be taken have been kept, shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised. This is a similar power to that conferred on the Court of Chancery by 15 & 16 Vict. c. 86, s. 54 (*r*). The same principle is adopted for proceedings in county courts by Rule 8 of Order XXIV. of the County Court Rules, 1903.

(*p*) 2 E. & B. 933.
(*q*) *Digby* v. *Steadman*, 1 Esp. 328.
(*r*) The power was exercised in *Banks* v. *Cartwright*, 15 W. R. 417, in the case of books of account kept by trustees to which the beneficiaries had access.

## EVIDENCE IN A FORMER PROCEEDING.

With regard to civil actions, it is a general rule that "all evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter" (*s*). But the admissibility of evidence taken at the hearing or trial of a former action stands on a different footing. Such evidence is only admissible—

(i.) if the issue is the same in both actions;

(ii.) if the subsequent action is between the same parties as in the former action, or their representatives in interest;

(iii.) if the other party or his predecessors in interest had in the former trial an opportunity of cross-examining the witness; and

(iv.) if the witness whose evidence it is sought to use cannot be called on the subsequent trial because he is dead, or insane, or out of the jurisdiction of the Court, or so ill that he probably will never be able to travel, or is kept out of the way by the other party, or, perhaps, cannot be found (*t*).

With regard to criminal proceedings, it very seldom happens that the same issue can ever be re-tried between the Crown and the same prisoner. When, however, this does occur, evidence given at the former trial may, it seems, be received at the subsequent trial on conditions very similar to, but

(*s*) Order XXXVII., r. 25; as, for instance, on a new trial. There is a corresponding rule in the County Court, County Court Rules, 1903, Order XVIII., r. 12.

(*t*) *Llanover* v. *Homfray*, 19 Ch. D., p. 230; *Strutt* v. *Bovingdon*, 5 Esp. 56; *Fry* v. *Wood*, 1 Atk. 445; *Doncaster* v. *Day*, 3 Taunt. 262.

not identical with, those just set out with respect to civil actions.

Evidence given in the former action is only admissible so far as it relates to the issues which are common to both actions (*u*). The parties in the two actions need not be identical; it is sufficient if either of the parties in the former action owned the same property or represented the same interest as that now owned or represented by the present plaintiff or defendant (*w*). But, if in the latter action, there is another party, who is neither a successor in title of, nor represented by, any party in the former action, the evidence will not be admissible against him (*x*). Anyone who heard the former evidence may depose to it; except where it was the duty of the judge or other officer of the Court to take the evidence as a deposition or in some other formal record (*y*), in which case notice of intention to read such deposition or record must be given to the other side two days before the trial of the second action (*z*).

In criminal cases, no such evidence is admissible unless at the subsequent trial the same person is accused upon substantially the same facts; for example, if a man acquitted or convicted of robbery with violence, be afterwards tried for the murder of the person robbed, then it can be given, if it be shown that the witness is dead, insane (*a*), or kept out of the way by the prisoner (*b*). It is not clear, however, that such evidence can be given in criminal cases where the witness

(*u*) *Strutt* v. *Bovingdon*, *supra*; *Doe* v. *Derby*, 1 A. & E. 783.
(*w*) *Llanover* v. *Homfray*, 19 Ch. D. 224; *Printing Co.* v. *Drucker*, [1894] 2 Q. B., p. 803; *Evans* v. *Merthyr Tydfil Urban District Council*, [1899] 1 Ch. 241.
(*x*) *Wright* v. *Doe*, 1 A. & E. 3; *Brown* v. *White*, 24 W. R. 456.
(*y*) *Ex parte Newall*, *In re Newall*, 3 Mont. & Ayr. 666.
(*z*) Order XXXVII., r. 3.
(*a*) *R.* v. *Eriswell*, 3 T. R. 720.
(*b*) *R.* v. *Scaife*, 17 Q. B. 238, 243.

is too ill to travel, or out of the jurisdiction. It cannot be given, apparently, where the only information before the Court is that the witness cannot be found (*c*). Should power hereafter be given to the Court of Criminal Appeal to grant a new trial, this matter will become one of considerable importance, and the doubts existing with reference to it would probably soon be dispelled.

## DEPOSITIONS.

A deposition is the formal record of evidence given on oath, taken down by a magistrate or some officer of a Court, with a view to its being used in a subsequent proceeding. It is read over to the witness after it is written, corrected if necessary, and then signed by him. There are many kinds of depositions; they are used both in civil and criminal proceedings.

### (i.) *Depositions under the Indictable Offences Act*, 1848.

When anyone is charged with an indictable offence, the case is usually investigated by a justice of the peace before it is sent for trial at the Assizes or Quarter Sessions. The justice of the peace may summon before him on this preliminary inquiry anyone whom he believes to have knowledge of the facts, and compel him to give evidence on oath. While such evidence is being given, the substance of it is written down by the clerk to the justices; he should record every material fact stated by any witness, whether it tells for or against the accused.

(*c*) *R.* v. *Scaife*, *supra*; *R.* v. *Hogg*, 6 C. & P. 176; *R.* v. *Marshall*, Car. & M. 147.

As soon as it is decided to send the case for trial, this officer reads over to each witness the notes of his evidence. This gives the witness an opportunity of correcting or adding to them. The witness then signs the deposition as being correct. The depositions, with the exhibits, if any, attached to them, and the prisoner's statement (*d*), are then remitted to the clerk of the Court in which the prisoner is to be tried.

If on the day of trial the witness is dead, or too ill to travel, or has become insane, or is kept away by the prisoner or his friends, the deposition of this witness can, after formal proof, be laid before the grand jury and also be read to the petty jury in Court.

If a prisoner has been committed for trial on the oral depositions of witnesses, it would be manifestly unfair to admit their depositions, although certified by the committing magistrate, to be given in evidence against the prisoner, as long as the original witnesses can be produced before the jury, confronted with the prisoner, and subjected to the cross-examination of the latter, or his counsel in open Court; and such depositions are secondary evidence, which is admissible only in certain cases where the original deponents cannot be produced (*e*).

It has recently been held that, where the inquiry has been commenced before one magistrate and completed before another, the second magistrate may, instead of taking the evidence *de novo*, re-call the witnesses, have them re-sworn, read their depositions over to them, telling them to correct them if necessary, and then

(*d*) As to the prisoner's statement, see *ante*, pp. 111, 112.
(*e*) See *post*, pp. 328, 332.

allow counsel further to examine and cross-examine the witnesses (*f*).

The admissibility of such depositions is regulated by the Indictable Offences Act, 1848 (*g*). It must be shown (1) that the deposition was taken in the presence of the magistrate and of the prisoner (*h*), and that the latter either cross-examined, or had an opportunity of cross-examining, the deponent. (2) That it has been signed by the witness and also by the magistrate. But where the witness was unable to sign, owing to injuries to her hands, but she assented to the depositions on their being read over to her, they were held admissible (*i*). (3) That it was made on oath by the witness, or on affirmation, in such cases only in which an affirmation is allowed. (4) That the deponent is either dead (*k*) or so ill as not to be able to travel (or is absent for certain other causes, as mentioned below).

Only the first and last of these conditions are required to be distinctly proved, and the last is usually proved first. The signatures, purporting to be authentic, are presumed to be so until proved to be otherwise. The christian name of the witness may be proved by anyone who saw the witness sign (*l*); and the deposition is declared, on the face of it, to be taken on oath. It is not enough to show that the deposition purports to be signed by the magistrate, but it must also be shown affirmatively by the prosecutor that the deposition was taken in the presence of the prisoner, and that he or his counsel or solicitor had a full opportunity of cross-examining the witness; and when the prisoner is not attended by counsel or solicitor, it ought also to appear that the magistrate had asked him whether he would

(*f*) *Ex parte Bottomley*, [1909] 2 K. B. 14.
(*g*) See Appendix.
(*h*) *R.* v. *Watts*, L. & C. 339; *R.* v. *Holloway*, 65 J. P. 712.
(*i*) *R.* v. *Holloway*, *supra*.
(*k*) *R.* v. *Butcher*, 64 J. P. 808.
(*l*) *R.* v. *Foote*, 26 L. J. M. C. 79.

like to cross-examine, and that he had allowed the prisoner sufficient time to consider what questions he would put (*m*).

The last condition does not contain all the circumstances in which a deposition is generally admissible. Thus, before the statute, the deposition was received at common law, not merely on proof that the deponent was either dead, or so ill as to be unable to travel, but if he was proved to have become permanently insane (*n*), or to be actually insane at the time of trial with a possibility of recovery (*o*). It neither was nor is necessary to show that the illness under which a deponent is suffering is of a permanent, or of more than a temporary, nature; but where the illness of the witness is proved not to be serious, the judge may and will, in his discretion, postpone the trial until he has recovered; and this is the proper course whenever such postponement does not clearly clash with public convenience.

The illness must be real and serious, and there must either be a physical incapability of locomotion, or a probability that it might dangerously affect the witness's health (*p*). It is desirable, when it is possible, to prove this fact by a medical attendant, but it may be proved by anyone who has seen and examined the deponent recently. The Court will inquire scrupulously and even suspiciously into all these circumstances before receiving the deposition; and will reject it when the alleged illness appears to be not dangerous or serious enough to excuse the absence of the deponent. It is for the Court, in its discretion, to determine whether the alleged illness brings the case within the Act of Parliament (*q*). Pregnancy may or may not be a source of

(*m*) *Per* PLATT, B., in *R.* v. *Day*, 19 L. T. 35.
(*n*) *R.* v. *Eriswell*, 3 T. R. 707.
(*o*) *R.* v. *Marshall*, Car. & M. 147.
(*p*) *R.* v. *Day*, *suprà*.
(*q*) *R.* v. *Wellings*, 3 Q. B. D. 426.

such illness (*r*); insanity obviously is. Where a witness had an attack of paralysis, his deposition was read, although it would not have endangered his life to come into Court. In that case, however, the deponent could neither hear nor speak (*s*). The fact that a female witness was seventy-four years of age, and nervous, and (in the opinion of a medical witness) likely to faint under cross-examination, has been held not to amount to such inability to travel as to make her deposition admissible (*t*).

It is also settled that a deposition will be received if the deponent is proved to have been kept out of the way and prevented from appearing at the trial by the act of the prisoner or his agents, or by collusion with him or his friends (*u*). It is necessary to create by evidence a reasonable presumption that the prisoner's agents have been authorised or sanctioned by him to procure the absence of the witness. In such a case the deposition is evidence only against the prisoner who procured the absence of the deponent, and not against other prisoners in the same indictment who are not implicated in the collusion (*x*). Unless the absence of the witness is accounted for in some one of these ways, his deposition cannot be received. When the deponent is in a foreign country, his deposition cannot, on that ground alone, be read (*y*).

Each deposition strictly should be separately signed by the committing magistrate (*z*), but it is sufficient if the signature or signatures be placed at the end of the depositions, even though they are written on different sheets of paper, which are only connected by a pin (*a*).

(*r*) *R.* v. *Wellings*, *suprà*.
(*s*) *R.* v. *Cockburn*, Dears. & B. 203.
(*t*) *R.* v. *Farrell*, L. R. 2 C. C. R. 116.
(*u*) *R.* v. *Gutteridge*, 9 C. & P. 471; *R.* v. *Scaife*, 2 Den. 281.
(*x*) *R.* v. *Scaife*, *suprà*.
(*y*) *R.* v. *Austin*, Dears. 612.
(*z*) 11 & 12 Vict. c. 42, s. 17.
(*a*) *R.* v. *Parker*, L. R. 1 C. C. R. 225.

The depositions must be taken in the presence both of the magistrate and of the prisoner (*b*).

The depositions under this Act may be taken at a hospital: it is not necessary for such a purpose that the magistrate should sit in his accustomed Court (*c*).

If the depositions are lost without fraud or gross negligence before trial, and cannot be found after diligent search, they may be proved by a copy produced and certified by the magistrate's clerk (*d*); or by an examined copy.

It is the duty of the clerk to the justices to record every material statement made by a witness; hence the judge at the trial is always reluctant to admit oral evidence to the effect that a certain fact was stated on oath before the justices which is not found on the depositions. Such evidence, however, is not, as a rule, excluded, though strictly it is not evidence (*e*).

Section 3 of the Criminal Law Amendment Act, 1867 (*f*), provided, that if an accused person calls, or desires to call witnesses:—

"The justice or justices shall, in the presence of such accused person, take the statement on oath, both examination and cross-examination, of those who shall be so called as witnesses by such accused person, and who shall know anything relating to the facts and circumstances of the case, or anything tending to prove the innocence of such accused person, and shall put the same into writing; and such depositions of such witnesses shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same, and transmitted in due course of law with the depositions."

By s. 6 of the Foreign Jurisdiction Act, 1890 (*g*), a person accused of a crime cognisable by a British Court in a foreign country, is enabled to have the deposition of

(*b*) *R.* v. *Watts*, L. & C. 339.
(*c*) *R.* v. *Katz*, 64 J. P. 807.
(*d*) *R.* v. *Shellard*, 9 C. & P. 277.
(*e*) *Parsons* v. *Brown*, 3 Car. & K. 295.
(*f*) 30 & 31 Vict. c. 35.
(*g*) 53 & 54 Vict. c. 37.

a witness for the defence taken, under certain conditions, in order that it may be put in evidence without calling the witness. And now by the Criminal Evidence Act, 1898 (*h*), the prisoner may himself give evidence on oath before the magistrate if he thinks fit, and his evidence will be taken down in writing, and read over to him and signed by him and forwarded to the Court in the same manner as the depositions of other witnesses.

### (ii.) *Depositions under the Criminal Law Amendment Act*, 1867 (*i*).

This Act enables depositions to be taken for the perpetuation of testimony in criminal cases. It enacts that a deposition taken in accordance with its provisions may be produced and read as evidence, either for or against the accused, upon the trial of any offender or offence to which it relates—

(i.) If the deponent is proved to be dead, or if it is proved that there is no reasonable probability that he will ever be able to travel or to give evidence; and

(ii.) If the deposition purports to be signed by the justice by or before whom it purports to be taken; and

(iii.) If it is proved to the satisfaction of the Court that reasonable notice in writing of the intention to take such deposition was served upon the person (whether prosecutor or accused) against whom it is proposed to be read; and

(iv.) That such person or his counsel or solicitor, had or might have had, if he had chosen to be

(*h*) 61 & 62 Vict. c. 36.
(*i*) 30 & 31 Vict. c. 35, s. 6; see Appendix.

present, full opportunity of cross-examining the deponent.

Attention has already been called to this class of depositions under the head of "Relevancy" (*k*).

(iii.) *Depositions taken at a Coroner's Inquest.*

Although a coroner is not bound by any precise rules of evidence, and the issue at an inquest is what was the cause of deceased's death, and not whether his death renders any particular individual guilty of a criminal offence, yet if the jury find that someone is guilty of murder or manslaughter, their verdict is equivalent to the finding of a true bill against him by a grand jury, and he can be tried before the petty jury on that inquisition alone.

It is the duty of the coroner in such cases to take down the depositions of the witnesses in writing, which both he and the witnesses sign, and he must then, if the jury find a verdict of murder or manslaughter against an individual named, transmit the inquisition and the depositions to the clerk of assize or other proper officer before the trial of prisoners is due to commence (*l*). The person who is under suspicion can always give evidence at the inquest if he chooses, but he is usually cautioned, before being sworn, that he is not bound to answer any incriminating questions (*m*).

These depositions are, under the common law, admissible at the trial if the witnesses do not appear (*n*). There are no statutory provisions on the subject. It is not clear whether the signature of both the coroner

(*k*) See *ante*, p. 88.

(*l*) Coroners Act, 1887 (50 & 51 Vict. c. 71), ss. 4, 5; see Appendix.

(*m*) *Wakley* v. *Cooke*, 4 Ex. 511; *R.* v. *Gawthrop*, 59 J. P. 377; cf. *R.* v. *Boyes*, 1 B. & S. 311.

(*n*) See *ante*, p. 325. The Indictable Offences Act, 1848, does not apply.

and the witness must be proved before the deposition can be read (*o*).

It is doubtful whether a deposition taken in the absence of a prisoner or without his being afforded an opportunity of cross-examining the witness is admissible. Such a deposition was formerly admitted (*p*), but the better opinion now is that it cannot be received (*q*).

The depositions are admissible between third parties to show there has been a judicial inquiry into the matters to which it refers (*r*).

### (iv.) *Depositions of Children.*

Section 29 of the Children Act, 1908 (*s*), provides that on the trial of any person on indictment for an offence of cruelty, or for an offence under the Offences Against the Person Act, 1861, ss. 27, 55 or 56, or for an offence against a child or young person (*t*) under ss. 5, 42, 43, 52 or 62 of the same Act, or under the Criminal Law Amendment Act, 1885, or for an offence under the Dangerous Performances Acts, 1879 and 1897, or for any other offence involving bodily injury to a child or young person, if the Court is satisfied by the evidence of a duly qualified medical practitioner that the attendance before the Court of the child or young person in respect of whom the offence is alleged to have been committed, would involve serious danger to the life or health of the child or young person, any deposition of the child or young person taken under the Indictable Offences Act, 1848, or under Part II. of the Children Act, 1908, shall be admissible either for or against the accused without further

(*o*) *R.* v. *England*, 2 Leach, 770.
(*p*) *R.* v. *Eriswell*, 3 T. R. at p. 713; Bull. N. P. 242; *R.* v. *Purefoy*, Peake, Ev. 64.
(*q*) *R.* v. *Rigg*, 4 F. & F. 1085; *R.* v. *Wilshaw*, Car. & M. 145; *Sills* v. *Brown*, 9 C. & P. 601; 1 Taylor, Ev. 339.
(*r*) *R.* v. *Gregory*, 15 L. J. M. C. 38.
(*s*) 8 Edw. VII. c. 67.
(*t*) A child is a person under 14 years old; a young person between 14 and 16 years old: s. 131.

proof if it purports to be signed by the magistrate by and before whom it was taken, and if it is proved that reasonable notice of the intention to take the deposition has been served on the person against whom it is proposed to be used, and that person or his advocate had, or might have had if he had chosen to be present, an opportunity of cross-examining the deponent (*u*).

(v.) *Depositions under the Merchant Shipping Act*, 1894.

This Act applies to both civil and criminal proceedings. It enacts that whenever, in the course of any legal proceedings instituted in any part of His Majesty's dominions, testimony of any witness is required, any deposition that such witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in His Majesty's dominions or before any British consular officer elsewhere is admissible in evidence, provided that if such a proceeding is instituted in the United Kingdom or a British possession, due proof must be given that such witness cannot be found in that kingdom or possession respectively. If, however, such deposition was made in the United Kingdom, it is not admissible in any proceeding instituted in the United Kingdom, and if it was made in any British possession, it is not admissible in any proceeding instituted in that possession. Moreover, if the proceeding is criminal, the deposition is not admissible unless it was made in the presence of the person accused.

A deposition so made must be authenticated by the signature of the judge, magistrate, or consular officer before whom it was made, and he must certify (if the fact is so) that the accused was present at the taking thereof.

It is not necessary in any case to prove the signature

(*u*) A provision in almost identical terms is contained in s. 14 of the Prevention of Cruelty to Children Act, 1904 (4 Edw. VII. c. 15), as to offences under that Act.

or the official character of the person appearing to have signed any such deposition; and in any criminal proceeding the certificate is (unless the contrary is proved) sufficient evidence of the accused having been so present.

### (vi.) *Depositions in Civil Cases.*

The practice in respect of these depositions is now regulated by Order XXXVII. of the Rules of the Supreme Court (*x*). Rule 5 of this Order enables the Master, where it appears necessary for the purposes of justice (*y*), to make an order for the examination of any person before anyone whom he appoints, and to enable either party to give such deposition in evidence in the action, upon such terms as he shall direct.

This general provision is, however, modified by Rule 18 of the same Order, which provides that—

> "Except where by this Order otherwise provided, or directed by the Court or a judge, no deposition shall be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the Court or judge is satisfied that the deponent is dead, or beyond the jurisdiction of the Court, or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence saving all just exceptions without proof of the signature to such certificate."

Hence the very extensive power given by r. 5 is seldom exercised, except in the cases specially mentioned in r. 18. Still there are other possible cases in which it might properly be exercised, *e.g.*, where the deposition is that of a witness to prove *pro formâ* a relevant fact, and also when the consent of the opposite party is

(*x*) There are provisions almost identical in the Rules of the County Courts. Order XVIII., r. 18, of the Rules of 1903.

(*y*) As to the practice under this Order, see *post*, pp. 667 *et seq.*

withheld *malâ fide*. The sickness or infirmity mentioned in r. 18 need not necessarily be permanent or incurable (*z*).

### (vii.) *Depositions under the Extradition Acts and the Fugitive Offenders Act.*

Depositions taken in foreign countries may be used in proceedings taken under the Extradition Act, 1870 (*a*), s. 14 of which provides, that—

"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 (*b*), be received in evidence in proceedings under this Act."

It has been held to be unnecessary that the accused should have been present at the taking of the depositions (*c*); and the Extradition Act of 1873 (*d*), s. 4, enables a magistrate of this country, when acting under an order bearing the seal of a Secretary of State, to take evidence for the purpose of any criminal matter pending in a foreign court or tribunal, whether the accused be present or not, but his presence or absence must be stated in the deposition.

By the Fugitive Offenders Act, 1881 (*e*), s. 29, it is provided that—

"A magistrate may take depositions for the purposes of this Act in the absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him.

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 this Act.

Provided that nothing in this Act shall authorise the reception of any such depositions, copies, certificates, or documents in evidence against a person upon his trial for an offence."

(*z*) *Duke of Beaufort* v. *Crawshay*, L. R. 1 C. P. 699.
(*a*) 33 & 34 Vict. c. 52.
(*b*) Authentication is governed by s. 15; see Appendix.
(*c*) See *R.* v. *Ganz*, 9 Q. B. D. 93.
(*d*) 36 & 37 Vict. c. 60; see Appendix.
(*e*) 44 & 45 Vict. c. 69; see Appendix.

## Declarations as to Public and General Rights.

When an issue involves a question of public or general rights, or matters of public or general interest, the rule that hearsay or second-hand evidence is inadmissible is subject to this exception. Declarations of deceased persons of competent knowledge as to matters of public or general interest are admissible. So is evidence of general reputation as to such matters, and also depositions, judgments, or other proceedings in former litigation between different parties, in which the matters were discussed (*f*).

In the above cases, the declarations must have been made, and the general reputation must have existed, *ante litem motam*, *i.e.*, before the date at which the controversy began which subsequently culminates in a law suit. A contention may be raised and a claim definitely formulated for years or even for generations before any legal proceeding is begun; and evidence which comes into existence during this interval is naturally viewed with suspicion.

There is no *lis mota* till a dispute has arisen; it is not enough that the right has vested, or that the cause of action has accrued, which afterwards becomes the subject-matter of litigation (*g*). The dispute must relate to the particular subject which

(*f*) *Freeman* v. *Phillipps*, 4 M. & S. 486; *London City* v. *Clarke*, Bull. N. P. 233 a; *Reed* v. *Jackson*, 1 East, 355; *Earl de la Warr* v. *Miles*, 17 Ch. D. 535.

(*g*) The *dictum* of Alderson, B., to the contrary in *Walker* v. *Countess Beauchamp*, 6 C. & P. at p. 561, is expressly overruled in *Sheldon* v. *Attorney-General*, 2 Sw. & Tr. 170.

is in issue in the subsequent litigation (*h*); though it need not be between the same parties (*i*).

The ground for its reception lies in the supposition that the universality and notoriety of the interests concerned remove the temptation and the ability to misrepresent, which would arise if such evidence were received in matters of merely private and personal concern. Accordingly, it is rejected wherever the point at issue appears to partake more of the nature of a private than of a public interest.

Thus a map attached to an old enclosure award, although admissible to prove that a particular road was a public highway, was held inadmissible to prove the boundaries of such highway in favour of a defendant charged with obstructing the same (*k*).

In *Wright* v. *Doe* (*l*), COLTMAN, J., said:—

"The true line (says BULLER, J., in *R.* v. *Eriswell*) for Courts to adhere to, is that wherever evidence not on oath has been repeatedly received and sanctioned by judicial determination, it shall be allowed; but, beyond that, the rule that no evidence shall be admitted, but what is on oath, shall be observed. . . . Evidence of opinion is admitted in some cases without oath, as, for instance, where reputation is given in evidence to prove a public right. . . . The principle upon which I conceive the exception to rest is this, that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject; and such concurrence is presumptive evidence of the existence of an ancient right, of which, in most cases, direct proof can no longer be given, and ought not to be expected; a restriction now generally admitted as limiting the exception is this, that the right claimed must be of a public nature affecting a considerable number of persons."

And in the same case in the Exchequer Chamber (*m*), ALDERSON, B., said:—

"The general interest which belongs to the subject would lead to immediate contradiction from others, unless the statement

(*h*) *Freeman* v. *Phillipps*, 4 M. & S. 486.

(*i*) *Bullock & Co.* v. *Corry & Co.*, 3 Q. B. D. 356; *Pearce* v. *Foster*, 15 Q. B. D. 114.

(*k*) *R.* v. *Berger*, [1894] 1 Q. B. 823; see also *R.* v. *Bliss*, 7 A. & E. 550; *Mercer* v. *Denne*, [1905] 2 Ch. at p. 560; *Vyner* v. *Wirrall Rural Council*, 73 J. P. 242.

(*l*) 7 A. & E. at p. 360.

(*m*) 4 Bing. N. C. 528; and see *Doe* v. *Thomas*, 14 East, 323;

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

It was on this ground that JOYCE, J., recently decided that where a former lord of the manor had written at the close of an inventory of his furniture a private memorandum to the effect that he had caused it to be "called in church" that the right of the tenants of the manor to use a certain church path across the demesne was restricted to such as were "tenants above wall," this private memorandum could not be used in evidence by the present lord of the manor to show that the right of way was in fact so restricted; there being nothing to show that it was ever seen or heard of at the time it was written, by anyone except the writer, and consequently could not be contradicted (*n*).

So evidence of reputation was received on an issue as to whether the public are entitled to fish in a certain tidal river (*o*). Such evidence is also admissible in cases of local, as well as of general, public interest, but its value will depend on the vicinity of the witness to the *locus in quo*, and his personal knowledge of the surrounding circumstances.

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

The next important restriction on the rule under consideration, is contained in the principle that the declarations of deceased persons must be made and the general reputation must exist before the matter now in contest has become or appeared likely to become a subject of judicial controversy.

and the remarks of LE BLANC, J., in *Weeks* v. *Sparke*, 1 M. & S. 679; Cockle, 135; but cf. *Earl of Dunraven* v. *Llewellyn*, 15 Q. B. 791; Cockle, 138; see *post*, p. 346.

(*n*) *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344.

(*o*) *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135, *ante*, p. 65.

(*p*) *Per* PARKE, B., in *Crease* v. *Barrett*, 1 C. M. & R. 928.

In *R.* v. *Cotton* (*q*), DAMPIER, J., said :—

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

The material date is the time when the question began to attract public attention as a controversy, not the commencement of actual litigation—the origin of the controversy, not the commencement of the suit. After the controversy has originated, all declarations are to be excluded, whether the controversy was or was not known to the declarant (*r*). Declarations, however, will not be excluded on account of their having been made with the express view of preventing disputes (*s*), or in direct support of the declarant's title (*t*), or from the declarant being in the same situation, touching the matter in contest, with the party relying on the declaration (*u*).

There was formerly considerable conflict of opinion among the judges, as to the admissibility of reputation and the declarations of deceased persons to prove or disprove a claim of prescriptive right. In *Morewood* v. *Wood* (*x*), where, in an action of trespass the defendant pleaded a prescriptive right, Lord KENYON and ASHHURST, J., held the question to be one of a private nature, and that evidence of reputation should therefore be

(*q*) 3 Camp. at p. 446 ; and see *Richards* v. *Bassett*, 10 B. & C. 657 ; and *Freeman* v. *Phillipps*, 4 M. & S. 497.

(*r*) *Per* SIR JAMES MANSFIELD, C.J., in *Berkeley Peerage Care*, 4 Camp. 417.

(*s*) *Berkeley Peerage Case*, 4 Camp. 401 ; Cockle, 126.

(*t*) *Doe* v. *Davies*, 10 Q. B. 325.

(*u*) *Monkton* v. *Attorney-General*, 2 Russ. & My. 160.

(*x*) 14 East, 328, n.

rejected; but Buller, J., and Grose, J., appear to have thought the issue to be sufficiently of a public nature to let in the evidence. In the case of *Weeks* v. *Sparke* (*y*), Lord Ellenborough laid down the principle that when the right claimed does not curtail the general rights of others, being merely the claim of an individual against an individual, such evidence is not admissible. Traditionary reputation has been received as evidence of the boundaries between two parishes and two manors, but not of the boundaries between two estates (*z*).

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

Reputation has been received in support of an immemorial right of common, *pur cause de vicinage* so pleaded (*b*). In *Duke of Newcastle* v. *Hundred of Broxtowe* (*c*), the question was, whether Nottingham Castle was within the hundred: and it was held that Orders made at the county sessions between 1654 and 1660, in which the castle was described as being within the hundred, were admissible, as the justices must be presumed to have had sufficient acquaintance with the subject to which their declarations related; and that, although contrary evidence that the castle was excepted from the hundred was given from Domesday Book and an old charter of Henry VI., the judge was right in telling the jury to act on the evidence of a more modern and continuous reputation. But when the question was as to the rights of the county of the city of Chester, as

(*y*) 1 M. & S. 679; Cockle, 135.
(*z*) *Nicholls* v. *Parker*, 14 East, 331, n.
(*a*) 8 A. & E. 516.
(*b*) *Pritchard* v. *Powell*, 10 Q. B. 589.
(*c*) 4 B. & Ad. 273; Cockle, 141.

between that city and the County Palatine of Chester, a decree by a Lord Treasurer and other persons who were not a competent tribunal, and who had no personal knowledge of the facts, except such as they derived from an irregular judicial proceeding, was held inadmissible evidence of reputation (*d*). So an extra-judicial report by a government surveyor, appointed by Queen Elizabeth, as to the boundaries of a manor, has been rejected as evidence of such boundaries. Lord DENMAN said:—

"The surveyor does not appear to have had any authority to institute the inquiry; and, stripped of his authority, he has not merely no right to make any kind of return, but the presumption that he did make it falls to the ground. The paper may have been written by any clerk idling in the office, from his own imagination, or compiled, possibly by some interested person in furtherance of a sinister object of his own" (*e*).

An old survey of landed property, taken under the directions of a former proprietor, is no evidence that he was entitled to it (*f*). And old surveys were rejected as evidence of the high-water mark at the time they were made (*g*).

Declarations as to public or general rights may be either written or oral. If written they must be produced from a proper custody, and must bear plain marks of authenticity; they must also be shown to have been written or prepared by some person who had, or was likely to have had, some knowledge as to the matter of public interest in question.

In a case in the Exchequer Chamber (*h*) (in 1854), on a question, in replevin, whether goods were taken in Norfolk or Suffolk, a map of Suffolk purporting to have been republished in 1766, *with corrections and additions*,

(*d*) *Rogers* v. *Wood*, 2 B. & Ad. 245.
(*e*) *Evans* v. *Taylor*, 7 A. & E. at p. 627; *Mercer* v. *Denne*, [1905] 2 Ch. 538.
(*f*) *Daniel* v. *Wilkin*, 7 Ex. 429; but see *Jenkins* v. *Dunraven*, *post*, p. 345.
(*g*) *Assheton-Smith* v. *Owen*, [1906] 1 Ch. 179.
(*h*) *Hammond* v. *Bradstreet*, 10 Ex. 390.

by the sons of J. K., from a map published in 1736 by J. K., who then took an accurate survey of the whole county, was tendered to show that the *locus in quo* was not in Suffolk. It was produced by a magistrate of both Norfolk and Suffolk, who had purchased it twelve or fourteen years previously, and before any dispute as to the boundaries had arisen. The Court rejected the evidence chiefly on the ground that the new editors did not appear to have had any personal knowledge of the subject, nor to be in any way connected with the district, so as to make it probable that they had such knowledge. The fact of the map being in the possession of the county magistrate was no guarantee of its accuracy. So, too, in *Bidder* v. *Bridges* (*i*), which was an action to enforce commonable rights, a note book, called Bracton's Note Book, from the British Museum, and a document forming part of the Cottonian MSS. in the same Museum, and purporting to be a register of Merton Priory, were rejected by Kay, J., on the ground that there was no evidence of their having been in such custody as would entitle a Court to treat them as authentic. He also refused to admit in evidence, on the question of boundary, the Ordnance map and certain maps from the British Museum, on the ground that they were only the opinions of map makers upon such information as they had at the time. In the same case, however, the judge admitted in evidence, for what it was worth, an entry in the church book of the parish of Beddington, made in 1678, of a note of an action in 1240, in which the parson of Beddington was one of the defendants, as an entry of an historical fact in which the parish was interested. The case went to the Court of Appeal, which agreed with the learned judge, as to the non-admissibility of a copy of the register of Merton Priory, but did not express any opinion on the other matters above mentioned.

(*i*) 54 L. T. 529.

The statement, especially where it is documentary, must contain a clear and unambiguous declaration concerning the disputed issue. It must relate directly to the existence of the right itself, and not to particular facts which may support or negative it. Thus, where the question was whether a certain road was public or private, a statement made by a deceased resident, that he had planted a tree to mark the boundary of the road, was inadmissible (*k*). In one case, to prove a public right of way over a manor, a map of the manor, which had been made by a deceased steward of the manor, was given in evidence. The map showed lines made by the deceased witness which indicated clearly some kind of way over the *locus in quo*, but contained nothing to show whether the way was a public one, or only one of several occupation ways such as existed in the manor. The map was clearly inadmissible to prove an occupation way, which is merely a private right; and, there being nothing on the face of the map to show that it was a public way, and the map having been used only to settle the boundaries of the copyholds of the manor, it was rejected (*l*). A map of the manor produced from the manor house where it was usually kept, made by a surveyor conversant with the *locus in quo* and recognised by parish authorities for rating purposes, was in one case held admissible on a question of general right to the waste of the manor. The tithe map was also admitted in this case (*m*). An ancient survey of a manor has also been held admissible as to lands within the manor (*n*), and court rolls on a question as to a customary right to dig stones within the manor (*o*).

(*k*) *R.* v. *Bliss*, 7 A. & E. 550; Cockle, 140; see *Crease* v. *Barrett*, 1 C. M. & R. 925.
(*l*) *Pipe* v. *Fulcher*, 1 E. & E. 111.
(*m*) *Smith* v. *Lister*, 64 L. J. Q. B. 154; see also *Attorney-General* v. *Antrobus*, [1905] 2 Ch. 188; *Vyner* v. *Wirrall Rural Council*, 73 J. P. 242.
(*n*) *Jenkins* v. *Dunraven*, 62 J. P. 661.
(*o*) *Heath* v. *Deane*, [1905] 2 Ch. 86.

The conversations of former tenants of a manor, and of other persons interested in it, have been held good evidence as to the boundaries of the manor (*p*). A document purporting to be a survey of a manor, while it was part of the possessions of the Duchy of Cornwall, and coming out of proper custody, was admitted by Lord Romilly (*q*) as evidence of the boundaries and customs of the manor; although a survey of a manor belonging to Oliver Cromwell as his private property, and taken by commissioners appointed by him, containing also a presentment by a jury that certain dues were payable to the lord, was held inadmissible as a public document, or as reputation to prove such dues (*r*). In an action of trespass the question argued in the Exchequer Chamber (*s*) was as to the property in a plot of ground which lay between the waste of the plaintiff and the estate of the defendant. The plaintiff offered evidence of statements made before any controversy arose, by his deceased tenants, who as such had exercised commonable rights over the waste adjoining the *locus in quo*, and other statements made by deceased persons, who, although not tenants, were resident in the manor, and well acquainted with it. No evidence was given of an actual enjoyment of the right on the close by the tenants. Parke, B., said:—

"If the question had been one in which all the inhabitants of the manor, or all the tenants of it or of a particular district of it, had been interested, reputation from any deceased inhabitant or tenant, or even deceased residents in the manor, would have been admissible, such residents having presumably a knowledge of such local customs; and, if there had been a common law right for every tenant of the manor to have common on the wastes of a manor, reputation from any deceased tenant as to the extent of those wastes, and therefore as to any particular land being waste of the manor, would have been admissible. . . . This case is precisely in the same situation as if evidence had been offered that there were many persons, tenants of the manor, who had separate prescriptive

(*p*) *Doe* v. *Sleeman*, 9 Q. B. 298.
(*q*) *Smith* v. *Earl Brownlow*, L. R. 9 Eq. 241.
(*r*) *Duke of Beaufort* v. *Smith*, 4 Ex. 450.
(*s*) *Earl of Dunraven* v. *Llewellyn*, 15 Q. B. 791; Cockle, 138.

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

In a later case (*t*) the Court of Appeal said that the question whether a piece of land was part of a common over which any one in certain parishes had a right of common, was a question of such general interest in the locality as to let in evidence of reputation, and they held that *The Earl of Dunraven* v. *Llewellyn* was no authority to the contrary, as the issue in that case was simply whether a piece of land was the plaintiff's or defendant's. LINDLEY, M.R., also said that *Warrick* v. *Queen's College, Oxford* (*u*), shows that *The Earl of Dunraven* v. *Llewellyn* does not go so far as is sometimes supposed.

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

(*t*) *Evans* v. *Merthyr Tydfil Urban District Council*, [1899] 1 Ch. 241.
(*u*) L. R. 6 Ch. 716. And see L. R. 3 Eq. 683.
(*x*) *Barraclough* v. *Johnson*, 8 A. & E. 99.
(*y*) *Brisco* v. *Lomax*, 8 A. & E. 198.

*The Earl of Dunraven* v. *Llewellyn*. Thus, COLERIDGE, J., states:

"On the question of boundary between two owners, no doubt reputation is admissible."

But this observation must be limited by the circumstances of the case, which concerned the boundaries of a manor, and not of private property. So an award, made in a private dispute, is not evidence of reputation (*z*).

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

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

(*z*) *Evans* v. *Rees*, 10 A. & E. 151; *Lady Wenman* v. *Mackenzie*, 5 E. & B. 447.
(*a*) 4 E. & B. 535.

these reasons, we think that evidence of reputation was improperly rejected."

Standard public historical works are admissible to prove a matter relating to the kingdom at large (*b*), such as the death of a sovereign or the time of his accession. They are admissible to prove ancient facts of a public nature (*c*), although not to prove a particular or local custom (*d*). Standard maps and charts which are offered for sale to the general public are admitted as evidence of general geographical facts, such as the relative position of countries, counties and towns: and distances (other than minute distances) may be proved by the use of the Ordnance maps (*e*).

Peerages, army and navy lists, directories, calendars, or other non-official publications, are inadmissible.

### DECLARATIONS IN PEDIGREE CASES.

In actions where the relationship and descent of members of a family are in issue, the rule excluding hearsay is waived to some extent, and the statements of deceased persons who were connected by blood or marriage with the family are admissible to prove the pedigree, provided those persons were on terms of such intimacy with the family as to render it probable that they could give accurate information on such matters. But no declaration made by a deceased person as to any matter of pedigree will be received, unless it first be established by other evidence that the declarant was legitimately related by blood, or was the husband

(*b*) Bull. N. P. 248.
(*c*) *Read* v. *Bishop of Lincoln*, [1892] A. C. 653.
(*d*) *Stainer* v. *Droitwich*, 1 Salk. 281.
(*e*) *Mouflet* v. *Cole*, L. R. 8 Ex. 35; but see *Hammond* v. *Bradstreet*, 10 Ex. 390, *ante*, p. 343.

or wife of a person legitimately related by blood, to the party whose pedigree is in issue (*f*). Moreover, such declarations, as in the class last mentioned, will be inadmissible, unless made *ante litem motam*.

It is for the judge to decide, as a question precedent to the admission of the evidence, whether the declarant has been proved to have been sufficiently connected by consanguinity or affinity to the family in question.

Even then it is necessary that these relations should have been on terms of sufficient intimacy with the family as to render it probable that their information was accurate (*g*). The declarations of persons other than blood relations, and their husbands or wives, are not admissible. Thus, the declarations of deceased servants and intimate acquaintances are rejected (*h*), even though they were in the nature of dying declarations (*i*); nor are the declarations of illegitimate relations received (*k*).

The relationship of the declarant must be established by other evidence before his statement can be proved (*l*). The declaration itself cannot be used for this purpose.

"The law resorts to hearsay of relations upon the principle of interest in the person from whom the descent is to be made out; and it is not necessary that evidence of consanguinity should have the correctness required as to other facts. If a person says another is his relative or next of kin, it is not necessary to state how the consanguinity exists. It is sufficient that he says A. is his relation, without stating the particular degree, which perhaps he could not tell if asked; but it is evidence, from the interest of the person in knowing the connections of the family; therefore the opinion of the neighbourhood of what passed among the acquaintances will not do" (*m*).

(*f*) *Shrewsbury Peerage Case*, 7 H. L. Cas. at p. 26.
(*g*) *Whitelocke* v. *Baker*, 13 Ves. 511.
(*h*) *Johnson* v. *Lawson*, 9 Moore, 183; Cockle, 133.
(*i*) *Doe* v. *Ridgway*, 4 B. & Ald. 53.
(*k*) *Doe* v. *Barton*, 2 M. & R. 28.
(*l*) *Per* Lord ELDON, in the *Berkeley Peerage Case*, 4 Camp. 419; *Lyell* v. *Kennedy*, 14 App. Cas. 451.
(*m*) *Per* Lord ERSKINE, in *Vowles* v. *Young*, 13 Ves. 147.

It was accordingly held that the declarations by a deceased husband as to his wife's legitimacy are admissible, as well as those of her blood relations. Again, in *Doe* v. *Randall* (*n*), it was held that the declaration of a deceased woman of statements made by her former husband that his estate would go to J. F., and then to J. F.'s heir, were admissible to show the relationship of the lessor of the plaintiff to J. F. BEST, C.J., said :—

"Consanguinity, or affinity by blood, therefore, is not necessary, and for this obvious reason, that a party by marriage is more likely to be informed of the state of the family of which he is to become a member, than a relation who is only distantly connected by blood ; as, by frequent conversations, the former may hear the particulars and characters of branches of the family long since dead. . . . The declarations of deceased persons must be taken with all their imperfections, and if they appear to have been made honestly and fairly, they are receivable. If, however, they are made *post litem motam*, they are not admissible, as the party making them must be presumed to have an interest, and not to have expressed an unprejudiced or unbiassed opinion."

The statement of a wife as to her husband's family, and that of a husband as to his wife's family, stand upon the same footing (*o*).

It makes no difference that the declarant is in the same position as the person tendering the evidence. Thus, the declarations of a deceased sister of the plaintiff as to their legitimacy have been received (*p*), but a statement by a deceased person who was twice married, which tended to invalidate his first and to establish his second marriage, has been rejected (*q*).

The term "pedigree," in this connection, embraces not only general questions of descent and relationship, but also the particular facts of birth, marriage and death, and the times when, either absolutely or relatively, those events happened. All these facts, therefore, may be proved from hearsay derived from

(*n*) 2 M. & P. 20.
(*o*) See *Shrewsbury Peerage Case*, 7 H. L. Cas. 23.
(*p*) *Doe* v. *Davies*, 10 Q. B. 314 ; *Monkton* v. *Attorney-General* 2 Russ. & My. 159.
(*q*) *Plant* v. *Taylor*, 7 H. & N. 211.

relatives. It has been doubted whether specific dates can be so proved; but the preponderance of authority clearly is that they can be (*r*). The written memorandum of a father as to the time when his child was born, has been received to prove when the infant would come of age (*s*); but in a settlement case the declaration of a father as to the place of his child's birth has been rejected, it not being strictly a question of pedigree (*t*). So, an order of removal was quashed for being founded merely on the pauper's own evidence as to the time and place of her birth, because the statement was held to be one which she could not make of her own knowledge (*u*); but in *Shields* v. *Boucher* (*x*), KNIGHT BRUCE, V.-C., was of opinion that declarations of a person deceased as to what place his father came from would be admissible.

As to what are questions of pedigree, it has been said, on the authority of an old case (*y*):—

> "Hearsay is good evidence to prove who is my grandfather, when he married, and what children he had, etc., of which it is not reasonable to presume I have better evidence. So, to prove my father, mother, cousin, or other relation, beyond the sea, dead; and the common reputation and belief of it in the family gives credit to such evidence."

Hence the declaration need not be made by the deceased to the witness as of his own knowledge, provided his information was derived from other members of his family. It may be, as a learned judge has expressed it, "two deep," or infinitely more remote in degree; it is sufficient to show that a general belief has prevailed in a family. Thus, evidence that a person went abroad when a young man, and, according to the repute of the family, had afterwards died in the West

(*r*) *Haines* v. *Guthrie*, 13 Q. B. D. 818.
(*s*) *Per* Lord ELLENBOROUGH, in *Roe* v. *Rawlings*, 7 East, 290.
(*t*) *R.* v. *Erith*, 8 East, 539.
(*u*) *R.* v. *Rishworth*, 2 Q. B. 487; now see 39 & 40 Vict. c. 61, s. 34.
(*x*) 1 De G. & Sm. 40, 51.
(*y*) *Grimwade* v. *Stephens* (Kent Assizes, 1697), Bull. N. P. 294, cited in note 15 East, 294.

Indies, and that the family had never heard of his being married, is strictly admissible to show that he died unmarried (*z*).

On this ground, not merely oral declarations of deceased persons connected with the family, but old family documents, genealogies, entries in family Bibles (*a*), inscriptions on tombstones, or walls, or rings, if sufficiently authenticated as genuine, and as having been recognised as such by the family, will be received (*b*). The admissibility of genealogies was discussed in *Davies* v. *Lowndes* (*c*), in the Exchequer Chamber. A paper purporting to be an old genealogy, having been offered as evidence of pedigree, Lord DENMAN said:—

"A pedigree, whether in the shape of a genealogical tree or map, or contained in a book, or mural or monumental inscription, if recognised by a deceased member of the same family, is admissible, however early the period from which it purports to have been deduced. . . . The reason why a pedigree, when made or recognised by a member of the family, is admissible, may be that it is presumably made or recognised by him in consequence of his personal knowledge of the individuals therein stated to be relations, or of information received by him from some deceased members, of what the latter knew or heard from other members who lived before his time. And, if so, it may well be contended that if the facts rebut that presumption, and show that no part of the pedigree was derived from proper sources of information, then the whole of it ought to be rejected; and so also, if there be some, but an uncertain and undefined, part derived from reference to improper sources. But where the framer speaks of individuals whom he describes as living, we think the reasonable presumption is that he knew them, and spoke of his own personal knowledge, and not from registers, wills, monumental inscriptions, and family records or history: and consequently to that extent the statements in the pedigree are derived from a proper source, and are good evidence of the relationship of those persons."

But evidence of this kind is only admissible when questions of pedigree are directly in issue, not where they arise incidentally in the course of an action. Thus

(*z*) *Doe* v. *Griffin*, 15 East, 293; Cockle, 134.
(*a*) Cf. *Hubbard* v. *Lees*, L. R. 1 Ex. 255.
(*b*) See *The Fairfax Peerage Case*, [1908] W. N. 226.
(*c*) 6 Man. & G. 525.

in an action for goods sold and delivered where the defendant pleaded infancy, it was sought to prove the plea by a statement contained in an affidavit made by the defendant's deceased father in a chancery suit to which the plaintiff was not a party, but it was held that, there being no question of pedigree in the action, the evidence was not admissible (*d*).

In the *Berkeley Peerage Case* (*e*), on an issue as to the legitimacy of the petitioner, the three questions referred by the House of Lords to the judges were substantially (1) Whether the depositions made by A.'s reputed father, in a suit by A. against B., were evidence of pedigree for A., in a suit by A. against C. (2) Whether, in a similar case, entries made by A.'s reputed father in a Bible, that A. was his son, born in wedlock on a certain day, were inadmissible. (3) Whether such entries were inadmissible, if made with the express purpose of establishing A.'s legitimacy in case it should ever be called in question.

The points involved, therefore, were whether hearsay declarations of pedigree, made after a judicial controversy has arisen, are admissible; whether an entry in a book made by a deceased relation is evidence; and whether such an entry, if otherwise admissible, continues to be so when made with an express purpose of providing against a contemplated or impending controversy. It was held on the first point that the evidence was inadmissible, because it was made after an actual, though not as yet a judicial, controversy had arisen; on the second, that it was strictly admissible, whether the entry was made in a Bible or any other book, or on any other piece of paper; and, on the third, that it was also admissible, whatever objections there might be to its credibility.

Another important case on this subject is the *Sussex*

(*d*) *Haines* v. *Guthrie*, 13 Q. B. D. 818.
(*e*) 4 Camp. 401; Cockle, 126.

*Peerage Case* (*f*). There, an entry made in her prayer-book, by Lady Augusta Murray, of her marriage at Rome to the Duke of Sussex, was received, not as conclusive proof, but as a declaration made by one of the parties. In the same case, as already stated, evidence of declarations by a deceased clergyman that he had celebrated the marriage was rejected (as a declaration against interest).

In *Lyell* v. *Kennedy* (*g*), the House of Lords held that certain proceedings in which one James Martin was a defendant were admissible to prove that in those proceedings James Martin by his defence admitted that one Elspeth Duncan was his mother. Lord SELBORNE, in that case said:—

> "With respect to the proceedings in 1766 in the Sheriff's Court of Perthshire (which were produced from the proper custody), I consider them also admissible on the same principle on which answers and decrees in Chancery have been admitted by this House in peerage cases, as to matters of pedigree where the facts of the pedigree were not in dispute, but only incidentally stated."

In accordance with the rules recognised in the preceding cases, a cancelled will of an ancestor, found among family papers, has been received as a declaration concerning the relations of the family (*h*); and so has an unexecuted will in the handwriting of the intending testator, which was treated as a statement of the fact of relationship, not merely as a statement of testamentary intentions (*i*). Pedigrees hung up in family mansions (*k*); a marriage certificate kept by the family (*l*); a genealogy made by a deceased member of a family, even though purporting to be founded partly on hearsay (*m*); engravings on rings (*n*); coffin-plates, and monumental

(*f*) 11 Cl. & F. 85.
(*g*) 14 App. Cas. 437.
(*h*) *Doe* v. *Earl of Pembroke*, 11 East, 504.
(*i*) *Re Lambert*, 56 L. J. Ch. 122.
(*k*) *Goodright* v. *Moss*, Cowp. 591; Cockle, 134.
(*l*) *Doe* v. *Davies*, 10 Q. B. 314.
(*m*) *Monkton* v. *Attorney-General*, 2 Russ. & My. 147.
(*n*) *Vowles* v. *Young*, 13 Ves. 144.

inscriptions generally are regarded as admissible for what they are worth (*o*). BACON, V.-C., once said of inscriptions on tombstones :—

"In the case of tombstones, no doubt the publicity of the inscription gives a sort of authenticity to it, and if it remains uncontradicted for a great many years, it would, in the absence of every other fact in the case, be taken to be true ; but you cannot put it higher than that" (*p*).

Not only hearsay declarations of deceased relatives, but also proof of the manner in which a person has been brought up and treated by his family, will be evidence. In the *Berkeley Peerage Case*, Sir JAMES MANSFIELD, C.J., said :—

"If the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached ; and indeed it amounts to a daily assertion that the son is legitimate" (*q*).

And in *Goodright* v. *Moss* (*r*) Lord MANSFIELD, C.J., said :—

"Suppose from the hour of one child's birth to the death of its parent, it had always been treated as illegitimate, and another introduced and considered as the heir of the family ; that would be good evidence."

In *Sturla* v. *Freccia* (*s*), Lord BLACKBURN said :—

"Statements by deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted on them, or assented to them, or did anything that amounted to showing that they recognised them."

Lastly, declarations of deceased persons to be admissible must have been made *ante litem motam*, even if the declarant was unaware of the controversy (*t*). On this

(*o*) *Davies* v. *Lowndes*, 6 Man. & G. 527.
(*p*) *Haslam* v. *Crow*, 19 W. R. 969.
(*q*) 4 Camp. 416 ; cf. *Khajah Hidayut Oollah* v. *Rai Jan Khanum*, Moo. Ind. App. 295.
(*r*) Cowp. 591 ; Cockle, 134.
(*s*) 5 App. Cas. 641.
(*t*) *Berkeley Peerage Case*, 4 Camp. p. 417 ; cf. *Frederick* v. *Attorney-General*, L. R. 3 P. & D. 270 ; *In re Turner*, 29 Ch. D. 985.

head it is only necessary to refer to the declaration which has been already quoted, of Sir JAMES MANSFIELD, C.J., in the *Berkeley Peerage Case*, that the *lis mota*, or beginning of the litigation, dates from the origin of the controversy, and not from the commencement of the trial (*u*). When a question of pedigree has assumed such a degree of conflicting interest, that the declarant must be reasonably presumed to be under the influence of undue partiality or prejudice, the disposition of the Courts is either to reject his evidence altogether, or to receive it only with the strict limitations as to credibility which are laid down by the judges in their answer to the third question in the *Berkeley Peerage Case*. In a case of disputed descent from a lunatic, one of the claimants was allowed to give in evidence a deposition, made by a deceased relation of the lunatic before a Master in Chancery on an inquiry, to discover who was entitled by consanguinity to become committee. It was urged that the deposition was inadmissible as being made *post litem motam*; but the Court held that it was admissible (*v*). In a petition for a declaration of legitimacy it was proved that A., the petitioner's grandfather (whose legitimacy was in issue), had claimed some property in the possession of his reputed maternal uncle, but the latter said that he should defend any action which A. might bring, and communicated the circumstances to A.'s maternal uncle, and A. replied by letter that he wished to establish his legitimacy, but took no further proceedings. Sir J. HANNEN held that there was proof of the commencement of a controversy, so as to exclude subsequent declarations by any member of the family as to the marriage of A.'s father and mother (*x*).

(*u*) See also *Butler* v. *Mountgarrett*, 7 H. L. Cas. 633; Cockle, 129.
(*v*) *Gee* v. *Good*, 29 L. T. (o. s.) 128.
(*x*) *Frederick* v. *Attorney-General*, L. R. 3 P. & D. 196.

## Declarations by a Patient as to his Symptoms.

Any statement made by a patient as to the state of his health, or as to his physical condition at the time of the statement, is admissible, whether the patient subsequently dies or recovers. In practice such statements are seldom received unless they were made to a medical man who was in attendance upon the invalid; strictly, however, it would seem that such a statement can be reported by anyone who heard it whether it was made to a medical man or not. But only so much of the statement made on the occasion is admissible as relates to the symptoms and sufferings of the patient; any narrative as to the events which reduced him to his present condition will be excluded; such events must be proved by primary evidence; and no statement as to them can be received, unless it follows so immediately after the event that it can fairly be deemed part of the same transaction, in which event it becomes admissible as part of the "*Res Gesta*" (*y*).

The leading case on this subject is *Aveson* v. *Lord Kinnaird* (*z*). There the plaintiff sued upon a policy of insurance upon his wife's life, which had been granted to him by the defendants, on the faith of a declaration that the wife at the time it was granted was in good health. The defendants pleaded that this declaration was false to the knowledge of the plaintiff, and that the policy was therefore void. In support of this plea they called as a witness a woman who had visited the deceased a few days before the policy was granted and proposed to examine

(*y*) See *ante*, p. 68.
(*z*) 6 East, 188.

her as to statements made by the deceased woman on that occasion about her state of health at that time. The evidence was objected to, but GRAHAM, B., admitted it "as in general any opinion of the state of health of a person must partly be formed on the accounts which such person gives of his complaints." The witness then proved that she found the plaintiff's wife in bed at 11 o'clock in the forenoon, that the latter stated that she was very poorly, that she had been to Manchester a day or two before, that her husband had been insuring her life, that she was not well nor fit to go when she went, that it would be ten days before the policy could be returned, and that she was afraid she could not live till it was made, and her husband could not get the money. On an application for a new trial on the ground of misreception of this evidence, it was held that it had been properly admitted. In delivering judgment in this case, LAWRENCE, J., said (*a*):—

"As to the general ground of objection to the evidence as hearsay, it is in every day's experience in actions of assault, that what a man has said of himself to his surgeon is evidence to show what he suffered by reason of the assault."

So in *R.* v. *Johnson* (*b*), the accused was indicted for poisoning her husband. In order to prove that the deceased was in good health a few days before his death, evidence was afterwards admitted of a conversation held about that time between the deceased and the witness with regard to the former's state of health at that time.

(*a*) 6 East, at p. 198.
(*b*) 2 Car. & K. 354.

## CANADIAN NOTES.

### DECLARATIONS IN COURSE OF DUTY.

In ejectment under a tax deed the plaintiff, to prove the taxes being in arrear, produced the treasurer's books containing such an entry. It was held that this was sufficient *primâ facie* evidence and also that the recital in the tax deed and the advertisement in the *Gazette* was sufficient evidence of the amount of taxes due, but not of the warrant to sell. Also, that s. 130 of 32 Vict. c. 36, Ontario, did not dispense with proof of the warrant or cast the burden of negativing its existence on the objector to it. *Hutchison* v. *Collier*, 27 U. C. C. P. 249.

In an action of replevin for goods sold for taxes, the plaintiff having succeeded for want of evidence of any demand by the collector, defendants moved for a new trial on affidavits showing the discovery since the trial in the collector's blank receipt book, opposite to the receipt intended to have been given for these taxes, of a minute made by the collector: "Wrote January 21st, 1864." The death of the collector was shown, but not when he died, nor when the entry was made, nor that it was in the usual course of business to make such an entry. It was held that this would be insufficient to establish a demand. So far as being an entry such as the deceased collector was in the usual habit of making, it would rather seem from the evidence tendered at the trial that the town clerk had advised him in this instance to send a written notice, as if this was not the ordinary course, and, looking at the words of the minute

it was somewhat difficult to say that the word "wrote" must, or ought to be interpreted—wrote to B. McNab a statement and demand of the taxes charged against him. *Barton* v. *Corporation of Dundas*, 24 U. C. Q. B. 273.

The township clerk produced a copy which he swore was a true copy of a fence-viewer's award, the original being in his custody. *Held*, that such copy was admissible in evidence under C. S. of U. C. c. 32, s. 6, these awards being made by a statutable public officer, acting in a judicial capacity and which might affect a large portion of the public and even municipalities. WILSON, J., thought that if the copy had been one delivered by the fence-viewer under the statute, it might be received without proving it to be a true copy. See statute, p. 61 of the report. *Warren* v. *Des Lippes*, 33 U. C. Q. B. 59.

In an action against sureties for a town collector, for his default in paying over a sum collected by him, it was held in the *Town of Welland* v. *Brown*, 4 O. R. 217, that entries made by the collector on his rolls, in the discharge of the duties of his office, of taxes paid to him, were evidence against the sureties.

In the Common Pleas Division, it had been questioned whether these entries were evidence in the lifetime of the collector against the sureties. 3 O. R. 378.

The certificate of the commissioner for administering the oath of allegiance is evidence after his death and that of the party taking it, to prove it administered, as part of the transaction of a public officer in the execution of his duty. *Doe* e. d. *MacFarlane* v. *Lindsay*, Draper's U. C. K. B. Reports, 123 (1830).

The question in dispute being the boundary between lots 3 and 4, the field notes of a surveyor, since deceased, of a survey made by him in June, 1827, for one B., was tendered in evidence, in which it appeared that he found a post which he treated as an original post

between these lots. B., as appeared by the entry in the registry, became the owner of lot 2 in August, 1827, and of lot 3 in January, 1830. The notes were held admissible, if the survey was shown to have been made for a person interested in it of which there was evidence, as being an entry made in the course of business and in the performance of *quasi* public duties. *O'Connor et al.* v. *Dunn*, 39 U. C. Q. B. 597. In this case the divisional court had held that the field notes had been rightly rejected, it not being shown that the survey was made for the then owner of the lots. 37 U. C. Q. B. 430. On appeal, reported in 2 O. A. R. 247, it was held that the surveyor's notes were not admissible in evidence, although he was dead. The notes were made in a book in which the surveyor kept a diary of matters private and professional, and the note referred to information got from a person named in reference to the boundaries of certain lots of land, and a charge against a Mr. Bolton, who it was not shown had any interest in either of the lots. At the time this note was made, surveyors were not under any obligation to make notes of surveys, and it was not proved that the note was made contemporaneously with the transaction.

The field notes of a surveyor, not made in the execution of his duty as a surveyor, were held not admissible in evidence to show the boundaries between two lots. *MacGregor* v. *Keiller et al.*, 9 O. R. 677, distinguishing *Harris* v. *Mudie*, 7 O. A. R. 414.

There is nothing in ss. 34 to 37, R. S. O., 1877, c. 146, making a survey thereunder, or the placing of monuments conclusive whether right or wrong, and evidence may be received in contradiction. This was held on a Crown Case Reserved, from the general sessions, on an indictment for obstruction of a highway, being a town line between two counties. *R.* v. *Cosby*, 21 O. R. 591.

See *Palmer* v. *Thornbeck*, 27 U. C. C. P. 291, as to

the effect of a survey under 24 Vict. c. 64, and 25 Vict. c. 38.

The question in dispute at the trial being the boundary line between lots 11 and 12, affidavits were held properly rejected as to the line between lots 4 and 5, and 14 and 15. One of these affidavits went to show that none of the side lines in this concession had been run in the original survey, owing to a large swamp. This was held not to be an affidavit within the statute Con. Stat. U. C. c. 93, s. 50, enabling a surveyor to administer an oath to every person whom he examines concerning any boundary, etc., etc., which such surveyor may be employed to survey. "Evidence concerning any boundary" did not mean that no such boundary ever existed. *Manary* v. *Dash*, 23 U. C. Q. B. 580.

It was held that entries in the diary of the surveyor, together with a small piece of map also produced, supposed to be his, which was all that remained in the Crown Lands Office, showing the lines in question run, and the trace of a blaze for a great part of the way, were evidence of the fact of the lines having been run by him in the manner in which he was directed to run them by his instructions which were produced, although there was no further evidence on the ground that the original lines had been run. *Smith* v. *Clunas et al.*, 20 U. C. C. P. 213.

*Sworn Culler.*

The certificate given under the authority of the 19th section of Chapter 46, Consolidated Statutes of Canada, was held to be receivable as evidence of the work done by the culler. *Dobell* v. *Ontario Bank*, 9 O. A. R. 484.

In *Anderson* v. *Anderson*, 27 N. B. 432, entries in the handwriting of a deceased person in books of account,

made in the ordinary course of his business, were held admissible under the New Brunswick Statute, c. 127, s. 38, of the Con. Stat., 1903, the first entry being admitted to be a payment on account of a land purchase, although the second of the entries was regarded by TUCK, C.J., as too indefinite to prove a payment on account of the land in dispute. It was further held that where an entry in the handwriting of a deceased person is *primâ facie* against interest, it is admissible for all purposes, irrespective of its effect or value when received.

A. was married at St. Paul's Church, Halifax, 1809. In the entry of the marriage in the church's marriage register his name appears with the addition batr., a contraction for bachelor. There was nothing to show by whom the entry of the addition was made, or that it was made in pursuance of a duty prescribed by statute.

It was held that the register, while admissible in proof of the marriage, could not be received as evidence that A. had previously not been married.

*Quære* whether declarations in letters written *ante litem motam* between D. the son of A. and G. the son of C., in which D. recognised C.'s relationship to him, were admissible in D.'s lifetime, but, *semble*, that where *primâ facie* evidence of C.'s legitimacy had been given, declarations in G.'s letters, he being dead, were admissible. *Johnston* v. *Hazen*, 3rd Trueman, N. B. Eq. 147.

*Declarations against Interest.*

It was held in *Bertrand* v. *Heman*, 11 Man. 205, which was followed in *Marshall* v. *May*, 12 Man. 381, that on an interpleader issue to decide the title to a sum of money claimed by the plaintiff under an assignment from H. for the benefit of creditors as against the defendant, a judgment creditor of H who claimed the

money under a garnishing order, that evidence of the admissions of the judgment debtor was not admissible as against the garnishing creditor, either on account of any privity between them or as evidence of declarations made by a party against his own interest, there being no proof of his death.

In an action for, among other things, an accounting, it was held that the trial judge was right in making an order under r. 3 of Order XXXII., Nova Scotia Judicature Rules, directing that books of account kept by an executrix and trustee which consisted largely of admissions made against her own interest, should be taken as *primâ facie* evidence of the truth of the matters therein contained. The order provides that the judge may give special directions with regard to the mode in which an account is to be taken or vouched, and, in particular, may direct that in taking an account the books of account in which the accounts in question have been kept, shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they are advised. *Cairns et al.* v. *Murray et al.*, 37 N. S. R. 451.

The declarations of a deceased testator, respecting his age at the time of the execution of his will, are not admissible as evidence. This was held in *Doe* e. d. *Stephen and Wife* v. *Ford*, 3 U. C. Q. B. 352, in which the question to be tried was whether Matthew Henderson was or was not of full age when he made his will. ROBINSON, C.J., said, he considered those declarations not admissible in evidence, for they regarded a fact of which he could not have any personal knowledge, namely, the exact time of his own birth, and they were declarations tending to confer a disposing power upon himself, and not therefore receivable on the ground of being against his interests. Declarations of the infant might be made,

in such a case, for the express purpose of setting up a will made or intended to be made by him.

In *Brown* v. *Morrow*, 43 U. C. Q. B. 436, it was held that a will was sufficiently proved by the execution and registry by the heir-at-law of a memorial of the will, it being a declaration against his proprietory interest, and he being dead at the time of the trial, and *semble* that this was good primary evidence, not only against the heir-at-law and those claiming under him, but against third parties.

In an action by an executor for money lent and advanced by his testator, the evidence of indebtedness consisted of a receipt, signed by the testator, and found amongst his papers, in the words following: "Received from my son, S. G., the sum of $48 for interest of £300 at four per cent., due the first day of May next, according to agreement, which I cannot find, so I have put the receipt on this paper." Held, affirming the judgment of the Court below (*a*), that this was not admissible as evidence against the estate of S. G., the same not being an entry against the interest of the party making it. *Per* DRAPER, C.J., "Although the entry, by admitting the payment of $48, made by the son to the father is an entry against the father's interest, yet the words which are relied upon to prove the plaintiff's case 'for interest on £300 at four per cent., due the first of May next, according to agreement' form part of the same statement, and are as clearly for the father's interest as the admission of receiving 48 dollars is against it, and more than that, the concluding words of the receipt, 'which I cannot find, so I have put the receipt on this paper,' show to my mind conclusively that the entry as a whole was made to serve and maintain the interest of the party who made it." The learned judge continues with a reference to other circumstances

(*a*) See report in 22 U. C. Q. B. 473.

in support of this view. *Ganton* v. *Size*, 2 Grant E. & A. 368 (1864).

In a prosecution for bigamy, it appeared that the prisoner had executed a deed containing a recital of his having a wife and child in England, and conveying certain lands and premises to two trustees in trust to receive and pay over the rent and profits to such wife and child, but with a power of revocation to the prisoner. One of the trustees proved that, at the time of the execution of the deed, the prisoner had informed him that he had quarrelled with his present wife and had a law suit with her, that the place had been bought with the first wife's money and he wished it to go to her, and that he had requested the witness to act as trustee, and to receive and pay over the rents and profits, but nothing had been so paid over, nor had the witness ever written to or heard from such alleged wife. It was held that this was not sufficient evidence of the first marriage. It all rested upon the prisoner's declaration that he had a wife in England before the second marriage and had left her. The effect of the prisoner's declaration was to prevent the so-called second wife from having or making any claim upon him. The prisoner had, therefore, a plain and direct purpose to serve in making the declaration. There was no kind of proof but his mere word, which was apparently uttered for the bad purpose already stated, of the circumstances required to establish the charge of bigamy. The confession of guilt, without proof that there was ever such a woman as the alleged first wife, or that he was ever married to her, or that she was alive at the time of the marriage to the alleged second wife, and made also to answer some special purpose of his own, which he thought his confession would accomplish, did not constitute sufficient evidence of the marriage of the prisoner to the alleged first wife. This is the reasoning of WILSON, C.J.; GWYNNE, J., concurred, adding that the deed executed

by the prisoner after he had quarrelled with the woman to whom he was lawfully married if he had not another wife living at the time, in which he professed to provide for a woman as his wife whom, as he alleged, he had left many years ago in England, reserving to himself a power of revocation, was quite consistent with the fact that the deed was executed to endeavour to defeat the woman to whom he was married of the alimony which she was seeking, and with the fact that there never had in truth been such a person as the woman referred to in the deed as his first wife. The prisoner's admission, therefore, of having been formerly married could not be said to be an admission against his interest.

The execution of a release of dower being disputed, the defendant proved the handwriting of P., the subscribing witness, who was dead. The demandant, who alleged the release to be a forgery, offered to prove a declaration by P. that he had left the country because he had forged the demandant's name. *Held*, following *Stobert* v. *Dryden*, 1 M. & W. 615, that such evidence was rightly rejected. *Rose* v. *Cuyler*, 27 U. C. Q. B. 270.

*Declarations as to Pedigree.*

Before a stranger can be allowed to give evidence of declarations as to pedigree, made by a relative of the family, there must be shown first, the death of that relative; and secondly, the fact of his relationship to the family, which fact must be proved *aliunde*, and not by his own assertion. *Doe* e. d. *Dunlop* v. *Survos*, 5 U. C. Q. B. 284.

*Depositions, etc.*

In proceedings in 1881, for the extradition of a prisoner charged with having committed forgery in the United States, it was held that under s. 14 of the

Imperial Extradition Act of 1870, the original depositions were properly received, as the power given therein to use the original depositions was not qualified by s. 2 of 31 Vict. c. 94, D. *Per* PATTERSON, J.A., *semble*, that the right given by said s. 14 to use copies of depositions is confined by s. 2 of 31 Vict. c. 94 to those cases in which a warrant has been issued in the United States upon the depositions.

It was also held that the foreign indictment was not admissible in evidence against the accused. *R. v. Browne*, 6 O. A. R. 386.

In extradition proceedings, the information warrant and depositions were certified under the hand and seal of a justice of the peace of Oscoda township, in the county of Josio, in the State of Michigan. There was also a certificate under the hand of the clerk of the county of Josio and the clerk of the Circuit Court of the said county, and the official seal of the said Circuit Court, certifying that the said justice of the peace was, at the time of signing his certificate, a duly qualified justice of the peace in the active discharge of the duties of his said office, and that his official seals were entitled to full credit. At the hearing before the county judge, before whom the extradition proceedings were had, one S. stated that he was the prosecuting attorney of Josio county, and all criminal prosecutions therein came under his care. He identified the papers, and that they were the depositions and copies of depositions relating to the trial, and that the justices who took the depositions were justices of the peace as alleged, and had jurisdiction in the premises.

It was held, that the documents were sufficiently authenticated. The term "authenticated," as used in s. 9 of 40 Vict. c. 25, Dom., is in effect the same as "attested" in s. 2 of 31 Vict. c. 94, Dom.

It was also held that the depositions and statements admissible in evidence are not restricted to those made in respect of the charge upon which the original warrant issued. *In re Weir*, 14 O. R. 389.

In extradition proceedings, on a charge of forgery, certain foreign depositions used were sworn to before E. G., a justice of the peace for Cincinnati township, Hamilton County, Ohio. A certificate was attached commencing, "I, Daniel J. Dalton, clerk of the Court of Common Pleas for Hamilton County," certifying as to the signature of E. G., and that he was a duly qualified justice of the peace for said county and entitled to take depositions of witnesses, etc., etc., and concluded, "In testimony whereof I have hereunto set my hand and affixed the seal of the said Court at Cincinnati, etc. D. J. Dalton, by Richard C. Rohner, Deputy." To this was attached the certificate of the Governor of the State of Ohio, under the Great Seal of the State, certifying that D. J. Dalton, "whose genuine signature and seal are affixed to the annexed attestation was, at the date thereof, clerk of the said Court, etc., and that he is the proper person to make such attestation which is in due form, and that his official acts are entitled to full faith and credit." The Court refused to allow an objection to the sufficiency of the depositions.

It was also said by WILSON, C.J.: "In these proceedings the evidence of interested parties need not be corroborated." *In re H. L. Lee*, 5 O. R. 583.

Upon a prosecution for uttering forged notes, the deposition of one Smith, taken before the police magistrate on a preliminary investigation, was read, upon the following proof that Smith was absent from Canada. One Ross stated that Smith had a few months before left her house where she had for a time lodged, that she, Ross, had since twice heard from her in the United States, but not for six months. The chief constable of Hamilton,

where the prisoner was tried, proved ineffectual attempts to find Smith by means of personal inquiries in some places and correspondence with the police of other cities. Smith had for some time lived with the prisoner or his wife. It was held upon a case reserved, CAMERON, J., dissenting, that the admissibility of the deposition was in the discretion of the judge at the trial, and that it could not be said that he had wrongly admitted it. *R.* v. *Nelson*, 1 O. R. 500.

*See also* as to the sufficiency of the evidence of absence from the province to warrant depositions read in evidence. *Heathcote* v. *Hughes*, 18 N. B. 296.

An affidavit drawn up in a language not understood by the deponent may be read in Court, if it appears from the jurat that it was first read over and interpreted to deponent. *In re Hong Yuk and The Chinese Immigration Act*, 8 B. C. 118. It had been ruled otherwise *In re Ah Guay*, 2 B. C. 343.

## CHAPTER IX.

### SECONDARY DOCUMENTARY EVIDENCE.

If an original document for any reason is not produced in court, the party who relies upon it is in some cases permitted to prove the terms of it, either by putting in a copy of it or by calling someone who has seen the original and recollects its contents. In other words, secondary documentary evidence may in itself be either documentary or oral. And when any kind of secondary documentary evidence is admissible, all kinds are equally admissible. There are no degrees of secondary documentary evidence.

The rules which govern secondary documentary evidence differ in some material respects from those which regulate secondary oral evidence. It cannot be said that in all cases there are no degrees of secondary oral evidence. Let us suppose that a witness, who gave evidence before the magistrates on a criminal charge in the presence of the person accused, and whose deposition was then read over to him and signed by him as being correct, has died before the trial of the indictment, and that it is proposed to prove what he then said by secondary evidence. It would be untrue to say that this could be done by any kind of secondary evidence. None of the other witnesses who were called before the magistrates can come

forward and state their recollection of what the deceased witness then said. Even a transcript of a shorthand writer's note of what he said would be inadmissible. The only way in which his evidence can be reported to the Court is by the production of the official deposition in accordance with the statute (*a*). The maxim, then, that "there are no degrees of secondary evidence," though it was true no doubt at common law, is too wide in the present day so far as secondary oral evidence is concerned.

But it applies with full force to secondary documentary evidence. If a material document has been lost or destroyed, secondary evidence can be given of its contents, and this can be done in many ways with equal propriety. The party who relies upon it can put in a copy of it if he has one. Anyone who ever read the document can come forward and state his recollection of the contents; so can the writer of it. All these methods are equally admissible; no one of them is technically "better" than any other. But the absence of the primary evidence must first be explained to the satisfaction of the Court; for all secondary documentary evidence is *primâ facie* inadmissible.

Thus, if an action be brought on a contract which is contained in a writing, the writing itself is primary evidence, and should be produced to show the terms of the contract. As long as it exists, and can be obtained by reasonable diligence, no other written or oral evidence of its contents will be received; but if it be destroyed, or if it cannot be found after proper search, or if an adverse party holding it refuses to produce it after due notice,

(*a*) 11 & 12 Vict. c. 42, s. 17, *ante*, p. 326.

then either written or oral evidence may be given by anyone who is acquainted with the contents of the written instrument. Again, a witness cannot be asked whether his name is written in a book; but the book must be produced, or its non-production be excused. He cannot be examined as to the contents of a letter, but the original must be produced and read (*b*). Similarly, oral evidence of the words of a libel is inadmissible as long as the writing, or print, is producible. So where it appears that a representation or statement by a witness was made in writing, he will not be allowed to say what the statement was; the writing must be produced to prove it. In all such cases oral evidence will be inadmissible, until it be proved that every endeavour has been used, without success, to produce the writing.

But as soon as the absence of the original document has been accounted for, any kind of admissible secondary evidence may be substituted for it. Thus, a lost deed may be proved, either by an examined copy (*c*), or by oral evidence of anyone who can swear positively to the contents of the original. Therefore, where it appeared that a party held a copy of an original, which was not produced, it was held that he was not obliged to produce the copy, but might give oral evidence of the contents of the original (*d*). And a vendor is not bound to procure or produce a document which is of record in Scotland, but may give secondary evidence of its contents (*e*). So, in *Doe* v. *Ross* (*f*), it was held that oral evidence of an original might be substituted for an attested copy, which was tendered but rejected for want of a stamp. It is not, however, to be supposed that oral evidence of a document, although in some cases equally admissible

(*b*) *The Queen's Case*, 2 B. & B. 286.

(*c*) But not by what purports to be an attested copy, though the death and handwriting of the attesting witnesses be proved (*Brindley* v. *Woodhouse*, 1 Car. & K. 647).

(*d*) *Brown* v. *Woodman*, 6 C. & P. 206.

(*e*) *Halkett* v. *Earl of Dudley*, [1907] 1 Ch. 590.

(*f*) 7 M. & W. 102; Cockle, 163.

with an attested or examined copy, is therefore entitled to the same credit; and it will be for a jury to place their own estimate on the value of the witness's memory.

Secondary evidence may be given of the contents of a lost will as well as of any other lost instrument (*g*). To obtain probate of a lost will not only must its contents be proved, but also its due execution and attestation (*h*). But declarations made by a testator after the date of an alleged will are not admissible to prove the execution of the will, and they are equally inadmissible to prove that the will was executed in duplicate (*i*). So parol evidence is admissible to prove the contents of a written acknowledgment which has been lost (*k*).

It will be presumed, in the absence of contrary evidence, that the original was properly stamped, if it required to be stamped (*l*), and an unstamped copy will be good secondary evidence; but neither at law (*m*) nor in equity (*n*) can secondary evidence of the contents of an unstamped agreement be given, even though it was destroyed by the wrongful act of the party objecting to such evidence.

But, in a recent case, the Court looked at a copy of an unstamped document, not as an agreement, but as a document evidencing the terms upon which a defendant company proposed to sell if not restrained (*o*).

Secondary, even more than primary, documentary evidence requires a witness or witnesses to support

(*g*) *Sugden* v. *Lord St. Leonards*, 1 P. D. 154; Cockle, 179; but see *Woodward* v. *Goulstone*, 11 App. Cas. 469.
(*h*) *Harris* v. *Knight*, 15 P. D. 170.
(*i*) *Atkinson* v. *Morris*, [1897] P. 40; compare *In the Goods of Leigh*, [1892] P. 82, where the will had been torn into pieces after the testator's death and some of the pieces had been lost.
(*k*) *Read* v. *Price*, [1909] 2 K. B. 724.
(*l*) *Marine Investment Co.* v. *Haviside*, L. R. 5 H. L. 624.
(*m*) *Rippiner* v. *Wright*, 2 B. & Ald. 478.
(*n*) *Smith* v. *Henley*, 1 Phil. 391.
(*o*) *Mason* v. *Motor Traction Co.*, [1905] 1 Ch. 419.

it. This is so whether it is sought to substitute for the original either a copy of it or some person's recollection of its contents. The original document itself must of course be produced at the trial if it be possible to obtain it. Where it has passed through many hands, it must be carefully traced and its ultimate loss or destruction clearly proved (*p*). Where there are several originals, each must be accounted for before secondary evidence can be given of any one (*q*). Next, a witness must be called either (a) to state that he had read the original and then to give his recollection of its contents, or (b) to produce a copy and prove that it is an accurate copy of the original. For the latter purpose, it is generally necessary to call the person who made the copy tendered in evidence, or a person who subsequently read that copy, compared it with the original and found it to be correct (*r*). Any party who seeks to put in a copy of a letter or other document sent to his opponent must prove that the document [which he tenders in evidence is a correct copy of that which was actually sent. It may be that that which is put forward as a true copy is only the draft of a letter which he meant to send, but eventually tore up ; that which he actually sent being an amended or extended version of it.

There are several kinds of copies. We have already dealt with four different kinds—examined

(*p*) *Fryer* v. *Gathercole*, 4 Ex. 262; *Adams* v. *Kelly*, Ry. & Moo. 157.
(*q*) *Per* PARKE, B., in *Alivon* v. *Furnival*, 1 C M. & R. 292.
(*r*) *Fisher* v. *Samuda*, 1 Camp. 193.

copies, certified copies, office copies, and copies printed by the official printer—in the chapter on Public Documents (*s*). In the same chapter we have pointed out (*t*) that the probate of a will takes rank as primary evidence. It is indeed of superior efficacy to the original will itself, for it records the judgment of the Court as to the due execution of the will, and establishes the title of the executors to administer the estate of the deceased. There was formerly also a kind of copy called an exemplification, which is now practically obsolete. Formerly the judgment of any superior court of law or equity could only be proved in any other court by producing either the original judgment roll itself or an exemplification of it under the Great Seal. Both methods were costly; and the exemplification —which was after all only a kind of *édition de luxe* of an office copy—has now been superseded by that humbler mode of proof (*u*). Other kinds of copies are sometimes seen in court. The master will in a proper case order a party who is in possession of a material document to permit his opponent to take photographic or facsimile copies of it, *e.g.*, where there are corrections and interlineations in the original, or where one party denies that he wrote the original, though it purports to be in his handwriting (*x*). And extracts from the business books of a trading company, of a banker and of a tradesman will in some cases

(*s*) *Ante*, p. 249.
(*t*) *Ante*, p. 258.
(*u*) See Order XXXVII., r. 4, *ante*, p. 250.
(*x*) *Davey* v. *Pemberton*, 11 C. B. (N.S.) 628; *Lewis* v. *Earl of Londesborough*, [1893] 2 Q. B. 191.

be received in evidence, if verified by a proper affidavit (*y*).

It is important to determine what documents are copies and what are not. The draft of a deed or agreement is not the same thing as a copy of it, and cannot be read unless there be evidence to show that the original was copied from that draft, and even then the engrossment may have been altered before execution and without the corresponding alterations being made in the draft. But drafts endorsed with memoranda which showed that certain deeds were engrossed from them have been held good secondary evidence of the contents of such deeds (*z*). Where an edition of a newspaper is struck off the same type, any copy is primary evidence of any other, as also are lithographs from the same block, photographs from the same negative, or any copies produced by a process securing uniformity. None of these are copies in the legal sense of the word. They are all counterpart originals, and each is primary evidence of the contents of the rest (*a*). Counterparts stand on a footing superior to mere copies; for they are primary evidence against the party executing them and those claiming under him, although no notice may have been given to produce the original. As against other parties to the contract they are only secondary evidence.

But although either a copy or oral proof of an original will be equally admissible as secondary evidence, the copy of a copy will never (in the absence of express statutory provision) (*b*) be admitted, for it is one step farther removed from the original. Neither is anyone's recollection of the copy derived from a perusal of it admissible, even though he proves that both original

(*y*) See *post*, p. 374.
(*z*) *Waldy* v. *Gray*, L. R. 20 Eq. at p. 250.
(*a*) *R.* v. *Watson*, 2 Stark. at p. 129; *Johnson* v. *Hudson*, 7 A. & E. 233, n.
(*b*) *Liebman* v. *Pooley*, 1 Stark. 167.

and copy have been destroyed (*c*). A duplicate copy stands on a different footing.

Secondary evidence of a document is only admissible in five cases :—

(i.) Where the original is lost or destroyed, or cannot, for any other reason, be produced in court.

(ii.) Where the original is in the possession of the opposing party who does not produce it after due notice requiring him to do so.

(iii.) Where the original is in the possession of a third person who is out of the jurisdiction and refuses to produce it ; or who, being within the jurisdiction, has been duly served with a *subpœna duces tecum*, and yet rightfully refuses to produce it.

(iv.) Where the copy has been supplied by one party to the other during the course of the litigation as being a correct copy of a material document in the possession of the former party.

(v.) By virtue of some Act of Parliament or Rule of Court.

It will be seen that the first three of these exceptions rest upon the principle that the party who tenders a copy in evidence has done all that he can reasonably be expected to do to bring the original before the Court. In the first case he must show that he has made a thorough and conscientious search for the missing document ; in the second, he must, a reasonable time before the day of trial, give his opponent explicit notice to produce the original ; in the third case he must do all in his power to induce the person who holds the original document out of the jurisdiction to forward it for production in court. The fourth case rests upon an

(*c*) *Everingham* v. *Roundell*, 2 Moo. & R. 138 ; *Brain* v. *Preece*, 11 M. & W. 773.

entirely different ground, namely, that the conduct of his opponent in supplying him with the document for the purposes of the trial amounts to an admission, if not to an estoppel; and an admission is always evidence against the party making it, even though it relates to the contents of a written document. The last exception is based upon considerations of public utility and convenience.

(i.) When a party has done every reasonable thing in his power to bring before the Court primary evidence of a document which was in his possession by searching for it without success in places where he would naturally expect to find it, he will then, and not till then, be permitted by the Court to give secondary evidence of its contents. So too where he proves clearly that the original has been destroyed. When a document is alleged to have been destroyed by the opposite party, notice to produce it is necessary (*d*). The sufficiency of the excuse for the non-production of the direct evidence is always for the judge, even when it involves a disputed question of fact (*e*).

The search must be *bonâ fide* and diligent (*f*). If there are several places of probable deposit, all must be searched (*g*). Every possible search need not be made, but every reasonable search will be sufficient (*h*), and the search need not be recent or made for the purposes of the trial (*i*).

Thus, in order to show that reasonable search has

(*d*) *Doe* v. *Morris*, 3 A. & E. 46.
(*e*) *Gathercole* v. *Miall*, 15 M. & W. 319.
(*f*) *R.* v. *Denio*, 7 B. & C. 620.
(*g*) *Doe* v. *Lewis*, 11 C. B. 1035.
(*h*) *Hart* v. *Hart*, 1 Hare, 1.
(*i*) *Fitz* v. *Rabbits*, 2 Moo. & R. 60.

been made for a lost indenture, a witness may be asked whether he has inquired of persons who were likely to know about it, and what answers were given to his inquiries (*k*). This is not regarded as hearsay; it is evidence that reasonable search has been made.

Where for physical reasons it is impossible or highly inconvenient to produce the original, secondary evidence is admissible. Thus, if it is material to prove the inscription on a tombstone or an escutcheon, or where libellous words have been chalked on a wall, oral evidence may be given of the words, because it is practically impossible to bring the tombstone, escutcheon or wall into court (*l*).

(ii.) Again, if the document on which a party relies was not when last seen or heard of in his own possession, and there is good ground for supposing that it is or was in the possession of his opponent, he must, a reasonable time before the trial, serve upon his opponent or his solicitor an express notice to produce it at the trial (*m*). If at the trial the original is not produced when called for, he may then give secondary evidence of its contents. This is so, although the opponent may have a lawful excuse for refusing to produce it. If, for instance, the opponent succeeds in proving that the document is privileged from production (*n*), the first party may put in a copy of that document if he has one, or prove its contents by any other secondary evidence. But this rule does not apply where the document is privileged from production on the

(*k*) *R.* v. *Braintree*, 1 E. & E. 51; *R.* v. *Kenilworth*, 7 Q. B. 642
(*l*) *Bruce* v. *Nicolopulo*, 11 Ex. at p. 133; *Mortimer* v. *M'Callan*, 6 M. & W. at p. 68.
(*m*) For Notice to Produce, see *post*, p. 676.
(*n*) *Calcraft* v. *Guest*, [1898] 1 Q. B. 759; and see *ante*, p. 289.

ground of public policy (*o*), nor, it is submitted, when it is written "without prejudice."

The party who claims, under this head, to read a copy of a document must, in the first place, call on the opponent to produce the original. If it be not produced, he must then prove that the document is in the possession of the opponent. This he can easily do if it has been included in the latter's affidavit of documents. Next, he must prove that he gave the opponent notice to produce the original and that the notice was served a reasonable time before trial. Lastly, he must prove that the document which he now tenders in evidence is a true copy of the original. Then he will be entitled to have it read to the jury.

Where a prisoner was indicted for arson with intent to defraud a fire office, it was held that secondary evidence of the policy was inadmissible, as due notice had not been given to produce it (*p*).

But in an action to recover a written document, oral evidence of its contents may be given, without previous notice to produce it. The writ in the action is a sufficient notice (*q*).

A solicitor may be asked whether he has papers of his client in court; and if by his answer, which is compulsory, he admits the fact, secondary evidence of their contents may be given if the originals are not produced (*r*). If a solicitor be subpœnaed to produce a document which he holds for a client, he may, in his discretion, refuse to produce it or answer any question as to its contents; and the judge ought not to examine it to ascertain whether it ought to be withheld (*s*).

(*o*) *Home* v. *Bentinck*, 2 B. & B. 130; *Stace* v. *Griffith*, L. R. 2 P. C. 420; see *ante*, p. 273.

(*p*) *R.* v. *Kitson*, Dears. 187; cf. *R.* v. *Elworthy*, L. R. 1 C. C. R. 103.

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

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

(*s*) *Volent* v. *Soyer*, 13 C. B. 231.

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

"The second objection is, that the judge improperly overruled the privilege in the next step in the cause. There being some doubt, when the next witness was called, whether the draft which the witness was speaking of was a draft of the deed in question, the judge, in order to ascertain that, compelled the attorney to produce the document for the purpose of identification. It is contended it was a breach of the privilege to produce the deed in evidence for any purpose whatever. But whether it is a breach of the privilege or not must depend upon the circumstances of each case. I quite agree that sometimes, as in *Brand* v. *Akerman* (*v*), the process of identification will require a disclosure of the contents of the deed; and, if so, I think the inquiry must stop. But here I do not see that anything was done that had the effect of disclosing the contents of the deed, or violating any of the secrets which the attorney had intrusted to him by his client. The indorsement

(*t*) *Phelps* v. *Prew*, 3 E. & B. 430; 23 L. J. Q. B. 140.
(*u*) 23 L. J. Q. B. at p. 143.
(*v*) 5 Esp. 118.

might disclose that the deed was an assignment, but of what property and whether it was of the legal or equitable estate it would not disclose."

A solicitor who was a witness to a deed is bound to disclose what takes place at the time of its execution (*x*).

(iii.) If the original document be in the possession of a third person within the jurisdiction who is a stranger to the cause and who refuses to produce it, although duly served with a *subpœna duces tecum* for the purpose, then the right to give secondary evidence of its contents appears to depend on whether such refusal be rightful or wrongful. If it be a wrongful refusal, then it is said the remedy of the plaintiff is against the witness only (*y*). If it be a rightful refusal, then secondary evidence is, as a rule, admitted, as the plaintiff has done all in his power to produce primary proof (*z*).

But if a material document be in the possession of a person who is beyond the jurisdiction of the Court and who consequently cannot be compelled to produce it, the party relying upon it may give secondary evidence of its contents, provided he has informed the person outside the jurisdiction of the purpose for which the document is required, and done all in his power to procure the attendance of that person or the presence of that document at the trial.

(iv.) There is another and a somewhat anomalous exception to the rule that secondary evidence is inadmissible where there is primary evidence which

(*x*) *Robson* v. *Kent*, 5 Esp. 552.
(*y*) *R.* v. *Llanfaethly*, 2 E. & B. 940; Cockle, 158.
(*z*) *Mills* v. *Oddy*, 6 C. & P. 728.

ought strictly to be produced. If a material document is in the possession of one party, and he or his solicitor delivers to the opponent a document which he represents to be a true copy of the material document, the copy so supplied is evidence against the party who supplied it, although the original is not produced and although no notice to produce the original has been given. For the conduct of the party in supplying that copy to his opponent amounts to an admission of its accuracy, and to a consent that such copy, being supplied for the purposes of the action, should be used in the action without the necessity for strict proof. And it is not necessary to prove that the original was duly stamped (*a*).

This is an instance of the principle laid down in *Slatterie* v. *Pooley* (*b*). An affidavit of documents or an affidavit in answer to interrogatories made in the action is usually proved in this way—by merely producing the copy of the affidavit received from the other side. Such a copy is always indorsed with the name of the deponent's solicitor, whose act in forwarding it to the opponent amounts to an admission that it is a correct copy.

(v.) Lastly, by various Acts of Parliament or rules of Court, certain copies have been made admissible, although the originals are still in existence and could be produced. In some of these cases, however, the copy must be verified by affidavit.

(*a*) *Stowe* v. *Querner*, L. R. 5 Ex. 155, 159; *Slatterie* v. *Pooley*, 6 M. & W. 664.

(*b*) 6 M. & W. 664. This case will be found discussed in the chapter on Admissions, *post*, p. 444.

The Documentary Evidence Act, 1845 (*c*), so far as it refers to public documents, is virtually superseded by the Evidence Act, 1851 (*d*), but, as the earlier Act extends to some private documents, it is subjoined:—

"Whenever by any Act now in force or hereafter to be in force any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any Committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts, made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence" (*e*).

So, by s. 3 of the Bankers' Books Evidence Act, 1879 (*f*), it is provided that:—

"Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded,"

and by s. 7 that:—

"On the application of any party to a legal proceeding a Court or judge may order 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. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the Court or judge otherwise directs."

A magistrate before whom criminal proceedings are pending is a Court within the meaning of the Act, and can therefore make an order under s. 7 (*g*).

It has been held by the Court of Appeal that such an

(*c*) 8 & 9 Vict. c. 113, s. 1.
(*d*) Cited *ante*, p. 250.
(*e*) See Appendix.
(*f*) 42 Vict. c. 11; see Appendix.
(*g*) *R.* v. *Kinghorn*, [1908] 2 K. B. 949.

order can be made *ex parte*, but that the judge ought to be careful about so doing (*h*). No evidence is absolutely necessary, but the judge must be satisfied that the entries in question are admissible in evidence in the action, and for this purpose evidence may be required (*i*). An order may be made in England to operate in Scotland or Ireland and *vice versâ* (*k*). The making of an order at all is a matter of discretion with the Court, and an order was refused in an action of libel to defendants, who had stated that the plaintiff was a man of no means and who pleaded justification (*l*). The Act includes "ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank" (*m*). It applies to books in the custody or control of the successors to the bank by whom the entries were made; and a book is "used in the ordinary business of the bank" within the meaning of s. 9 (*n*) of the Act, although it may not be in daily use, if kept for reference (*o*).

This Act cannot be used to get behind an affidavit of documents. Therefore, where a plaintiff, on making such an affidavit, had sealed up part of her pass books, and sworn that the parts so sealed up were not relevant, an application to order the plaintiff's bankers to produce the entries in their books relating to the plaintiff's account for the inspection of the defendants, was refused (*p*). A banker is only exonerated by s. 6 of this Act from personal attendance in Court when he craves the aid of and follows out the provisions of ss. 2—5 (*q*).

(*h*) *Arnott* v. *Hayes*, 36 Ch. D. 731.
(*i*) *Ibid.*
(*k*) *Kissam* v. *Link*, [1896] 1 Q. B. 574.
(*l*) *Emmott* v. *Star Newspaper Co.*, 62 L. J. Q. B. 77.
(*m*) 42 Vict. c. 11, s. 9.
(*n*) See Appendix.
(*o*) *Asylum for Idiots* v. *Handysides*, 22 T. L. R. 573.
(*p*) *Parnell* v. *Wood*, [1892] P. 137; approved by Court of Appeal in *South Staffordshire Tramways Co.* v. *Ebbsmith*, [1895] 2 Q. B. 669.
(*q*) *Emmott* v. *Star Newspaper Co.*, *suprà*.

By the Revenue, Friendly Societies, and National Debt Act, 1882 (*r*), s. 11 (2), the privileges of the last-mentioned Act are extended to banking companies to which the provisions of the Companies Acts, 1862 to 1880 (now the Companies (Consolidation) Act, 1908 (*s*)), are applicable, provided they have complied with the requirements of the Act under notice.

The principle established by the above Acts applies to the accounts of persons other than the parties to the proceedings (*t*). But the Court must be satisfied by the party asking for the order that the entries are admissible as evidence in the action, and the person whose account is sought to be inspected must be brought before the Court (*u*), before it will make an order under s. 7 of the Act (*v*) for inspection of the accounts of a person not a party to the action. The Court of Appeal has laid down that where the account is the account of a person not a party to and having no interest in the litigation, the Court will take care that the section is not made a means of oppression, and will protect such person against a roving inspection of his account (*w*).

So a banker is bound not to disclose the state of a customer's accounts, except upon a reasonable and proper occasion, and what is a reasonable and proper occasion is a question for the jury (*x*).

Again, by Order XXXI., r. 19A (1) of the Rules of the Supreme Court—

"Where inspection of any business books is applied for, the Court or a judge may, if they or he shall think fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit

(*r*) 45 & 46 Vict. c. 72; see Appendix.
(*s*) 8 Edw. VII. c. 69.
(*t*) *Howard* v. *Beall*, 23 Q. B. D. 1.
(*u*) *South Staffordshire Tramways Co.* v. *Ebbsmith*, [1895] 2 Q. B. 669; *L'Amie* v. *Wilson*, [1907] 2 Ir. R. 130.
(*v*) 42 Vict. c. 11.
(*w*) *Pollock* v. *Garle*, [1898] 1 Ch. 1.
(*x*) *Hardy* v. *Veasey*, L. R. 3 Ex. 107.

shall state whether or not there are in the original book any and what erasures, interlineations, or alterations. Provided that, notwithstanding that such copy has been supplied, the Court or a judge may order inspection of the book from which the copy was made."

By s. 3 of the Judicature Act, 1894 (*y*), power was given to the Rule Committee of the judges of the High Court to make rules for regulating the means by which particular facts may be proved, and the mode in which evidence thereof may be given (a) on any application in matters relating to the distribution of any fund or property, and (b) on any application upon summons for directions pursuant to the rules. The only rule which has been made under this power is r. 7 of Order XXX., which is that on the hearing of a summons for directions, "the Court or a judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the Court or judge may direct." This rule, which applies to the Chancery Division as well as to the King's Bench Division, embodies the only existing power enabling judges of the High Court to dispense with the technical rules of evidence otherwise than by consent (*z*). Apart from this rule the judge has no power to give to secondary evidence the effect of primary. Thus where an order required a party to admit "a copy of a letter," it was held that the other party could not give it in evidence without first accounting for the non-production of the original (*a*).

(*y*) 57 & 58 Vict. c. 16.
(*z*) *Baerlein* v. *Chartered Mercantile Bank*, [1895] 2 Ch. 488.
(*a*) *Sharpe* v. *Lamb*, 11 A. & E. 805.

## CANADIAN NOTES.

### SECONDARY EVIDENCE OF DOCUMENTS.

Where an objection to secondary evidence of a deed was either not taken, or is waived at the trial, it cannot be taken afterwards, and in such a case regularity of notices to produce and matters of the like kind are always presumed. *Smith* v. *Smith*, 2 Oldright, 303.

Where a party endeavours to prove, by oral testimony, the contents of a written document, the Court, before giving effect to such testimony, should be convinced that all the terms have been proven. It is not sufficient for the party undertaking such a duty to furnish evidence of certain clauses which support his claim, but he must set out the whole document so that the Court may be able to give effect to all its provisions, and that by testimony of the clearest nature. The document need not be set forth in its very words, but its exact sense and effect must be shown. *Ross* v. *Williamson*, 14 O. R. 184.

A person who has received a letter, part only of which he stated related to the subject-matter of the suit, may, after destruction of the letter, testify as to the contents of that part, though he cannot state the words of the remainder of it, except generally that it had no reference to the question involved in the suit. *McGibbon* v. *Burpee*, 25 N. B. 81.

*Notice to Produce.*

Defendant gave a notice to produce "the several documents hereunder specified and all other documents,

etc., etc., relating to the matters in this cause." The schedule specified all letters, etc., "and particularly certain orders given by defendant to plaintiff to forward the trees which the defendant was to sell to the plaintiff under the agreement between them, and which orders are dated in or about March, 1856." The trial judge thought this notice to produce was too general in its terms, and therefore excluded secondary evidence, but it was held sufficient to let in secondary evidence of a letter written by defendant to plaintiff in March, requiring trees to be sent by a certain time.

It was also held that defendant, having put in a letter from the plaintiff to establish that he had received the trees for sale, was not bound by the plaintiff's statement in the same letter of the amount due for such trees. *Leslie* v. *Morrison*, 16 U. C. Q. B. 130.

Before parol or secondary evidence can be given of a note being received by the plaintiff in satisfaction of a claim for work done, the defendant must prove that he has given notice to the plaintiff to produce the note. *Heward* v. *McDougall*, 3 U. C. Q. B. O. S. 647 (5 Will. IV.).

In an action of trover for promissory notes, the plaintiff's counsel, in opening the case, stated that the notes were left by the plaintiff with the defendant as security, and that they had been given up by him to the makers improperly before any demand on the defendant or refusal on his part to return them. It was held that no notice to the defendant to produce was necessary, and that the plaintiff was entitled to prove the contents of the notes without showing the originals lost or destroyed, or laying any foundation for the admission of secondary evidence. *Tilley* v. *Fisher*, 10 U. C. Q. B. 32.

*Search for Originals necessary.*

In the case of lost deeds, it is always a question for the presiding judge whether sufficient search has been

made for documents to justify the admission of secondary evidence as to their contents. In *Russell* v. *Fraser*, 15 U. C. C. P. 375, the witness, who was a son of the late agent of one of the grantors, stated that his father had possession of all the papers of the grantor relating to lands in Upper Canada, that he had searched through his father's papers and the papers of the grantor, all of which were then in possession of himself and mother, that at the suggestion of the executors of the said grantor another person had searched among those of his papers deposited in a certain bank, as well as elsewhere amongst his private papers, but that he had not applied to the heirs or legatees of the grantor, though he had made every other inquiry where there was a probability of his finding the deeds in question; nor had he searched among the papers of the other grantor, because he was a bankrupt, and the grantor among whose papers he had already searched was his assignee. *Held*, sufficient to justify the admission of secondary evidence as to the deeds in question.

In ejectment by trustees of a Wesleyan Methodist congregation for the parsonage property, it was proved that a search was made for the deed, from the patentee to the trustees at the parsonage house, its proper and usual place of deposit, and that an inquiry had been made of the minister who officiated there when the deed was supposed to have gone astray. None of the ministers formerly officiating there had any interest in the deed or the possession of it, and it was of no use to anyone unconnected with the present enjoyment of the property. *Held*, sufficient proof of the loss to let in secondary evidence and that the evidence of the subscribing witness as to the execution of the deed and memorial with a copy of the memorial certified by the registrar was clearly sufficient secondary evidence. *Trustees of Ainleyville Wesleyan Methodist Church* v. *Grewer*, 23 U. C. C. P. 533.

To lay the ground for secondary evidence of a letter, a search was made at the post office and at the hotel where plaintiff was staying, and also at plaintiff's place in Toronto. A witness from the post office stated that, unless registered, they could not tell if any letter had come for the plaintiff, and that letters after being advertised were sent two months after their receipt to the Dead Letter Office at Ottawa, but what was done with them there was not shown. It was held that secondary evidence was properly admitted without proof of a search at the Dead Letter Office. *Williams* v. *Grey*, 23 U. C. C. P. 561.

It appeared that search for a will was made in the office in which it would have been had it been admitted to probate, in the different registry offices in the county in which the several parcels of land of which the testator died seised were situate, among the papers of the owners of the several parcels, among the papers of the only executor of three named in the will who could be found, among the papers of the draughtsman of the will and among those of several of the devisees. It was held that this was sufficient to let in secondary evidence of the will. *Brown* v. *Morrow*, 43 U. C. Q. B. 436.

Where a deed has been traced into the actual possession of a party it is necessary to call him to account for it before secondary evidence can be let in, but where doubt exists as to whether it was actually left with a party who has no interest in it, held sufficient to prove a search amongst the papers of the person who it was presumed last had possession of it. *Barto* v. *Morris*, Cochrane, N. S. 90.

Copies of three deeds were offered in evidence in *McCormack* v. *McBride*, 23 N. B. 12. The affidavit of the plaintiff stated that the original deeds, copies of which were annexed, describing each of them separately, were not under his control, and he did not know where

they could be found. It was held, against a dissenting judgment of WETMORE, J., that the affidavit was insufficient, and that it should have stated that neither of the deeds was under his control, etc.

In an action of ejectment for lands granted in trust and vested by act of the Assembly in the Diocesan Church Society, and by the society conveyed to the lessor of the plaintiff, a certified copy of the deed was put in evidence under Consolidated Statutes, c. 74, s. 14. Upon an affidavit of the vestry clerk of the corporation, stating that the original deed was not in his possession, and he did not know where it was to be found, this was held to be sufficient to admit the certified copy as evidence. *Rector of Andover* v. *Kennedy*, 26 N. B. 83.

In *Ansley* v. *Breo et al.*, 14 U. C. C. P. 371, it was held that before secondary evidence could be let in, in reference to a deed supposed to have been lost, proof must be first adduced that such supposed deed once existed, and that it had been destroyed or lost and diligent search made therefor, and on the authority of *Gough* v. *McBride*, 10 U. C. C. P. 166, a memorial executed by the grantee was held to be no evidence of a deed to which it was supposed to relate.

In *Soules* v. *Donovan*, 14 U. C. C. P. 510, the plaintiff's title rested on a deed from the sheriff, and he was non-suited for not producing or accounting for the non-production of the *fi. fa.*, under which the sheriff sold. It was held, on the motion for a new trial, that secondary evidence of the *fi. fa.* had been properly rejected, and the plaintiff properly non-suited, that every place should have been searched where there was reasonable ground for supposing that the *fi. fa.* might be found, and that some of the sheriff's papers having been left in the court-house, search should have been made among them before secondary evidence was admissible, but a new trial was granted on payment of costs, affidavits having

been filed that diligent search had since been made in the court-house.

B., to whom a deed, proof of which was required, was made, was absent from the country, and the plaintiff proved a search with several of his relatives for the deed from P. to him, but it was not shown that he had lived with or left the charge of his papers to any of them. Secondary evidence being then admitted, he proved the existence of this deed and the execution by P. of a memorial of it which the deputy registrar produced. It was held that the search was not sufficient to let in secondary evidence, and if it had been, *quære*, whether the memorial would have proved the deed as against the defendant. *Covert* v. *Robinson*, 24 U. C. Q. B. 282.

A document was required in an action for specific performance of which the proper custodian was Angus W. Campbell. He had returned to Scotland in 1884. Letters had been addressed to him and inquires made for him, and as to his whereabouts, but information had not been received. It was held by the Supreme Court of New Brunswick that the inquiries were not sufficient to let in secondary evidence of the document. "What the appellant should have done was this: he should have stated in his letters to Angus and Miss Campbell, his sister, that he wanted this specific paper, and in his letters to Miles" (another party with whom communication had been held), he should have asked for information as to Angus, stating that his object in making the inquiries was to obtain this document." Additional expedients are suggested, but it is not certain that the suggestion is more than a sage counsel from the Chief Justice. The decision of the Supreme Court was that the inquiries made were not sufficient for the purpose of allowing the introduction of secondary evidence of the document. It was also held that the parol evidence was not sufficient, even if admitted. *Porter* v. *Hale*, 23, S. C. R. 265.

Plaintiff in ejectment claimed under a mortgage from C. to O. executed in 1856. C., being called, proved his execution of such a mortgage, and the memorial of it signed by him was produced from the registry office. He had last seen the mortgage with O., the mortgagee, in 1857. O. in 1859 became insolvent, and made an assignment of all his estate to F. He absconded to the United States shortly after, and was followed by F. It was not shown that F. had ever had the mortgage, and it appeared that in a suit against him and O. in Chancery, on behalf of the creditors, commenced many years after the assignment, and which resulted in the appointment of the plaintiff as receiver, F. produced the papers in the suit under an order of Court, and this mortgage was not among them. A search was proved to have been made in the master's office, with the plaintiff's solicitor in that suit, and among the receiver's papers, but not with O., who was still living in Michigan, nor with his solicitor in the suit. *Held*, that the proof of search was sufficient to let in the secondary evidence, for under the circumstances there was no presumption that O. retained the mortgage or took it to the United States with him. *Gordon* v. *McPhail*, 32 U. C. Q. B. 480

## CHAPTER X.

### REAL EVIDENCE.

We have dealt with the oral evidence of witnesses and also with documentary evidence; there remains the evidence of things other than documents, which is generally termed Real Evidence.

Whenever a question arises as to the nature, appearance, identity or condition of any physical object, the Court naturally desires that such object should, if possible, be produced for its inspection. The evidence thus addressed directly to the senses of the tribunal is obviously more satisfactory and reliable than verbal descriptions of such an object given by witnesses; and the non-production of the thing itself is clearly a matter for comment and suspicion if it could have been produced in Court without great difficulty.

The law, however, will not in all cases insist upon the production or inspection of an original object with the same strictness as it does in the case of an original document. Nevertheless, whenever a thing is produced, it nearly always requires the oral evidence of some witness to establish its genuineness and materiality, *e.g.*, by explaining what it is, where it was found, and the meaning of the marks upon it, or by calling attention to anything else which indicates the use for which it was intended or to which it has been put.

Real evidence is a very important, and perhaps the oldest and commonest mode of proof, and is abundantly recognised in practice.

A well-known American writer says :—

"Nothing is older or commoner in the administration of law, in all countries, than the submission to the senses of the tribunal itself, whether judge or jury, of objects which furnish evidence. The viewing of the land by the jury in real actions, of a wound by the judge where mayhem was alleged, and of the person of one alleged to be an infant, in order to fix his age, the inspection and comparison of seals, the examination of writings to determine whether they were 'blemished,' the inspection of the implements with which a crime was committed, or of a person alleged, in a bastardy proceeding, to be the child of another, are a few illustrations of what may be found abundantly in our own legal records and text books for seven centuries past" (*a*).

Thus identification has been established to the satisfaction of the Court by the production of a bullet which fitted an empty cartridge case; of a portion of a ballad forming the wadding of a pistol, which corresponded with another portion of the same ballad found in the prisoner's possession; and of a portion of a knife blade, found on the prosecutor's premises, which had obviously been broken from a knife in the prisoner's possession (*b*).

In an old case, related by Sir MATTHEW HALE, a man cleared himself from a charge of rape by exhibiting to the Court a frightful rupture which rendered the act practically impossible (*c*).

Although the coroner's jurisdiction is purely statutory and no statutory provision requires a view of the body, it is universally agreed that omission to view invalidates the inquest (*d*).

Again, in a case, tried before HOLT, C.J., in 1696, a

(*a*) Thayer, Cases on Evidence, 720.

(*b*) See Wills on Circumstantial Evidence, p. 166 *et seq.*, for these and other cases.

(*c*) Hale, Pleas of the Crown, I., 635.

(*d*) See *R.* v. *Clerk*, 1 Salk. 377; *R.* v. *Bond*, 1 Stra. 22; *R.* v. *Ferrand*, 3 B. & Ald. 260; and *R.* v. *Ingham*, 5 B. & S. 257. The view of the body is often of great value in establishing the identity of the deceased.

witness was called to identify a person. "If it be the same gentleman," said he, "his hair is reddish." "Pull off his peruke," said the Chief Justice. This having been done, Baron POWIS told someone to look at it more particularly. Then an officer took a candle, and looked at his head, but it was shaved so close that the colour could not be discerned (*e*).

In more recent times, it has been held in an action for knowingly keeping a fierce dog (*f*), that the dog might be brought into Court and shown to the jury to assist them in judging of its temper and disposition.

The photograph of a picture was produced in an action for infringement of the copyright in the picture (*g*); and it is common practice to lay before the Court photographs (*h*), plans, models, and the like, for inspection.

Another instance of "real evidence" is afforded by the rule requiring witnesses to give their evidence in open Court. Their demeanour and conduct under examination is frequently a valuable aid in arriving at the truth and understanding the matter in issue. The jury of matrons, summoned by the writ *de ventre inspiciendo*, is another illustration of real evidence.

The Court may judge, to some extent, of the age, not only of things, but of persons, from inspection. This matter is particularly dealt with in some cases by statute. Thus, the Summary Jurisdiction Act, 1879, provides that the expression "child" when used therein means a person who "in the opinion of the Court before whom he is brought" is under twelve (*i*). The Prevention of Cruelty to Children Act, 1904, provides that where it is alleged that a person charged thereunder is under any specified age and "appears to the Court" to be under that age, he shall be deemed to be under that age, unless

(*e*) *R.* v. *Vaughan*, 13 How. St. Tr. 517.
(*f*) *Line* v. *Taylor*, 3 F. & F. 731.
(*g*) *Lucas* v. *Williams & Sons*, [1892] 2 Q. B. 113.
(*h*) See *M'Cullough* v. *Munn*, [1908] 2 Ir. R. 194.
(*i*) 42 & 43 Vict. c. 49, s. 49.

the contrary is proved (*k*); and the Children Act, 1908, contains a similar provision (*l*).

Real evidence, however, like documentary, generally requires to be supported by the oral evidence of some witness. The mere production of a thing does not make clear to the Court its materiality and significance. Thus, if a bullet and pistol be produced, they of themselves tell nothing; witnesses must be called to prove that the pistol was found in the pocket of the prisoner and the bullet in the heart of the murdered man; then it is material to show by actual demonstration in Court, before the jury, that the bullet fits the pistol. There are many physical objects with respect to which the Court cannot form a correct opinion by unaided inspection. In many cases it requires the help of expert witnesses. Thus, it may be necessary to have expert witnesses to explain to the Court the appearance of a wound, the identity of, or difference between, samples of goods, or handwriting, and such matters. But, in all such cases, the articles should be produced to the jury, so that they may understand and test the reasons and opinions given by the expert witnesses. It seems that a judge may not decide a case merely upon his own inspection, without further evidence. In a recent case, an omnibus proprietor sought to restrain another omnibus proprietor from running omnibuses so painted as to be calculated to deceive passengers into the belief that they were the plaintiff's omnibuses. The judge himself viewed the two omnibuses, and then stated that he was satisfied upon the evidence of his own eyesight alone, that the defendant's omnibus was so painted and lettered as to be calculated to deceive passengers. It was held on appeal that the judge must be satisfied by independent evidence, and could not grant an injunction on his own view only (*m*).

(*k*) 4 Edw. VII. c. 15, s. 17; see Appendix.
(*l*) 8 Edw. VII. c. 67, s. 123; see Appendix.
(*m*) *L. G. Omnibus Co.* v. *Lavell*, [1901] 1 Ch. 137; see observations on this case, *per* FARWELL, J., in *Bourne* v. *Swan*, [1903] 1 Ch. 211.

Nevertheless, production of physical objects is not, as a rule, compulsory or legally required. This is so even though the object in question contain or bear upon it words or inscriptions material to the case, so long as it does not come within the legal idea of a "document" (in which case, as we have seen, the document must be produced or its absence accounted for). Thus, in the well-known case of *R.* v. *Hunt* (*n*), on an indictment for conspiracy, certain flags and banners, bearing inscriptions and devices of a seditious and inflammatory tendency, were not produced, but were described by witnesses from memory. It was objected that such flags and banners should have been produced, but ABBOTT, C.J., said:—

"I think it was not necessary either to produce the flags or to give notice to the defendants to produce them. The cases requiring the production of a writing itself will be found to apply to writings of a very different character. There is no authority to show that in a criminal case, ensigns, banners, or other things exhibited to public view, and of which the effect depends upon such public exhibition, must be produced or accounted for on the part either of the prosecutor or of the defendants. And in many cases the proof of such matters from eye-witnesses, speaking to what they saw on the occasion, has been received, and its competency was never, to my knowledge, called in question until the present time. Inscriptions used on such occasions are the public expression of the sentiments of those who bear and adopt them, and have rather the character of speeches than of writings. If we were to hold that words inscribed on a banner so exhibited could not be proved without the production of the banner, I know not upon what reason a witness should be allowed to mention the colour of the banner or even to say that he saw a banner displayed, for the banner itself may be said to be the best possible evidence of its existence and its colour."

It may be difficult indeed in some cases to determine whether a particular physical object with words upon it is a document or not. An object without any words or writing on it may apparently be a document, *e.g.*, pieces of wood on which bakers, milkmen, and others sometimes indicate by mere notches the number of loaves or quarts of milk delivered; and exchequer tallies,

(*n*) 3 B. & Ald. 566.

indicating by notches the amount of money paid (*o*). But, once establish that the object in question is not a document, then the rule applies that production is not strictly necessary. Its non-production is, at most, matter for comment. As ABBOTT, C.J., said, in the case last referred to (*p*):—

"Its proper effect would only be to furnish matter of observation to the jury on the part of the defendants, that the prosecutor chose to offer only the fallible testimony of witnesses where he had it in his power to produce the infallible testimony of the things themselves."

In the case of *R.* v. *Francis* (*q*), where the prisoner was charged with obtaining money by the false pretence that a ring was a diamond ring, and evidence was offered to the effect that he had on another occasion attempted to obtain money by the false pretence that another ring was a diamond ring, it was objected that such other ring ought to have been produced. But Lord COLERIDGE, C.J., said:—

"Though the non-production of the article may afford ground for observation more or less weighty, according to circumstances, it only goes to the weight, not to the admissibility of the evidence, and no question as to the weight of this evidence is now before us. Where the question is as to the effect of a written instrument, the instrument itself is primary evidence of its contents, and until it is produced, or the non-production is excused, no secondary evidence can be received. But there is no case whatever deciding that, when the issue is as to the state of a chattel, *e.g.*, the soundness of a horse, the production of the chattel is primary evidence, and that no other evidence can be given till the chattel is produced in Court for the inspection of the jury. The law of evidence is the same in criminal and civil suits."

The non-production, however, of a material physical object, where such production is possible, is ground for suspicion or comment. Thus, in the well-known leading case of *Armory* v. *Delamirie* (*r*), where a chimney-sweeper's boy who had found a jewel sued a goldsmith

(*o*) See Best, Ev., (1902) p. 197, n.
(*p*) *R.* v. *Hunt*, 3 B. & Ald. at p. 575.
(*q*) L. R. 2 C. C. R. 128.
(*r*) 1 Strange, 504.

for detaining it, as the goldsmith did not produce the jewel at the trial, PRATT, C.J., directed the jury—

"Unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages:"

which they accordingly did.

But no suspicion can of course arise where it is physically impossible to produce the original object in Court, as, for instance, where a question has arisen concerning buildings, walls, boundaries, rights of way, or locality. To meet such cases provision has been made for inspection or view, even before trial, both in criminal cases and in civil cases (*s*), whether depending in the High Court (*t*) or in the County Court (*u*). Apart from such provision there is apparently jurisdiction at common law to adjourn the Court during a trial in order to allow the jury to view the property (*x*), even after the judge has summed up (*y*). This matter is more particularly dealt with later (*z*). But whether the judge or jury has viewed the premises or not, secondary evidence is always admissible as to the condition of any immovable property.

Thus, the report of a surveyor will be received as to the state of repair of a house; and anyone may inform the Court what words have been carved or inscribed upon a tombstone or a wall (*a*). So models, maps, and plans are constantly produced in Court and proved to be correct by the persons who made them. They are then secondary real evidence.

(*s*) 6 Geo. IV. c. 50, s. 23.
(*t*) R. S. C., Order L., rr. 3—5.
(*u*) C. C. Rules, Order XII., rr. 3, 4.
(*x*) *R.* v. *Whalley*, 2 Car. & K. 376.
(*y*) *R.* v. *Martin*, L. R. 1 C. C. R. 378.
(*z*) See *post*, p. 652.
(*a*) *Bruce* v. *Nicolopulo*, 11 Ex., at p. 133; *Mortimer* v. *M'Callan*, 6 M. & W. at p. 68.

## CANADIAN NOTES.

### REAL EVIDENCE.

The action being for injury to the leg by collision with the train of the defendant company, plaintiff was allowed to show his leg to the jury, the trial judge telling the jury that they must not look at the leg and draw any conclusion from the appearance of the leg, or from the leg itself, but it was only exhibited for the purpose of enabling the doctor to explain to them the nature of the injuries more satisfactorily than he otherwise could. "Your conclusion is to be drawn from the evidence of the doctor, who uses the leg merely for the purpose of explaining to you where the injuries were, and of what nature they were."

On the appeal it was held that this direction was unexceptionable and more restricted against the plaintiff than would be warranted by the American cases. "In England, there is a strange silence on the subject. Only one case is to be found, which is merely noted in the *Times* newspaper of February 15th, 1891, and not reported, wherein Mr. Justice WRIGHT refused at *nisi prius* to permit a wound to be shown to the jury. I confess that I see no objection whatever to the rule of practice which obtains in the courts of the Union, tersely expressed in a late case in Illinois, thus: "It is within the discretion of the Court to allow the plaintiff to exhibit to the jury his injured limb or body for the purpose of being examined thereon by a physician."

BOYD, C., *Sornberger* v. *Canadian Pacific Rail. Co.*, 24 O. A. R. 263.

In *Laughlin* v. *Harvey* it was held that, in an action to recover damages for alleged malpractice, the plaintiff was not entitled to show to the jury the part of his body in question, for the purpose of enabling them to judge as to his condition. In this case, the case of *Sornberger* v. *Canadian Pacific Rail. Co.* was approved, but distinguished. *Per* OSLER, J.A. : "I have been favoured with a perusal of the learned Chancellor's judgment in that case, and I may be permitted to say that I agree with what was there decided. It was held that the plaintiff might show the jury the injured limb or body, for the purpose of being examined thereon by a physician. The jury were told that they were not to look at the limb and draw any conclusion from its appearance. It was only for the evidence of the doctor, who asked to see it, in order that he might explain the nature of the injury more clearly. This seems to me free from objection, but it was not what was done in the case before us. The plaintiff was allowed to exhibit his leg, apparently for no other purpose than that the jury might see it, quite unconnected with the medical evidence of his condition, which was undisputed, and they were not warned that they were not to draw any inference of negligence from its appearance. It seems to me that this was a course which the defendant might well complain of, and that it was calculated to prejudice him extremely with the jury. The difference between a deliberate and studied exhibition of this kind, and the casual and necessary view which a jury must have of parts of the body always exposed to view, hardly needs to be emphasised. A recent case on this subject is *Hall* v. *Manson*, 1896, (Iowa), 34 L. R. A. 207." *Laughlin* v. *Harvey*, 24 O. A. R. 438.

# CHAPTER XI.

## PRESUMPTIONS.

THE law, as we have seen, does not require that all facts should be strictly proved or proved up to the hilt. The burden of proof in Court is often lightened by—

(i.) Presumptions,

(ii.) Admissions, and

(iii.) Estoppels.

These will be dealt with in this and the two following chapters.

A presumption is an inference as to a matter of fact which a judge draws, or directs a jury to draw, as a matter of law.

Suppose that in order to entitle him to judgment, the plaintiff in a given case must establish four facts to the satisfaction of the jury. As a general rule, he will have to call some evidence in proof of each separate fact. But it sometimes happens that as soon as he has proved, say, three of these facts the law will infer the existence of the fourth fact, which then need not be expressly proved. This presumption is rebuttable; that is, the other side may try to disprove it. But if they cannot do this, the law treats the fact presumed as proved. The presumption is not conclusive, but it shifts the burden of proof.

The word "presumption" in the older books is used in a much wider sense. It included two other kinds of inference, in addition to that defined above. It was usual to divide "presumptions" into three classes:—

(i.) Presumptions of fact (*præsumptiones facti vel naturæ*).

(ii.) Rebuttable presumptions of law (*præsumptiones juris*), the class defined above.

(iii.) Irrebuttable presumptions of law (*præsumptiones juris et de jure*).

But a presumption of fact is nothing more than an argument more or less cogent; it is an inference of one fact drawn from other facts. It is for the jury to draw that inference or not as they think fit; they are not bound as a matter of law to draw it. It is the duty of the judge, when there is no evidence from which a reasonable man would honestly draw that inference, to withdraw that question from the jury; but if there is any evidence upon the matter, he must leave it to the decision of the jury. If they do draw the inference their verdict will not be disturbed; but equally it will not be disturbed if they decline to draw it.

On the other hand, a *presumptio juris et de jure* is no presumption at all; it is simply an indisputable proposition of law. For example, the rule that a child under seven cannot commit a crime is a rigid rule of law—in fact, part of the definition of a crime.

The Legislature frequently enacts that certain matters are "to be deemed" to be conclusive evidence of other facts; in such cases there is no presumption, it is a matter of positive law (*a*). In other cases, however, the Legislature is content to enact that a certain thing "shall be deemed" to have occurred unless and until the contrary be proved (*b*); and here we have that

(*a*) See, for instance, the definition of an unsafe ship in s. 439 of the Merchant Shipping Act, 1894.

(*b*) For an instance of evidence made by statute "sufficient,"

rebuttable presumption of law, which in a law book alone deserves the name of "presumption." In this work the word "presumption" is invariably used to denote what the older writers would have called a *presumptio juris*, that is, a rebuttable presumption of law.

A presumption of law must be distinguished from *primâ facie* evidence of a fact. The latter serves, no doubt, to shift the burden of proving that fact to this extent, that the judge or jury wish now to hear what the other side has to say on the matter. Suppose that the person on whose behalf they now expect to hear evidence given should offer none, but content himself with merely criticising the evidence already given by his opponent, pointing out its weak places, and showing how far it is from being conclusive of the issue. It will then be open to the jury to find a verdict for either party; whereas a presumption is an inference which they must draw as a matter of law, and is conclusive, unless the party against whom the presumption arises gives evidence sufficient to rebut it.

Take, for instance, a matter to which we have already called attention (*c*), the inferences which arise in connection with the posting of letters (*d*). As soon as it has been established that a letter properly addressed to A. was posted, with the postage prepaid, juries are in the habit, and rightly in the habit, of taking it for granted that A. received that letter, unless A. can satisfy them that he did not. Such *primâ facie* evidence will as a

though probably not conclusive, see *The Board of Trade* v. *The Sailing Ship Glenpark, Ltd.*, [1904] 1 K. B. 682.

(*c*) See *ante*, pp. 144, 145.

(*d*) As to postmarks, see *post*, p. 392.

matter of fact shift the burden of proof to A., but it does not raise any presumption of law (*e*). Even if A. called no evidence, it would nevertheless be open to the jury to disbelieve the evidence already given and find that they were not satisfied that A. ever received the letter.

But in two or three instances the Legislature has not been content to leave the matter thus. It has thought fit to raise that which is usually merely *primâ facie* evidence to the level of a presumption of law. Thus, by s. 26 of the Interpretation Act, 1889—

"Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve,' or the expression 'give' or 'send,' or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

And in at least one case the Legislature has raised it to the rank of conclusive evidence (*presumptio juris et de jure*), for by s. 329 of the Lunacy Act, 1890—

"Where any person is proceeded against under this Act on a charge of omitting to transmit or send any copy, list, notice, statement, report or other document required to be transmitted or sent by such person, the burden of proof that the same was transmitted or sent within the time required shall lie upon such person; but if he proves by the testimony of one witness upon oath that the copy, list, notice, statement, report or document in respect of which the proceeding is taken was properly addressed and put into the post in due time, or (in the case of documents required to be sent to the commissioners or a clerk of the peace or a clerk to guardians) left at the office of the commissioners or of the clerk of the peace or clerk to guardians, such proof shall be a bar to all further proceedings in respect of such charge."

Again, where a tenant produces a receipt for rent due at a certain date, it is highly probable that he has paid all rent which accrued before then, and very strong evidence is needed to rebut the inference in this and all other cases of periodical payments: yet there is no

(*e*) See *ante*, pp. 163 *et seq.*

presumption of law. But in the special case of the sale of a lease the production by the vendor of the receipt for the last rent due is by statute made conclusive evidence that the covenants have been duly performed and the previous rent paid, unless the purchaser can show that in fact the covenants have been broken or the rent not paid (*f*).

And, similarly, the mere fact that one person has paid sums of money at regular intervals to another person raises no presumption as to the title of that other to enforce payment. But here again the Legislature has, in one instance, raised the inference to the rank of a presumption, for by s. 5 (2) of the Charitable Trusts Recovery Act, 1891 (*g*)—

"Where any yearly or other periodical payment has been made in respect of any land, to or for the benefit of any charity or charitable purpose, for twelve consecutive years, such payment shall be deemed, subject to any evidence which may be given to the contrary, *primâ facie* evidence of the perpetual liability of such land to such yearly or other periodical payment, and no proof of the origin of such payment shall be necessary."

There is also one case in which that which was originally, and which strictly still is, only *primâ facie* evidence of a fact has been raised by the procedure of our Courts almost to the level of a presumption of law. We refer to the inference drawn from recent possession of stolen articles. When a man is charged with stealing goods or receiving them knowing them to have been stolen, and, after proof has been given of the theft, it is shown that the prisoner had the goods in his possession soon after the theft, there is so strong a likelihood that the prisoner stole or received them that the jury is justified in convicting him, without any other evidence, unless he shows that he came by them in an honest and lawful manner (*h*). But they are not bound to do so.

(*f*) Conveyancing Act, 1881, s. 3 (4); *In re Highett and Bird*, [1903] 1 Ch. 287.
(*g*) 54 Vict. c. 17.
(*h*) *R.* v. *Langmead*, L. & C. 427.

The strength of the inference depends upon the length of time which has elapsed and the nature of the goods which have been stolen. Thus, some classes of goods pass readily from hand to hand, and in a day or two may have been acquired by someone who knows nothing whatever of the theft, while others are not readily saleable, and even after the lapse of a considerable time it is extremely likely that the person who has them was guilty of larceny or receiving.

The rule, however, is not infallible. Lord HALE mentions a case, which he says was tried before a very learned and wary judge, where a man was condemned and executed for horse-stealing, upon proof of his having been apprehended with the horse shortly after it was stolen; and afterwards it came out that the real thief, being closely pursued, had overtaken the man upon the road, and asked him to hold the horse for him for a few minutes. The thief escaped, and the innocent man, who was apprehended with the horse, was convicted and hanged (*i*).

It is impossible to lay down any definite rule. Each case depends upon its own facts, and for this reason the inference has just stopped short of becoming a true presumption of law.

We will now deal with the presumptions which arise most frequently in practice.

### *Presumption of Regularity.*

There is a well-known maxim of our law, "*omnia præsumuntur rite esse acta*": this is an inference of reasonable probability arising out of the experience of mankind. The law assumes that any act done in public or any formal act privately

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

performed will be done in due form by the person authorised to do it (*j*).

Thus, there is a presumption that a public officer acting in execution of a public trust will do his duty (*k*); and therefore it is presumed that all who act as justices of the peace, or as constables, have been duly appointed (*l*). Proof that a man had acted as constable is sufficient evidence that he was a constable, even on a trial for his murder, when the offence would have been only manslaughter if he had not been a constable (*m*). On an indictment for having committed perjury before a surrogate of an Ecclesiastical Court, proof that the person who administered the oath acted as surrogate has been held sufficient *primâ facie* evidence that he has been duly appointed, and had authority to administer the oath (*n*). This presumption has been adopted by the Legislature in the case of excise (*o*) and custom house officers (*p*). The rule does not apply to *private* appointments, such as tithe collectors, or a town clerk (*q*); in these cases the appointments must be proved.

Private documents, such as a deed, bill of exchange, or promissory note, are presumed to have been made or executed at the time when they bear date (*r*), and this extends even to letters (*s*). And a document purporting to be a deed has been presumed to be duly sealed,

(*j*) See the judgments of the C. A. in *Harris* v. *Knight*, 15 P. D. 170.

(*k*) *Per* Lord ELLENBOROUGH, in *R.* v. *Verelst*, 3 Camp. at p. 433; *per* COLERIDGE, J., in *R.* v. *Whiston*, 4 A. & E. at p. 611; and *per* BLACKBURN, J., in *Waddington* v. *Roberts*, L. R. 3 Q. B. 579.

(*l*) *Berryman* v. *Wise*, 4 T. R. 366; Cockle, 19.

(*m*) *R.* v. *Gordon*, 1 Leach, 515.

(*n*) *R.* v. *Verelst*, 3 Camp. 432.

(*o*) 7 & 8 Geo. IV. c. 53, s. 17.

(*p*) 16 & 17 Vict. c. 107, s. 307.

(*q*) *R.* v. *Mayor of Stamford*, 6 Q. B. 433.

(*r*) *Malpas* v. *Clements*, 19 L. J. Q. B. 435; *Anderson* v. *Weston*, 6 Bing. N. C. 296; Cockle, 169.

(*s*) *Goodtitle* v. *Milburn*, 2 M. & W. 853; *Hunt* v. *Massey*, 5 B. & Ad. 902.

although only a signature appeared (*t*). Where indentures of a pauper's apprenticeship would have been invalid, if not executed in conformity with the rules of the Poor Law Commissioners, and there was no evidence to show that their regulations had been observed, it was held that, in the absence of any evidence to the contrary, it must be presumed that the regulations had been observed (*u*). So, generally, the orders of justices will be presumed to have been made in accordance with all statutory formalities (*x*). Thus, when to prove a parish apprenticeship secondary evidence of a lost indenture was admitted, it was presumed that the indenture had been executed according to all the requisites of the statute 56 Geo. III. c. 139, because there was evidence that an arrangement for the apprenticeship had been made before justices, and that an apprenticeship had subsequently existed (*y*); but it seems that it would be otherwise where there is no such evidence (*z*). In similar cases it has been held that the law will presume that which accounts reasonably for an existing state of things; and therefore the fact that a person served an apprenticeship raises a presumption that he was duly bound an apprentice (*a*). When a rate has been made, it will be presumed to have been duly made (*b*).

If a date and hour and the name of a place appear on a telegram or on a post-mark, it will be presumed that the telegram was sent or the letter posted at the time and place indicated (*c*). The meaning of such postal marks may be explained to the Court by a post office

(*t*) *In re Sandilands*, L. R. 6 C. P. 411; Cockle, 167.
(*u*) *R.* v. *St. Mary Magdalen*, 2 E. & B. 809.
(*x*) *Williams* v. *Eyton*, 4 H. & N. 357.
(*y*) *R.* v. *Broadhempston*, 1 E. & E. 154.
(*z*) *R.* v. *Stonehouse*, 10 Q. B. 234.
(*a*) *R.* v. *Fordingbridge*, E. B. & E. 678.
(*b*) *R.* v. *Reynolds*, [1893] 2 Q. B. 75.
(*c*) *R.* v. *Johnson*, 7 East, 65; *Warren* v *Warren*, 1 C. M. & R. 50.

official, or, indeed, by anyone who is familiar with the practice of the post office (*d*).

The fact of a marriage having taken place before a registrar in a chapel raises the presumption that the chapel was properly registered, and the marriage legal (*e*); and, in support of a plea of coverture, a certificate of the defendant's marriage in a Roman Catholic chapel according to the rites of that Church, with evidence of subsequent cohabitation, was held to be *primâ facie* proof of a valid marriage under the sta ute 6 & 7 Will. IV. c. 85 (*f*). In short, wherever a marriage has been solemnized, the law strongly presumes that all legal requisites have been complied with (*g*); and the fact of the ceremony of marriage having been performed by a clergyman in a place where divine service has been performed raises the presumption that the place was duly licensed for marriages (*h*). A foreign marriage is presumed to have been celebrated with the due solemnities required by the law of the place where it is celebrated (*i*).

The maxim *Omnia præsumuntur rite esse acta* is applied by the Courts to the execution both of deeds and of wills (*k*). Where all the witnesses are dead, and the handwriting of one of them is proved, the statement in the attestation clause will be presumed to be correct (*l*). A Court of Probate goes further than this, and presumes that all formalities have been complied with in respect of a will when the attestation clause is in the usual form (*m*). When there is no attestation clause, or when

(*d*) *Linzey* v. *Linzey*, 29 L. J. P. & M. 128; *Abbey* v. *Lill*, 5 Bing. 299; see further, *ante*, pp. 45, 144, 145.
(*e*) *R.* v. *Mainwaring*, Dears. & B. 139.
(*f*) *Sichel* v. *Lambert*, 15 C. B. (N.S.) 781; cf. *De Thoren* v. *Attorney-General*, 1 App. Cas. 686.
(*g*) *Smith* v. *Huson*, 1 Phillimore, at p. 294.
(*h*) *R.* v. *Cresswell*, 1 Q. B. D. 446.
(*i*) *R.* v. *Brampton*, 10 East, 202.
(*k*) *In re Sandilands*, L. R. 6 C. P. 411; Cockle, 167.
(*l*) *Adam* v. *Kerr*, 1 B. & P. 360; *Andrew* v. *Motley*, 12 C. B. (N.S.) 526.
(*m*) *Vinnicombe* v. *Butler*, 3 Sw. & Tr. 580.

it is not in the usual form, Courts of law will, it seems, nevertheless presume compliance with all formalities in respect of a will (*n*), and the tendency of a Court of Probate will be to give effect to the testator's intentions (*o*). Of course the evidence of the attesting witnesses may rebut the presumption of due execution (*p*); but when a will appears on the face of it to have been duly attested, and surrounding circumstances imply that this was so, the contrary evidence of one attesting witness will not rebut the presumption of due execution (*q*). Where the recollection of the attesting witnesses is imperfect, but the undisputed facts, the probabilities of the case, and the *evidentia rei*, are in favour of due execution, such execution will be presumed (*r*). It may here be remarked that when a will is traced to the custody of the testator and is not forthcoming, then, in the absence of other evidence, it will be presumed that the testator destroyed it *animo revocandi* (*s*). This presumption may be rebutted by the facts, and will be more or less strong according to the character of the custody which the testator had over the will (*t*). Clear evidence will be needed to satisfy the Court that it was not destroyed by the testator *animo revocandi* (*u*). Again, where signing and sealing are proved, the Courts will presume the delivery of a deed (*x*). So it will be presumed that an instrument lost or not produced after notice was duly stamped (*y*); unless there is evidence that it remained without a stamp for some

(*n*) *Spilsbury* v. *Burdett*, 10 Cl. & F. 840.
(*o*) *In the Goods of Rees*, 34 L. J. P. M. & A. 56.
(*p*) *Croft* v. *Croft*, 34 L. J. P. M. & A. 44.
(*q*) *Wright* v. *Rogers*, L. R. 1 P. & D. 678; cf. *In the Goods of Jane Thomas*, 1 Sw. & Tr. 255.
(*r*) *Wright* v. *Sanderson*, 9 P. D. 149; *Whiting* v. *Turner*, 89 L. T. 71; and see *Pilkington* v. *Gray*, [1899] A. C. 401.
(*s*) *Welch* v. *Phillips*, 1 Moo. P. C. 299.
(*t*) *Per* COCKBURN, C.J., in *Sugden* v. *Lord St. Leonards*, 1 P. D. 218; Cockle, 179. In that case the presumption was rebutted.
(*u*) *Allan* v. *Morrison*, [1900] A. C. 604.
(*x*) *Hall* v. *Bainbridge*, 12 Q. B. 699.
(*y*) *R.* v. *Long Buckley*, 7 East, 45.

time after the execution, in which case the *onus* is shifted, and lies upon the party who tenders the document (*z*). If an instrument is produced bearing adhesive stamps, properly cancelled, it will be presumed they were affixed at the proper time (*a*).

The fact that a person is in possession of land raises a presumption that he has a freehold interest in it, and valid livery of seisin will be presumed where necessary (*b*). When a deed more than thirty years old, which purported to exercise a power of appointment, was executed by the appointors by attorney, it was held that it could not be presumed that the attorney was properly appointed *ad hoc* (*c*). But this decision was based on the rule as to delegating discretionary powers, and is, therefore, not one of general application.

With regard to alterations in documents, the general rule is, that the party producing an altered document in evidence must explain the alteration; but in the case of deeds and all documents which it is an offence to alter after completion, there is a presumption that alterations, if any, were made before execution in the one case, and before completion, in the other (*d*). In the case of a will the presumption is that an alteration was made after execution (*e*); but Lord PENZANCE has stated that there is a marked distinction between interlineations and alterations, and in a case of interlineations (*f*) he held that, having regard to the internal evidence of the document itself, he was not bound to presume they were made after execution. There is no presumption that blanks filled up in different ink were so filled up after execution (*g*). In the case of bills of exchange and

(*z*) *Marine Investment Co.* v. *Haviside*, L. R. 5 H. L. 624.
(*a*) *Bradlaugh* v. *De Rin*, L. R. 3 C. P. 286.
(*b*) *Ecclesiastical Commissioners* v. *Treemer*, [1893] 1 Ch. 166, 172.
(*c*) *In re Airey*, [1897] 1 Ch. 164.
(*d*) *Doe* v. *Catomore*, 16 Q. B. 745; Cockle, 183.
(*e*) *Cooper* v. *Bockett*, 4 Moo. P. C. 419; *Doe* v. *Palmer*, 16 Q. B. 747.
(*f*) *In the Goods of Cadge*, L. R. 1 P. & D. at p. 545.
(*g*) See *Greville* v. *Tyler*, 7 Moo. P. C. 327.

promissory notes, s. 64 of the Bills of Exchange Act, 1882 (*h*), enacts as follows:—

"(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers. Provided that, where a bill has been materially altered, but the alteration is not apparent and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour. (2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

This section includes promissory notes; the word "apparent" in the section has been held (*i*) not to be limited to that which is apparent to all mankind, but includes those cases in which the party sought to be bound can at once discern, from some incongruity on the face of the bill or note, and point out to the holder, that it is not what it was, *i.e.*, that it has been materially altered. The *onus* of proving the time when an alteration was made lies on a person suing on a bill of exchange where the time of alteration is material (*k*). An alteration in the number on a Bank of England note avoids the note (*l*).

So, if a document which requires a stamp be lost or destroyed or is not produced after notice, the Court will, in the absence of any evidence to the contrary, presume that it was properly stamped (*m*), and allow a copy to be put in.

It will be presumed that no appeal has been entered against a judgment or a conviction till the contrary is shown (*n*). Neither can be controverted in evidence (*o*);

(*h*) 45 & 46 Vict. c. 61.
(*i*) *Leeds and County Bank* v. *Walker*, 11 Q. B. D. 84.
(*k*) *Johnson* v. *Duke of Marlborough*, 2 Stark. 313.
(*l*) *Suffell* v. *Bank of England*, 9 Q. B. D. 555.
(*m*) *Hart* v. *Hart*, 1 Hare, 1; *Crisp* v. *Anderson*, 1 Stark. 35. For other presumptions as to stamps, see *ante*, p. 297.
(*n*) 24 & 25 Vict. c. 96, s. 112.
(*o*) *Fawcett* v. *Fowlis*, 7 B. & C. 394.

and, as long as it stands, it is conclusive against every one against whom it is producible (*p*).

The presumption in favour of wedlock is another instance of the rule *Omnia praesumuntur rite esse acta* (*q*). It has its own special maxim: *Semper praesumitur pro matrimonio.* "By the law of England . . . where a man and woman have long lived together as man and wife, and have been so treated by their friends and neighbours, there is a *primâ facie* presumption that they really are and have been what they profess to be" (*r*).

As was said by Lord LYNDHURST in *Morris* v. *Davies* (*s*), and approved by Lord COTTENHAM in *Piers* v. *Piers* (*t*), this presumption of law is not lightly to be repelled, and the evidence for repelling it must be strong, distinct, satisfactory and conclusive (*u*). It is not to be broken in upon or shaken by a mere balance of probability. Cohabitation as man and wife is therefore presumptive evidence of marriage, except in the cases of prosecutions for bigamy and cases for divorce or damages for adultery (*x*). Lord ELDON held that in cases of cohabitation the presumption is in favour of its legality (*y*), and this is particularly so after a long interval of time (*z*), and even where it commenced with a ceremony which was known by both parties to be invalid (*a*).

(*p*) See *Strickland* v. *Ward*, 7 T. R. 633; *Bynoe* v. *Bank of England*, [1902] 1 K. B. 470.

(*q*) *Fox* v. *Bearblock*, 17 Ch. D. 499.

(*r*) *Per* Lord CRANWORTH in *The Breadalbane Case*, L. R. 1 H. L. Sc. at p. 199; *Lyle* v. *Ellwood*, L. R. 19 Eq. 98.

(*s*) 5 Cl. & F. 163.

(*t*) 2 H. L. Cas. at p. 362.

(*u*) Recent cases are *Langham* v. *Thompson*, 91 L. T. 680; *George* v. *Thyer*, [1904] 1 Ch. 456; and *Haynes* v. *Carter*, 94 L. T. 431; see also *post*, p. 398.

(*x*) *Morris* v. *Miller*, 4 Burr. 2057; Cockle, 62; see *R.* v. *Wilson*, 3 F. & F. 119.

(*y*) *Cunninghame* v. *Cunninghame*, 2 Dow (H. L.), 507; *Piers* v. *Piers*, 2 H. L. Cas. 331; *De Thoren* v. *Attorney-General*, 1 App. Cas. 686.

(*z*) *The Breadalbane Case*, L. R. 1 H. L. Sc. 182.

(*a*) See *De Thoren* v. *Attorney-General*, *supra*; *George* v. *Thyer*, [1904] 1 Ch. 456.

It is not necessary that the reputation of the neighbourhood should be uniformly and consistently in favour of the marriage (*b*). From 1856 to 1866 a man and woman lived together as man and wife and had five children. There was evidence that they had been treated as man and wife by friends and neighbours, and that their children had been recognised by the head of the father's family. In 1866 the woman left the man, who in 1874, while she was still alive, married another woman. In 1904 the question of the legitimacy of the children was raised, and it was held that the presumption in favour of the marriage having taken place had been established (*c*).

The law also presumes strongly in favour of the legitimacy of children. A child born after marriage, of which the wife was pregnant at the time of the marriage, is presumed to be the child of the husband, and so every child born subsequent to the marriage will be presumed to be the child of the husband. But the conduct of the parties and the surrounding circumstances taken together may be strong enough to raise an irresistible conclusion that the child born was not the child of the husband, but of another (*d*). The evidence to rebut the presumption must be strong, distinct, satisfactory and conclusive (*e*), for the presumption is one which is not lightly to be repelled (*f*). It is sometimes rebutted by evidence from which non-access is inferred, and non-access will be presumed after the date of a divorce or of a decree for judicial separation, or of an order authorising

(*b*) *Lyle* v. *Ellwood*, L. R. 19 Eq. 98, where HALL, V.-C., did not follow the *dicta* of Lord REDESDALE in *Cunninghame* v. *Cunninghame*, 2 Dow (H. L.), 511.

(*c*) *In re Thompson*, 91 L. T. 680.

(*d*) *Per* Lord BLACKBURN, in *The Aylesford Peerage Case*, 11 App. Cas. 1.

(*e*) *Per* Lord LYNDHURST, in *Morris* v. *Davies*, 5 Cl. & F. 163.

(*f*) For cases in which the presumption was repelled, see *Hawes* v. *Draeger*, 23 Ch. D. 173; *Bosvile* v. *Attorney-General*, 12 P. D. 177; and *The Poulett Peerage Case*, [1903] A. C. 395.

the wife to refuse to cohabit with her husband (*g*). Neither husband nor wife can give evidence of non-access during marriage in order to bastardise a child.

### *Presumption of Lawful Origin.*

Where certain acts have for a long time been done openly, and yet nobody has raised objection or tried to stop them, the law will strive to find a lawful origin for that user. Lord ELLENBOROUGH said that he would, if necessary, presume a hundred lost grants whenever people have for a long period of time been doing something which they would have no right to do, unless they had a deed of grant.

But to create a presumption of a lost grant, the user must be long, open, and notorious, and of such a kind as a grant could render lawful (*h*).

It is a well settled principle of English law that when there has been long-continued possession or assertion of a right, the right should be presumed to have had a legal origin, if such a legal origin was possible (*i*), and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title (*k*). Therefore, on proof of long enjoyment of a pew, coupled with acts which would have been illegal unless there had been a faculty, a faculty was presumed (*l*). So, acts which would only be lawful on the assumption that the person who did them had a

(*g*) *Hetherington* v. *Hetherington*, 12 P. D. 112.
(*h*) *Attorney-General* v. *Antrobus*, [1905] 2 Ch. 188.
(*i*) *Johnson* v. *Barnes*, L. R. 8 C. P. 527; Cockle, 19.
(*k*) *Per* Lord HERSCHELL, in *Philipps* v. *Halliday*, [1891] A. C. at p. 231. See also *Haig* v. *West*, [1893] 2 Q. B. 19; *Foley's Charity* v. *Dudley Corporation*, [1910] 1 K. B. 317.
(*l*) *Philipps* v. *Halliday*, [1891] A. C. 228.

several fishery, will, if continued for a sufficient period, justify the presumption that such acts had a lawful origin at a period at which the law permitted such a right to be created (*m*). So in favour of a person who has been in long and peaceable possession, conveyances (*n*), royal grants (*o*), and even Acts of Parliament will be presumed; but in the case of Acts of Parliament this rule appears to be restricted to private Acts, and does not apply against the Crown (*p*). Even against the Crown, however, the uninterrupted user of a road by the public for forty or fifty years raises a presumption of dedication as a highway (*q*). The enrolment of a tithe award has been presumed where the usage of paying tithes has been shown (*r*).

Where there is evidence of a long exclusive enjoyment of property, and of an exercise of a distinct right referable to a legal origin, the Court will presume such an origin, and also (in the absence of proof to the contrary) that it commenced before legal memory (*s*). Even where long and undisputed enjoyment is shown to have had *de facto* an invalid or illegal or insufficient origin, still the Court will presume, if it can, that the illegality has been altered by something which has occurred in the course of time, and so clothe the enjoyment with legal right (*t*), unless, of course, the subsequent enjoyment is shown to be consistent with the right invalidly acquired rather than consistent with its having been made a legal

(*m*) See *Neill* v. *Duke of Devonshire*, 8 App. Cas. 158.

(*n*) *England* v. *Slade*, 4 T. R. 682; *Cooke* v. *Soltau*, 2 S. & S. 154; *Northam Bridge Co.* v. *S. Stoneham Rural Council*, 71 J. P. 345.

(*o*) *Goodtitle* v. *Baldwin*, 11 East, 488; see *University College, Oxford* v. *Oxford Corporation*, 68 J. P. 470.

(*p*) *Attorney-General* v. *Ewelme Hospital*, 17 Beav. 366. See *dicta* of Lord ABINGER in *Jewison* v. *Dyson*, 9 M. & W. 555; and of Lord WYNFORD in *Macdougall* v. *Purrier*, 2 Dow & Cl. 170.

(*q*) *R.* v. *East Mark*, 11 Q. B. 877; see *Van Diemen's Land Co.* v. *Marine Board of Table Cape*, [1906] A. C. 92; and *Farquhar* v. *Newbury Rural District Council*, [1909] 1 Ch. 12.

(*r*) *Macdougall* v. *Purrier*, 2 Dow & Cl. 135.

(*s*) *Johnson* v. *Barnes*, L. R. 8 C. P. 527; Cockle, 19.

(*t*) *Per* FRY, L.J., in *Halliday* v. *Phillips*, 23 Q. B. D. 56.

right (*u*). So, where a manor had existed in the hands of the Crown, and the Crown had granted some of the lands of the manor to a subject by a grant which did not pass the manor, but the successors in title of the grantee had held manorial courts and kept court rolls continuously, a grant of the manor itself from the Crown was presumed (*x*).

The presumption of a lost grant or of a dedication to the public in order to justify an open and long-continued user as of right, is a rebuttable presumption of law (*z*). "I decline," said COZENS-HARDY, M.R., in *Farquhar* v. *Newbury Rural District Council* (*a*), "to look into what was or was said to be actually in the mind of the person" who was alleged to have dedicated a public right of way. Where a case involving this presumption is tried by a judge without a jury, the judge ought to find the existence or non-existence of the lost grant as a fact; if it is tried with a jury, it is for the jury to find the fact; and evidence is admissible to prove that there has not been, since the user commenced, any person capable of granting it. A lost grant will not be presumed in contravention of an Act of Parliament (*b*).

This presumption was well known prior to the reign of James I., for in the case of *Bedle* v. *Beard* (*c*), which was decided in 1606, it is recorded that the judges considered precedents. BOWEN, J., said, in *Dalton* v. *Angus* (*d*), that it was originally nothing more than a rebuttable inference of fact. But it was not so regarded in later times; it came to be a legal fiction. "Juries were encouraged, for the sake of quieting possession, to infer the existence

(*u*) See judgment of Lord HERSCHELL in *Philipps* v. *Halliday*, [1891] A. C. 236.
(*x*) *Merttens* v. *Hill*, [1901] 1 Ch. 842.
(*z*) *Farquhar* v. *Newbury Rural District Council*, [1909] Ch. 12.
(*a*) *Ibid.* at p. 16.
(*b*) *Neaverson* v. *Peterborough, etc. Council*, [1902] 1 Ch. 557.
(*c*) 12 Rep. 5.
(*d*) 6 App. Cas. at p. 782.

of deeds in whose existence nobody did believe" (*e*). No case can be found in which this presumption has been rebutted at Nisi Prius by proof that no such grant was ever in fact made; although proof that no such deed could be efficacious at law was always regarded as putting an end to the presumption.

As MOULTON, L.J., said in a recent case (*f*) as to the dedication of a highway across land under a settlement:

"The plaintiff must show that it was impossible that dedication could take place, not merely that it was possible that it did not take place."

But this presumption must not be pressed too far. As Lord MACNAGHTEN remarks in *Simpson* v. *Attorney-General* (*g*), it cannot in every case be said:—

"This state of things has gone on so long that it must now go on for ever."

He continues thus:—

"It is quite true that the Court will go almost any length to support a right openly asserted, long continued, and never before contested if it can find any legal origin for such a right. But the converse does not hold good in the case of a burthen, however long it may have been borne. I took the liberty of asking the learned counsel for the respondents if he had any authority for making a presumption in favour of the legal obligation of an immemorial burthen, and he admitted that no such authority was to be found. There is authority the other way. In the great case of gleaning, *Steel* v. *Houghton* (*h*), HEATH, J., says: 'If A. and his ancestors have from time immemorial repaired a bridge or a highway, there is no obligation on him to continue the repair unless he is so bound by the tenure of lands or the like'" (*i*).

So a prescription in a *que* estate for a *profit à prendre in alieno solo* without stint and for commercial purposes is unknown to the law. Therefore, where by way of defence to an action of trespass by riparian proprietors, the alleged trespass consisting in fishing in a non-tidal reach of a river of which the plaintiffs claimed

(*e*) *Eldridge* v. *Knott*, 1 Cowp. 215.
(*f*) *Farquhar* v. *Newbury Rural District Council*, [1909] 1 Ch. at p. 18.
(*g*) [1904] A. C. at pp. 490, 491.
(*h*) 1 H. Bl. at p. 60.
(*i*) [1904] A. C. at p. 491.

to be the owners, the defendants set up a prescriptive right to a free fishery or common of fishery vested in the freehold tenants of a certain manor or hundred whose freeholds were situate in any of the parishes adjoining the river, and proved that they and their predecessors in title as such freeholders in exercise of such alleged right for three centuries past had openly and notoriously fished from boats with nets for salmon and other fish in the portion of the river in question and sold the fish so caught in the market, it was held, that the Court could not presume a legal origin for the alleged right (*k*).

The Court will not presume an incorporating charter from the Crown for the mere purpose of supporting a right otherwise incapable of having a legal origin, where the presumption is inconsistent with the past and existing state of things and there is no trace of such a corporation ever having existed (*l*).

The position has however to some extent been altered by the recognition in courts of law of equitable rights (*m*). As BOWEN, J., said in *Dalton* v. *Angus* (*n*):—

> "It would not now be sufficient to disprove a legal origin unless the possibility of an equitable origin were negatived as well."

## *Presumption of Innocence.*

No person will in the absence of proof be presumed to have done any act which amounts to a violation of the criminal law, or which would subject him to any species of punishment, or would involve any penalty or forfeiture. This is so, even where the act charged is one of omission only, and whether the guilt of the party comes in question

(*k*) *Lord Chesterfield* v. *Harris*, [1908] 2 Ch. 397.
(*l*) *Rivers* v. *Adams*, 3 Ex. D. 361.
(*m*) Under the Judicature Act, 1873.
(*n*) 6 App. Cas. at p. 783.

directly or collaterally. Where the omission to do a prescribed act will in certain circumstances amount to a criminal neglect, it is for the prosecution to prove affirmatively that the omission took place and that it took place under those circumstances, even though they may be thus driven to prove a negative.

Thus, where in a civil action it was alleged that the defendant, who had chartered the plaintiff's ship, put on board a combustible article by which loss was occasioned, without due notice to the captain, it was held that the plaintiff must prove not only that the defendant did so, but that he did so without that notice, because such conduct would then amount to a misdemeanour (*o*).

In bigamy cases the prosecution must prove that the first husband or wife was alive at the date of the second marriage (*p*). Where, however, the prisoner and his or her spouse have been living apart for seven years, the prosecution must go further and prove that during that period the prisoner knew that the spouse was still alive (*q*), and whether such husband or wife was alive at any time during the seven years is a question for the jury (*r*).

Whenever fraud is alleged, it must be distinctly pleaded and clearly proved at the trial; it will not be presumed (*s*). And this doctrine holds good even in the case of third parties, whose conduct comes in question collaterally (*t*). So the Courts will never presume a fraud upon a power of appointment (*u*). There are, it is true, many cases in

(*o*) *Per* Lord ELLENBOROUGH in *Williams* v. *East India Co.*, 3 East, at p. 199; Cockle, 15.
(*p*) *R.* v. *Twining*, 2 B. & Ald. 386.
(*q*) *R.* v. *Curgerwen*, L. R. 1 C. C. R. 1.
(*r*) *R.* v. *Lumley*, L. R. 1 C. C. R. 196; and see *R.* v. *Tolson*, 23 Q. B. D. 168.
(*s*) *Mather* v. *Lord Maidstone*, 1 C. B. (N.S.) 273.
(*t*) *Ross* v. *Hunter*, 4 T. R. 38.
(*u*) *Hamilton* v. *Kerwan*, 2 J. & L. 393; *Pares* v. *Pares*, 33 L. J. Ch. 215.

which Courts of Equity have said that fraud will be presumed, *e.g.*, where a trustee purchases a portion of the trust fund (*x*), but this phrase merely means that the transaction is one of which the Court disapproves and which it will therefore set aside; it does not imply that the Court finds as a fact that the trustee acted fraudulently. Lord BROUGHAM, in *Hunter* v. *Atkyns* (*y*), put the matter on its true ground:—

"There are certain relations known to the law as attorney, guardian, trustee; if a person standing in these relations to client, ward, or *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, etc., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered is that the person standing in such relation must, before he can take a gift or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation."

The rule extends to cases of parent, solicitor, spiritual adviser and medical attendant, and to other cases in which two persons are so situated that one may naturally obtain considerable influence over the other (*z*).

There are, however, certain cases in which it has been expressly declared by statute that, on proof of certain acts done by A., the burden shall be thrown upon him to show that he had no fraudulent intention in doing them. Thus, as we have seen (*a*), on proof that a bankrupt has not handed over to his trustee all his property available for distribution among his creditors, he will be held

(*x*) *Per* Lord ROMILLY in *Denton* v. *Donner*, 23 Beav. 290; and see *Mookerjee* v. *Mookerjee*, L. R. 2 Ind. App. 18; *Foster* v. *Roberts*, 29 Beav. 470; *Tate* v. *Williamson*, L. R. 1 Eq. 528; and 31 Vict. c. 4, s. 1.

(*y*) 3 Myl. & K. at p. 135; cf. *Gibson* v. *Jeyes*, 6 Ves. 277.

(*z*) *Cooke* v. *Lamotte*, 15 Beav. 234; cf. *Allcard* v. *Skinner*, 36 Ch. D. 145, and particularly the judgment of LINDLEY, L.J.; and *Wright* v. *Carter*, [1903] 1 Ch. 27.

(*a*) See *ante*, p. 156.

guilty of a misdemeanour unless he can satisfy the jury that he had no intent to defraud. Similarly, the Bankruptcy Act, 1883 (*b*), s. 47, enacts that any settlement of property, not being an ante-nuptial settlement made in good faith for valuable consideration, or one made on or for the wife or children of the settlor of property accruing to the settlor *jure mariti*, is void if the settlor becomes bankrupt within two years of its date; and if the settlor becomes bankrupt within ten years of its date, such a settlement is void unless those claiming under it can show that he was at the time of making it able to pay all his debts without the property comprised therein. This provision only comes into operation if and when the bankruptcy takes place, and *bonâ fide* sales for value of the settled property anterior to that date hold good and cannot be avoided (*c*).

### *Presumption of Intention.*

Every man is presumed to be sane until the contrary is shown. Every sane man is presumed to have known and to have intended the natural and necessary consequences of his act. This presumption is no doubt rebuttable in certain cases (*d*). But if a man is aware that certain consequences will probably follow the act which he contemplates doing and yet deliberately proceeds to do that act, he must be taken to have intended those consequences to follow, even though he may have hoped that they would not.

Thus, if any person who is sane and of full age deliberately does an act which was calculated to cause the death of another, he will be presumed to have

(*b*) 46 & 47 Vict. c. 52.
(*c*) *In re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776.
(*d*) *Per cur.*, in *R.* v. *Meade*, [1909] 1 K. B. at p. 899.

intended the death of that other, and will be liable to be convicted of murder, unless he proves extenuating circumstances which may reduce the act from murder to manslaughter, or to justifiable or excusable homicide (*e*). Again, a man is guilty of murder when he causes the death of another by doing a wanton act, such as driving a carriage furiously amongst a number of people, or discharging a loaded gun in the middle of a crowd (*f*).

A person who carried a child suffering from an infectious disease along a public highway, thus endangering the health of passengers, was held to be guilty of a misdemeanour, without proof of an intent that any person should catch the disease (*g*); and, again, where a person had published a pamphlet with an indecent tendency, it was held to be no defence that he had done so with the *bonâ fide* purpose of exposing the alleged errors of the Church of Rome (*h*). Where a debtor knew that his departure from England would have the natural and necessary effect of defeating and delaying his creditors, he was held to have departed with that intent, and to have committed an act of bankruptcy (*i*).

In an action for libel, it was held that a judge was wrong in leaving it to a jury to say whether the defendant intended to injure the plaintiff, inasmuch as if the tendency of the libel was injurious to the plaintiff, the defendant must be taken to have intended the consequence of his own act (*k*). If a man intends to do one thing and does another, he will be judged by what he does and not by what he intends to do.

If A. presents a loaded revolver at B.'s head and pulls the trigger, it is an almost irresistible inference that A.

(*e*) *Per* Lord ELLENBOROUGH in *R.* v. *Dixon*, 3 M. & S. 15.
(*f*) 1 Hale, P. C. 475.
(*g*) *R.* v. *Vantandillo*, 4 M. & S. 73.
(*h*) *R.* v. *Hicklin*, L. R. 3 Q. B. 360; *Steele* v. *Brannan*, L. R. 7 C. P. 261.
(*i*) *Ex parte Goater*, 22 W. R. 935.
(*k*) *Haire* v. *Wilson*, 9 B. & C. 643. See also *Fisher* v. *Clement*, 10 B. & C. 472; and cf. *E. Hulton & Co.* v. *Jones*, [1910] A. C. 20.

intended to kill B. Nor will the mere fact that he did not know for certain and took no pains to ascertain whether the revolver was loaded or not, in any way excuse the act.

But though it is easy thus to illustrate the operation of the presumption as to the intention of consequences, it is not easy to define the precise scope and effect of this presumption, or to state definitely how it may be rebutted. It will not be rebutted, however, merely by proof that the defendant never in fact intended that result to happen. But if he can show that the consequence, although physically inevitable, was not an obvious result of his act, or that it was only probable when certain circumstances co-existed, and he had no reason to know that some of them did exist, the presumption will be rebutted. Again, it is submitted that if he shows that the possibility of such a result never occurred to his mind, he cannot be held to have intended the result; although, indeed, he may be liable for other reasons. So, too, if he proves that at the time of the act he was incapable of forming any intention at all, that is, that he was insane, dead drunk, or acting under a *bonâ fide* mistake of fact or under coercion, the presumption will be rebutted.

The burden of proving all such facts as lunacy, somnambulism, mistake or duress, lies, of course, upon the person who seeks to rebut the presumption.

### *Presumption against a Wrongdoer.*

There is a well-known maxim: *omnia præsumuntur contra spoliatorem*—all things are presumed against a wrongdoer.

If a man, by his own wrongful act, withhold evidence by which the facts of the case would be manifested, every presumption to his disadvantage consistent with the facts admitted or proved will

be adopted (*l*). Where a wrong has been committed, the wrongdoer must suffer from the impossibility of accurately ascertaining the amount of the damage (*m*).

In *Armory* v. *Delamirie* (*n*), the plaintiff, a boy, had found a jewel, which he gave for inspection to the defendant, a jeweller; and in trover for it, it was held, that unless the defendant produced it, the jury must presume it to be of the first water, and make the value of the best jewel that would fit the socket the measure of their damages. Where the deficiency of evidence arises from negligence, the party who is accountable for it cannot be benefited by it. Thus, where a liquor merchant sued for goods sold and delivered, and the only evidence was that some hampers of full bottles had been delivered to the defendant, but there was no evidence of the contents of the bottles, Lord ELLENBOROUGH told the jury to presume that the bottles were filled with the cheapest liquor in which the plaintiff dealt (*o*). If a devisee under a first will destroys a subsequent will, it will be presumed as against him that the first will has been revoked (*p*). On this principle, in admitting evidence of a will proved to have been destroyed by the heir-at-law, the judge of the Irish Court of Probate said that he should be satisfied with evidence much less cogent than in the case of a lost will (*q*). Again, if an accounting party parts with or destroys his books, the strongest presumptions consistent with the rest of the case will be made against him (*r*). The principle of presuming against a *spoliator*

(*l*) *Williamson* v. *Rover Cycle Co.*, [1901] 2 Ir. R. 619.
(*m*) *Leeds* v. *Amherst*, 20 Beav. 239.
(*n*) 1 Sm. L. C. 153.
(*o*) *Clunnes* v. *Pezzey*, 1 Camp. 8.
(*p*) *Harwood* v. *Goodright*, 1 Cowp. 87.
(*q*) *Mahood* v. *Mahood*, Ir. R. 8 Eq. 359.
(*r*) *Gray* v. *Haig*, 20 Beav. at pp. 230, 231.

is adopted in International Law when papers have been spoliated by a captured party (*s*).

And by the Lunacy Act, 1890 (*t*), s. 329, it is enacted that when a question arises in proceedings under the Act whether a house is or is not a licensed house, or a registered hospital, it is to be presumed not to be so licensed unless the licence or certificate of registration is produced, or sufficient evidence is given that a licence or certificate of registration is in force.

But the facts of the case must be sufficient to raise the presumption: it will not arise unless there be either *mala fides* or negligence in the party against whom it is urged. Thus, where the plaintiff, who had purchased a particular make of bicycle from the defendants, was injured by the top of the steering-post breaking, and claimed damages for breach of warranty of fitness, and had the broken parts of the bicycle examined by experts before sending them to the defendants for inspection, and the defendants after replacing the broken parts threw the broken pieces away, so that they were not produced at the trial, it was held that, in spite of this rule, the loss and non-production of the broken pieces by the defendants did not under the circumstances (the plaintiff's experts having seen the pieces) make the defendants *spoliatores* against whom the presumption applied, so as to shift on to them the burden of proof (*u*). And where a person refused to allow his former solicitor to give evidence of matters connected with the professional relation, it was held that there was no adverse presumption against him, Lord ST. LEONARDS saying that there was no analogy to the case of *Armory* v. *Delamirie* (*x*). The refusal to produce documents on notice, is not ground for any inference as to their contents (*y*).

(*s*) *The Hunter*, 1 Dodson, 480.
(*t*) 53 & 54 Vict. c. 5.
(*u*) *Williamson* v. *Rover Cycle Co.*, [1901] 2 Ir. R. 615.
(*x*) *Wentworth* v. *Lloyd*, 10 H. L. Cas. 589.
(*y*) *Cooper* v. *Gibbons*, 3 Camp. 363.

*Presumption of Continuance.*

Where there is proof of the existence of a state of things and no evidence of its cessation, the presumption is that such state of things continues for a reasonable length of time.

Hence, if the question is as to the life or death of a person who has been once shown to be living, the burden of proving him dead lies, at first, on the party who asserts that fact (*z*); if, however, there be a question as to the exact date at which a person died, this is for the jury (*a*), and proof that he was alive at an antecedent date may or may not afford a reasonable inference that he was living at the subsequent date (*b*).

But this presumption is by no means confined to cases of the continuance of life. It has, for instance, been applied to cases of seisin of an estate (*c*), authority of an agent (*d*), adultery (*e*), and insanity (*f*). And in a recent case a presumption that a prisoner was, at the date of a person's death, possessed of sufficient means to have provided the latter with food and medicine, was raised by proof of previous possession of such means (*g*).

Where it is proved that a person has not been heard of for seven years, a presumption arises that he is dead (*h*). But this presumption will not arise if the person in question left his home under circumstances which

(*z*) *Wilson* v. *Hodges*, 2 East, 312; Cockle, 17; KEKEWICH, J., however denied this in *In re Aldersey*, [1905] 2 Ch. 186.
(*a*) See *R.* v. *Willshire*, 6 Q. B. D. 366; Cockle, 22.
(*b*) *Per* GIFFARD, L.J., in *In re Phené's Trusts*, L. R. 5 Ch. 139; cf. *R.* v. *Lumley*, L. R. 1 C. C. R. 196; and *In re Rhodes*, 36 Ch. D. 586; but see *In re Benjamin*, [1902] 1 Ch. 723.
(*c*) *Wrotesley* v. *Adams*, Plowden, 193.
(*d*) *Smout* v. *Ilbery*, 10 M. & W. 1.
(*e*) *Turton* v. *Turton*, 3 Haggard, N. R. 350.
(*f*) *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549.
(*g*) *R.* v. *Jones*, 19 Cox, 678.
(*h*) *Nepean* v. *Doe*, 2 M. & W. 894; Cockle, 18.

rendered it improbable that he would communicate with his friends (*i*).

In *Bowden* v. *Henderson* (*k*) Sir JOHN STUART, V.-C., said :—

"The principle on which the Court presumes the death of a person of whom no tidings have been received for a long period of time, is this—that, if he were living, he would probably have communicated with some of his friends and relatives. It is a conclusion which the Court draws from the probabilities of the case. It is quite clear, therefore, that, when no such probability exists, the presumption cannot arise.

"In this case, all the circumstances tend to show, that, after what had taken place between Letitia Langton and her friends, it was extremely improbable she would have entered into further communication with them. She had abandoned her religion, and her friends wrote to her a letter of remonstrance and reproach for so doing. These reproaches were not calculated to encourage further communications. I think this circumstance, taken in connection with the rather eccentric course of life, which, it appears from her letters, she pursued, renders it improbable that she would have further communicated with her friends. If I am right in this view, it follows, that the presumption of her death does not arise from the absence of information or of communication, when that absence is natural, even if the lady were still alive. There must, therefore, be further inquiry" (*l*).

But there is no presumption as to the exact time, during the seven years, the person in question died. Whenever that date is material, it must be a subject of distinct proof by the party interested in fixing the time; for there is no presumption as to when, during the seven years, the person in question died (*m*). The fact of letters of administration having been granted is not sufficient proof of death (*n*). In the Probate Division of the High Court death is not presumed in the case of disappearance, but the applicant for a grant has

(*i*) *Bowden* v. *Henderson*, 2 Sm. & G. 360; *McMahon* v. *McElroy*, 5 Ir. R. Eq. 1; but KEKEWICH, J., is reported to have decided the contrary in *Wills* v. *Palmer*, 53 W. R. 169. And see *per* Lord BLACKBURN, in *Prudential Assurance Co.* v. *Edmonds*, 2 App. Cas. 509.

(*k*) 2 Sm. & G. 360.

(*l*) At pp. 366, 367.

(*m*) *In re Phené's Trusts*, *supra*; *In re Lewes' Trusts*, L. R. 6 Ch. 357. See also *In re Benjamin*, [1902] 1 Ch. 723.

(*n*) *In re Beamish*, 9 W. R. 475.

to obtain leave "to swear the death" (*o*); and leave will be given in a proper case. The applicant has to swear to his belief of the death, and to prove that he has made proper and ample inquiries (*p*). Death has been allowed to be sworn after three years' disappearance (*q*). This presumption does not necessarily arise between vendor and purchaser (*r*).

It has been stated that the presumption is that an unmarried man who has not been heard of for seven years died without issue (*s*); and NORTH, J., is believed to have so decided in an unreported (*t*) case of *Re Harding*, in 1891. But, on the other hand, it was laid down by COCKBURN, C.J., in *Greaves* v. *Greenwood* (*u*), that if it is proved that a man died many years ago, and there is nothing to show that he had or had not issue, there is no presumption either way. And this statement of law has recently been approved (*x*). The true view seems to be that where the question of the failure of issue of a given person arises all that can be done is to prove facts from which the inference can be drawn that he died without issue (*y*), and then ask the Court to draw that inference. This has been done in cases where neither the given person, nor any issue of his, had been heard of for a considerable number of years—twenty-five years in two cases (*z*), and seventeen in another (*a*)—and inquiries had failed to elicit any information that he had, in fact, had issue.

There is no fixed time at which a woman will be

(*o*) *In the Goods of Jackson*, 87 L. T. 475.
(*p*) *In the Goods of Clarke*, [1896] P. 287; cf. *In re Walker*, [1909] P. 115.
(*q*) *In the Goods of Matthews*, [1898] P. 17.
(*r*) Dart's Law of Vendors and Purchasers, 7th ed., p. 380.
(*s*) Seton on Judgments, 6th ed., p. 1656.
(*t*) See Times Newspaper of May 28th, 1891.
(*u*) 2 Ex. D. 289.
(*x*) *In re Jackson*, *Jackson* v. *Ward*, [1907] 2 Ch. 354.
(*y*) See Hubback on Evidence of Succession, 203.
(*z*) *Re Hankey*, 25 W. R. 427; and *Re Webb*, Ir. R. 5 Eq. 235.
(*a*) *Rawlinson* v. *Miller*, L. R. 1 Eq. 52.

presumed to be past child-bearing. It depends on the particular circumstances of each case whether she is or not. As a general rule, in the absence of special circumstances (*b*), she is not considered to be past child-bearing until she is at least fifty-six years of age. But in *Re Sumner* (*c*), and also in *Re Millner* (*d*), a woman under fifty was, under the circumstances, found to be past child-bearing. In *Croxton* v. *May* (*e*), the inference was not drawn in the case of a woman just over fifty-four, but who had only been married three years. One of the latest cases in which it was drawn is *Re White* (*f*), where a woman was just over fifty-six. No analogous inference of incapacity arises in the case of a man of any age.

Where several persons have perished in the same calamity, the presumption was once said to be in favour of the survival of the stronger party (*g*); but in a case where it appeared that a husband, a wife, and their two children, were washed off from the deck of a ship by the same wave and drowned, the House of Lords held, that in the absence of further evidence it must be taken that all died at the same moment, as there was no presumption at all in such a case (*h*). This rule was applied by the Court of Probate when husband and wife were both killed in a railway accident, and the bodies were found two hours afterwards (*i*), and administration was granted to the next of kin of each; so also where husband and wife were proved to have been on board a vessel which was totally lost at sea (*k*).

(*b*) The circumstances to be considered are—whether a spinster or married: if married, how long, whether husband alive or dead, whether children or not, and when last child was born. See *In re Thornhill*, [1904] W. N. 112, and the next four cases in the text.
(*c*) 22 W. R. 639.
(*d*) L. R. 14 Eq. 245.
(*e*) 9 Ch. D. 388.
(*f*) [1901] 1 Ch. 570.
(*g*) *Sillick* v. *Booth*, 1 Y. & C. 117.
(*h*) *Wing* v. *Angrave*, 8 H. L. Cas. 183; Cockle, 21.
(*i*) *In the Goods of Wheeler*, 31 L. J. P. M. & A. 40.
(*k*) *In the Goods of Alston*, [1892] P. 144.

Again, every person acquires a domicil of origin at birth, which is that of the father at that date in the case of a legitimate child, and that of the mother in the case of an illegitimate child; this domicil continues until it is abandoned and a new one acquired. The presumption is in favour of the continuance of the domicil of origin, and the burden of proof is on those who allege the acquisition of a new one. Mere residence, however long, in a country which is not that of the domicil of origin does not prove the abandonment of the old domicil and the acquisition of a new one, but it is an element to be taken into consideration (*l*). But long and continuous residence, coupled with other circumstances, may raise a strong presumption of an intention to renounce the domicil of origin and acquire a new one in a particular country (*m*). The question in all these cases is, had the person whose domicil is in dispute at the time of his death settled in another country with the fixed intention of establishing his domicil there, and abandoning his previous domicil? If not, his domicil of origin continues.

We can here allude only briefly to some other well-known presumptions of law. Take, for example, those relating to the Ownership of Land. When two parishes or properties are separated by a highway, the presumption is that the *medium filum viæ* is the actual boundary (*n*); when they are separated by a river the *medium filum aquæ* is presumed to be the actual boundary. This rule has been also applied to an artificial watercourse (*o*). But by International Law, where two States are bounded by a river, the middle of the navigable channel or

(*l*) *Per* COLLINS, M.R., in *Sourdis* v. *Keyser*, 18 T. L. R. 416.
(*m*) See *Attorney-General* v. *Winans*, 85 L. T. 508; reversed by the House of Lords on the facts (*Winans* v. *Attorney-General*, [1904] A. C. 287).
(*n*) *R.* v. *Strand Board of Works*, 4 B. & S. 526.
(*o*) *Whitmores* v. *Stanford*, [1909] 1 Ch. 427.

*Thalweg* is presumed to be the boundary, with a common right of navigation to both. When there is an island in a river, so that the river is divided thereby into two streams, there is no presumption that the *medium filum* runs through the island (*p*).

The soil of a public highway is presumed to belong to the owners of the adjacent lands *usque ad medium filum viæ* (*q*), and this applies to the case of a street in a town (*r*). It does not, however, apply in the case of ground which is intended to be used as a highway, but has not been dedicated to the public (*s*). The rule is thus stated by COTTON, L.J. (*t*):—

> "The rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument, half the bed of the river or half of the road passes, unless there is enough in the circumstances, or enough in the expressions of the instrument, to show that it is not the intention of the parties."

The presumption that the bed and soil of a stream belong to the riparian owners does not apply to a large non-tidal and navigable lake (*u*). Where there is a metalled road bordered by unmetalled margins, there is a presumption—of course, a rebuttable one—that the highway extends up to the fences (*x*). So, in a recent case, it was held that when a highway runs between two fences the public have a *primâ facie* right

(*p*) *Great Torrington Commons Conservators* v. *Moore Stevens*, [1904] 1 Ch. 347.

(*q*) For cases in which the presumption was rebutted, see *Pryor* v. *Petre*, [1894] 2 Ch. 11; *Plumbley* v. *Lock*, 67 J. P. 237; *Mappin* v. *Liberty*, [1903] 1 Ch. 118.

(*r*) *In re White's Charities*, [1898] 1 Ch. 659.

(*s*) *Leigh* v. *Jack*, 5 Ex. D. 264.

(*t*) *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. at p. 145.

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

(*x*) *Belmore* v. *Kent County Council*, [1901] 1 Ch. 873 (in which case the presumption was rebutted). See also *Neeld* v. *Hendon Urban Council*, 81 L. T. 405; *Simcox* v. *Yardley Rural Council*, 69 J. P. 66.

over the whole space, and are not confined to the metalled part of it (*y*).

There are also a number of presumptions which arise in connection with Bills of Exchange. Thus, every person whose signature appears on a bill is *primâ facie* deemed to have become a party to it for value. Again, every holder of a bill is *primâ facie* deemed to have become the holder of it before it was overdue, in good faith, for value, and without notice of any defect in the title of the person from whom he took it. But if in an action on a bill it is admitted or proved that there was any fraud or illegality in the acceptance, issue, or subsequent negotiation of the bill, the burden of proof is shifted, and the holder must prove that after such fraud or illegality value was in good faith given for the bill (*z*). The possession of a bill of exchange (*a*) or promissory note (*b*) by the drawer or maker raises the presumption that it has been paid.

Similarly, by the Bills of Lading Act, 1855 (*c*), section 3—

"Every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board; provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims."

It has been held that this section does not estop the owners of a ship from showing the incorrectness of the bill of lading signed by the ship's agent as to the

(*y*) *Offin* v. *Rochford Rural Council*, [1906] 1 Ch. 342.
(*z*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 30; *Tatam* v. *Haslar*, 23 Q. B. D. 345.
(*a*) *Gibbon* v. *Featherstonehaugh*, 1 Stark. 225.
(*b*) *Bembridge* v. *Osborne*, 1 Stark. 374; *Doe* v. *Thomas*, 9 B. & C. 288.
(*c*) 18 & 19 Vict. c. 111.

weight of goods actually shipped (*d*); and in an action for freight the master is not estopped from denying the amount of goods actually received, though he would be estopped in an action against the owners for non-delivery (*e*).

In many cases it has been held that no presumption of law arises. Thus, as we have seen (*f*), although the absence of a man for seven years will, in certain circumstances, raise a presumption that he is dead, there is no presumption as to the exact date within those years on which he died. So, too, if a man engaged on board ship falls overboard and is drowned, but there is nothing to show what were the circumstances, no presumption arises that he was drowned by an accident which arose "out of his employment" (*g*). Again, if the lessor be proved to be in possession of an indenture of lease with the seals cut off, the Court will not presume that the lessee surrendered the term in the manner required by law (*h*). Nor, if a man give a bond to a woman with whom he is then cohabiting, will the presumption arise that it was in consideration of her consenting to continue the cohabitation in the future (*i*).

Again, the so-called presumptions of Satisfaction, Ademption, and Advancement, which are so often met with in Courts of Equity, are not presumptions of law at all. They are rules which have been laid down to enable judges to decide issues of fact according to fixed principles—such issue of fact generally being, What was the intention of the party?

(*d*) *Jessel* v. *Bath*, L. R. 2 Ex. 267.
(*e*) *Blanchet* v. *Llantivit Colliery Co.*, L. R. 9 Ex. 77.
(*f*) See *ante*, p. 411.
(*g*) *Marshall* v. *Wild Rose*, [1909] 2 K. B. 46; *Bender* v. *Zent*. *ibid*., p. 41; but see *Low* v. *General Steam Fishing Co.*, [1909] A. C. 523.
(*h*) *Doe* v. *Thomas*, *suprà*.
(*i*) *Vallance* v. *Blagden*, 26 Ch. D. 353.

Using the word "presumption" in the narrower sense indicated at the commencement of this chapter, it is seldom, if ever, possible that presumptions should conflict; and it is not clear what the law is should such a conflict arise. It has been said that in such a case, the stronger prevails, but where there are two presumptions both of which must be drawn as a matter of law there is nothing to show which is the stronger. Both, surely, must be equally strong. Mr. Best has suggested (i.) that special presumptions are stronger than general; (ii.) that those drawn from the course of nature are stronger than casual presumptions; and (iii.) presumptions are favoured which give validity to acts; (iv.) the presumption of innocence is favoured in law. These rules, however, are of little practical assistance. The true position appears to be that where presumptions conflict, the whole of the facts must be left to the jury as evidence upon which they are to decide (*k*).

(*k*) See *R.* v. *Willshire*, 6 Q. B. D. 366.

## CANADIAN NOTES.

### PRESUMPTION OF REGULARITY.

It was held in *Ex parte Doherty*, 27 N. B. 405, where a proclamation of the Governor-General directed a poll to be held on June 25th, to take the votes of electors under the Canada Temperance Act, and stated that if the petition was adopted, the Governor-General might, after the expiration of sixty days therefrom, declare that the Act should be in force on the expiration of the existing licences in the county, that, in the absence of evidence to the contrary, it might be presumed that the vote was taken on the day appointed, and, therefore, that a proclamation on September 1st, bringing the Act in force on the expiration of the existing licences, sufficiently showed that sixty days had elapsed since the adoption of the petition.

In an affidavit on which perjury was assigned, there was no statement as to where it had been sworn, either in the jurat or elsewhere, except the marginal venue, "Canada, County of Grey, to wit," but the contents showed that it related to lands in the County of Grey, and it was proved that defendant subscribed the affidavit, that the party before whom it purported to have been sworn was a justice of the peace for that county and had resided there for some years, that the affidavit had been received through the post office by the agent of the Crown Lands there, by whom it was forwarded to the Commissioner of Crown Lands, and that subsequently a patent for the lot issued to the party on whose behalf

the affidavit had been made. This was held to be evidence from which it was to be inferred that the affidavit was sworn in the County of Grey, and it was held that the jury had properly so found. *R.* v. *Atkinson*, 17 U. C. C. P. 295.

The certificate on a married woman's deed, twenty-five years old, signed by two justices, was as follows: "Midland District, to wit: Be it remembered, that on the 8th May, 1843, R. G., wife of the within named L. G. who, being examined by us, separate and apart from her said husband, touching her consent to surrender and give up to the within named H. S., his heirs and assigns, all her right and title, etc." This was held sufficient, because the venue sufficiently showed where the examination took place, and an admission which was made of the justice's authority must be taken to mean their authority as justices for that district, and as the names of the two witnesses to the deed were the same as those of the justices, and the handwriting similar, and the date of the deed and certificate the same, it might be inferred that the execution took place in their presence. *Simpson et al.* v. *Hartmen*, 27 U. C. Q. B. 460.

In an action of trover for timber cut on land covered by timber licences issued to the plaintiff, the question being whether the licences were sufficiently proved, the evidence was as follows: The Crown timber agent for the territory in which the lands were situate stated that he was such agent and was gazetted to that office in 1854, that he had acted as such ever since, and that his acts were sanctioned by the Crown Lands Department, that part of his duty was to issue such licences under instructions from the Crown Land Office; and the licences being shown to him, he said he had signed and issued them in the regular course of his duty as such agent. It was contended that the plaintiff should have gone further and proved the agent's appointment good *in omnibus*, but it was held that the licences had been

sufficiently proved. *Boyd et al.* v. *Link*, 29 U. C. Q. B. 365.

Where a conviction was attacked on the ground that the magistrate was out of his jurisdiction at the time of issuing the summons, the affidavit was merely of information and belief, without stating the grounds for the belief. It was held that the fact of the judge granting the summons afforded some ground in a doubtful case for the presumption that he was acting within his jurisdiction. *R.* v. *Johnson*, 27 N. S. R. 298.

In an action of ejectment by the sheriff's vendee of land under sale on *fieri facias* it was held that the production of the *ven. ex.* under which the sale took place, and of the sheriff's deed which recited the *fieri facias*, was sufficient *primâ facie* evidence to enable the plaintiff to recover against the judgment debtor. *Low* v. *Hicks*, 21 U. C. C. P. 113.

In ejectment by a purchaser of lands sold under an execution, the sheriff's deed was held *primâ facie* evidence that the writ was delivered to the sheriff, and the land seised and sold under it. *Doe* e. d. *Spafford* v. *Brown*, 3 U. C. O. S. 90 (3 Will. IV.).

In an action of ejectment under a sheriff's deed by the execution creditor, the vendee of the sheriff, against the debtor, the plaintiff need not prove the judgment, but may rely upon proof of the sheriff's deed and sale by him under the *fi. fa.*

The plaintiff produced the original judgment, but, upon its being objected that it was not stamped, he withdrew it by leave of the Court, and rested his case upon the *fi. fa.* lands.

It was held that the judgment having been withdrawn as evidence by leave of the Court, must be considered as if it had never been offered, and *semble* that

the defendant's proper course, if he desired to show the invalidity of the judgment and the execution issued under it, was to have given it in evidence himself. *Ralston* v. *Hughson*, 17 U. C. C. P. 364.

In an action of dower, where the plea was *ne unques accouple*, evidence of cohabitation and reputation of marriage was held sufficient in *Stoner* v. *Walton*, 6 U. C. Q. B. O. S. 190 (1841), and it was not necessary to prove the marriage by persons present at the ceremony.

A presumption of marriage, arising from reputation, may be rebutted by proof that the woman formerly lived with another man in such a manner as to raise the same presumption of marriage with him. *George* v. *Thomas*, 10 U. C. Q. B. 604.

In *Street* v. *Dolsen*, 14 U. C. Q. B. 537, the demandant in an action of dower relied upon evidence of cohabitation and reputation to prove the marriage said to have taken place in the United States.

ROBINSON, C. J., said that in the cases in this Court of *Stoner* v. *Walton*, 6 O. S. 190, and *Phipps* v. *Moore*, 5 U. C. R. 16, it had been held that in an action of dower, upon a plea denying the marriage, such evidence might be received. "It may be thought, perhaps, the Court took rather questionable ground in admitting proof of reputation and cohabitation in such cases. We had no express authority for it, nor, I think, any against it, and we ventured to rule as we did from a consideration of the impossibility, in many cases, of obtaining any other proof here of the marriage of parties, especially in humble stations of life, who have been emigrating to this country by thousands annually for forty years, and by the further consideration that where proof could be obtained, in Ireland, for instance, upon commission, the expense of obtaining it would in some cases, perhaps in many, exceed the value of the dower which the widow is claiming."

Where a marriage in fact has been proved, evidence of reputation and cohabitation is not sufficient to establish a prior marriage. *Doe* e. d. *Wheeler* v. *MacWilliams*, 3 U. C. Q. B. 165.

In *Doe* e. d. *Breakey* v. *Breakey*, 2 U. C. Q. B. 349, it was held that proof of marriage by reputation and cohabitation for twenty or thirty years was sufficient in ejectment, and if the presumption arising therefrom was to be rebutted, it must be by positive testimony.

*Presumption against Spoliator.*

The Exchequer Court dismissed a petition of right in which the claim was for a balance alleged to be due on a contract for certain public works. Certain time-books and books of account, as well as documents on which the accounts were made up, had disappeared, and the Exchequer Court, acting on the presumption *omnia præsumuntur contra spoliatorem*, dismissed the petition. The Supreme Court of Canada held that the principle had been carried too far. "The presumption against the spoliator could be removed, and in the present case the evidence shows that the books, if produced, would have corroborated instead of negativing the petitioner's right to recover." *St. Louis* v. *R.*, 25 S. C. R. 649.

*Presumption of Death after Seven Years.*

The heir of A. brought an action of ejectment against the purchaser under a sheriff's sale, and attempted to recover upon the ground that after so many years (about fifteen) had elapsed over and above the seven years the law presumed A. to have been living since he was last heard of, the presumption that he did not die till the expiration of the seventh year, though there was no circumstance in evidence to

show that he died earlier, was at an end, and that it was incumbent upon the purchaser at sheriff's sale to show that he did not in fact die till after the seventh year, and that the jury should be directed to find whether he did or did not die within the term of seven years; but it was held that the proper direction to give the jury was that at the end of seven years the fact of death was to be presumed, and not sooner, unless there was some evidence affecting the probability of life continuing so long, and also that it was incumbent on the heir of A. and not upon the purchaser on the *fi. fa.* to show when A. died. *Doe* e. d. *Hagarman* v. *Strong et al.*, 4 U. C. Q. B. 510. Affirmed in 8 U. C. Q. B. 291.

To prove that her first husband was dead, a wife, complaining of non-support by her second husband, proved that she never lived with him, although married in 1866, that in 1888 she had received a letter stating that he was dying in the United States, and that was the last she had heard from him, save that a year after her marriage with the defendant she heard that he was dead. It was held that this was evidence to go to the jury of the death of the first husband. *R.* v. *Holmes*, 29 O. R. 362.

In *Giles* v. *Morrow*, 1 O. R. 527, it was held that the presumption of death, arising from continued absence of the demandant's husband, unheard of for seven years, is sufficient to sustain an action of dower as against the objection that he is still living.

## CHAPTER XII.

### ADMISSIONS.

THE burden of proof is also lightened when the opposite party has admitted all or some of the facts upon which his opponent relies. An admitted fact need not be proved.

There are two kinds of admissions :—

I. Formal, made intentionally with a view to the proceedings.

II. Informal, made without any reference to proceedings.

Formal admissions may be made in six ways: (i.) on the pleadings; (ii.) in answer to interrogatories; (iii.) in answer to a notice to admit specified facts; (iv.) in answer to a notice to produce and admit documents; (v.) by the solicitor of a party during the litigation; and (vi.) in open Court by the litigant himself, and also by his advocate. A person charged with a criminal offence can admit the truth of the charge, but it seems still to be the law that if he pleads "Not guilty" he cannot lighten the task of the prosecution by admitting any incidental fact which is a stage in the proof of his guilt.

An informal admission may be made in any way. It has therefore much less weight than a formal admission, and may be much more easily explained away. But, if clearly proved and sufficiently explicit in itself, it shifts the burden of proof. The

only exceptions to the admissibility of informal admissions are, that in criminal cases a "confession" cannot be put in evidence if it has been obtained by improper inducements (*a*), and in civil cases admissions made in communications held "without prejudice" are excluded (*b*).

A person who is of full age and sound mind is bound by admissions made by himself or his agent, but the admissions of agents only bind the principal when the agent has authority to make them on his behalf. Thus, a general agent may bind his principal by admissions in the usual course of business; but a particular agent's authority is strictly limited to the actual business which he is employed to do, and his admissions will only bind his principal if made during his employment and within the scope of his duty. A person is also bound by admissions made by anyone through whom his title or claim is derived, when such person had the same interest or estate as the present party now has. A person who has a representative capacity can make admissions, which are evidence against those whom he represents, provided he has made them while acting in that capacity and in reference to it; and then such admissions are not evidence in actions against him personally. But the committee of a lunatic has no authority to bind the lunatic.

The proof of an admission is not hearsay. The precise words of the admission are material, and must be proved by primary evidence.

Admissions resemble presumptions in that they

(*a*) See *ante*, pp. 105 *et seq.*
(*b*) See *ante*, p. 292.

are conclusive as to the facts to which they relate, unless the party against whom they are tendered brings forward evidence to destroy them or explain them away; they differ from estoppels, however, for it is of the essence of an estoppel that the party who is estopped cannot bring forward any evidence to contradict his former conduct—in other words, an estoppel is a conclusive admission (*c*).

As BAYLEY, J., said, in *Heane* v. *Rogers* (*d*):—

"There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence—and strong evidence—against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and that he is not estopped or concluded by them, unless another person has been induced by them to alter his condition: in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction; but as to third persons he is not bound."

We will now deal in the first place with Formal Admissions.

## I. FORMAL ADMISSIONS.

### (1) *On the Pleadings.*

Any party to a civil action may expressly admit facts on his pleadings, etc. Thus, by R. S. C., Order XXXII., r. 1:—

"Any party to a cause or matter may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party."

In addition to such express admissions, a party may by not pleading, or insufficiently pleading, to an allegation of fact, impliedly admit it, Order XIX., r. 13, providing that—

"Every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication,

(*c*) Cf. *R.* v. *Erdheim*, [1896] 2 Q. B. p. 270.
(*d*) 9 B. & C. at p. 586.

or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition."

There are three exceptions to this rule :—

(i.) By Order XXI., r. 4 :—

"No denial or defence shall be necessary as to damages claimed or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted."

(ii.) A defendant in possession, in an action to recover land, need not plead his title unless his defence rests upon an equitable estate or right, or he claims relief upon any equitable ground, it being provided by Order XXI., r. 21, that, except in such cases, a plea that he is in possession shall be a sufficient denial of the plaintiff's allegations.

(iii.) The plea of "Not Guilty by Statute" (which now, however, is very seldom pleaded) (*e*) also impliedly traverses all material allegations of fact in a statement of claim.

The effect of payment into court as an admission of liability is now governed by Order XXII. of the R. S. C., 1883. Under Rule 1 of this Order (which is confined to actions to recover a debt or damages and Admiralty actions) a defendant may pay money into court by way of satisfaction, which admits the claim or cause of action in respect of which the payment is made, or he may, with a defence denying liability (except in actions or counterclaims for libel or slander), pay money into court, which will be subject to the provisions of Rule 6. Payment into court without a denial of liability is only an admission of liability up to the amount paid in. Therefore, where, in an action on a bill for work done, the defendants paid in £10 without any denial of liability, the defendants were held not precluded from showing that the work was not done at their request

(*e*) See the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2.

except as to that amount (*f*). Payment into court with a denial of liability is not an admission of the cause of action (*g*), although, under Rule 6, the plaintiff may accept it in satisfaction of the claim or cause of action in respect of which the payment into court has been made, in which case he is entitled to have the money paid out to him, and to sign judgment for his costs to date. If payment is made with denial of liability, but at the same time a formal admission is made that liability is not disputed, the defence will be struck out (*h*).

(2) *In Answer to Interrogatories* (*i*).

After the pleadings are closed and before the trial, either party may in a proper case obtain an order that his opponent shall answer certain written questions. The chief object of these questions is to obtain admissions that will save trouble and expense at the trial. Answering interrogatories differs from pleading to the allegations in a statement of claim or defence in these respects:—

(a) The party interrogated must answer them;

(b) He must answer them fully and fairly;

(c) He must answer the substance and not the letter of the question;

(d) He must answer them on oath.

In this case, therefore, he is compelled to make admissions, but he cannot be compelled to answer anything which is not within his own knowledge, unless he can obtain it from persons in his employment, who must have acquired their knowledge in the course of their employment (*j*).

(*f*) *Hennell* v. *Davies*, [1893] 1 Q. B. 367.

(*g*) *Coote* v. *Ford*, [1899] 2 Ch. 93.

(*h*) *Critchell* v. *London and South Western Rail. Co.*, [1907] 1 K. B. 860.

(*i*) This subject is more fully dealt with in Book IV., Chap. II., *post*, p. 615.

(*j*) *Bolckow Vaughan & Co.* v. *Fisher*, 10 Q. B. D. 161; *Rasbotham* v. *Shropshire Union, etc. Co.*, 24 Ch. D. 110; *Hall* v. *London and North Western Rail. Co.*, 35 L. T. 848; *Ehrmann* v. *Ehrmann*, [1896] 2 Ch. 611; *Welsbach etc. Co.* v. *New Sunlight Co.*, [1900] 2 Ch. 1.

(3) *On Notice to Admit Facts.*

In order to save expense and facilitate proceedings, it is usual and right for each party, previous to trial, to call on the opposite party to make various admissions. These admissions are now regulated, in the High Court, by Order XXXII., r. 4, which provides:—

"Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the Court or a judge certify that the refusal to admit was reasonable, or unless the Court or a judge shall at any time otherwise order or direct. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: provided also, that the Court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just."

The party served with such a notice is not bound to admit anything; hence the power to serve a notice to admit facts is not used as freely as it ought to be. But a refusal to make proper admissions may affect costs. And it should be noted that, unlike interrogatories, a notice to admit facts may be served in respect of things ancient (such as the death of an ancestor), or things only known to the other side or to a third person.

(4) *On Notice to Admit Documents.*

A notice to admit may be served, not only as to facts, but also as to documents. It is provided, by Order XXXII., r. 2, that—

"Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or

neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the Court or a judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense" (*k*).

This rule is substantially the same as Order XXXII., r. 2, of the R. S. C., 1875, and is also similar to the practice existing prior to 1875 under the Common Law Procedure Act, 1852 (*l*), and the Chancery Amendment Act, 1858 (*m*). Under those Acts it was held that a party, by admitting a document, does not thereby in any way recognise its legal validity, but merely enables the opposite party to dispense with the usual evidence which would otherwise be necessary to bring it before the Court. Thus, when a party admitted his signature to a bill of exchange, he was still allowed to object to the insufficiency of the stamp (*n*); and an admission on notice of certain documents which were described as copies of, or extracts from, certain original documents, was held not to make such copies evidence, in the absence of sufficient reason for the non-production of the originals (*o*). An admission of a bill of exchange drawn by the plaintiff, directed to the defendants, "and accepted by one H. B. for the defendants," was held to estop the defendants from disputing H. B.'s authority to accept (*p*); so it has been held that, after admission of a deed, no objection can be taken to an erasure or interlineation which may appear (*q*). Where the defendant objected at the trial to an unexplained interlineation in

(*k*) A similar provision is contained in the County Court Rules, 1903, Order XVIII., r. 6.
(*l*) 15 & 16 Vict. c. 76.
(*m*) 21 & 22 Vict. c. 27.
(*n*) *Vane* v. *Whittington*, 2 Dowl. (N.S.) 757.
(*o*) *Sharpe* v. *Lamb*, 11 A. & E. 805.
(*p*) *Wilkes* v. *Hopkins*, 1 C. B. 737.
(*q*) *Freeman* v. *Steggal*, 14 Q. B. 202.

a deed which had been admitted without objection, COLERIDGE, J., said :—

"Before a party admits a deed, it is produced to him for the very purpose of enabling him to inspect it, and say whether he objects to its admission in the form in which it appears to be written. Here it must be considered, either that the defendant really admitted that the deed was correct and the interlineation no objection, or that the admission was made with the dishonest intention of entrapping the plaintiff; and as it must be presumed that the defendant acted upon the inspection of the deed upon which he had a right to act, I think the objection has been waived under the notice to admit."

Where there is a variance in date between the document admitted and that which is produced, it will be immaterial, unless the opposite party has been misled by it (*r*); but it ought to be shown that the document admitted and that produced are the same (*s*).

The Courts will not sanction any agreement for an admission by which any of the known principles of law are evaded. No effect, therefore, will be given to an agreement to waive an objection arising from a deed not having been stamped (*t*).

### (5) *Admissions by Solicitors.*

A solicitor is presumed to have a general authority for whatever he may say or do on behalf of his client in the conduct of a case: and his authority to make admissions will be implied when he has been proved to be the solicitor on the record (*u*). In *Young* v. *Wright* (*v*), Lord ELLENBOROUGH said :—

"If a fact is admitted by the attorney on the record with intent to obviate the necessity of proving it, he must be supposed to have authority for the purpose, and his client will be bound by the admission; but it is clear that whatever the attorney says in the course of conversation is not evidence in the cause" (*x*).

(*r*) *Field* v. *Fleming*, 5 Dowl. 450.
(*s*) *Clay* v. *Thackrah*, 9 C. & P. 47.
(*t*) *Owen* v. *Thomas*, 3 Myl. & K. 357.
(*u*) *Gainsford* v. *Grammar*, 2 Camp. 9.
(*v*) 1 Camp. 159.
(*x*) See *Petch* v. *Lyon*, 9 Q. B. 147.

The solicitor on the record is bound by the acts of his London agent, and so is the client if it is not in defiance of his direct and positive instructions (*y*); the same rule applies when a London solicitor employs a country solicitor as his agent before a district registry.

Where an attorney on the record gave the following undertaking: "I hereby undertake to appear for A. and B., joint owners of the sloop *Arundel*," this was held sufficient *primâ facie* evidence that A. and B. were such joint owners (*z*); but an admission before action by an attorney, who afterwards appeared on the record, has been held insufficient without proof that he was authorised at the time to make the admission (*a*). An admission by a solicitor's clerk or agent is as valid as an admission by the solicitor himself (*b*). Where the defendant's attorney, after a controversy had arisen, admitted in conversation with the plaintiff's attorney that his client's title was under B., and ended with B., and the plaintiff claimed as a remainderman after B., this was held to be a good admission of B.'s title (*c*). So, in an action on a bill, an admission by the defendant's attorney that the acceptance was in his client's handwriting is evidence of acceptance without production of the bill (*d*). Of course, the client is not bound by admissions made by his solicitor fraudulently (*e*).

If in delivering a defence the solicitor for the defendant makes a formal admission that the defendant will not set up one of the defences pleaded, the whole defence will be struck out as an abuse of the process of the Court (*f*).

(*y*) *Carruthers* v. *Newen*, [1903] 1 Ch. 812.
(*z*) *Marshall* v. *Cliff*, 4 Camp. 133.
(*a*) *Wagstaff* v. *Wilson*, 4 B. & Ad. 339.
(*b*) *Taylor* v. *Willans*, 2 B. & Ad. 845.
(*c*) *Dorrett* v. *Meux*, 15 C. B. 142.
(*d*) *Chaplin* v. *Levy*, 9 Ex. 531.
(*e*) *Williams* v. *Preston*, 20 Ch. D. 672.
(*f*) *Critchell* v. *London and South Western Rail. Co.*, [1907] 1 K. B. 860.

### (6) *Admissions by Counsel.*

It has been said that if the parties have a particular controversy, and it seems plain that a certain fact is admitted, the jury, as men of common sense, may draw the same conclusion as to that fact as if it were formally proved before them (*g*); and therefore it has been suggested that if counsel opens statements which he does not prove, the opposite party may treat them as admissions; but this doctrine has been disputed in a later case (*h*). Generally counsel have authority to make all admissions in civil cases, which they may think proper in the conduct of a case (*i*), unless expressly forbidden so to do (*k*), and accordingly a special case signed by counsel on each side, at a formal trial, has been held evidence of all the facts therein stated, at a subsequent trial (*l*); but ordinary and less formal admissions by counsel at a former trial are not evidence on a subsequent trial (*m*). When counsel with the authority of their clients consent to an order, the clients cannot arbitrarily withdraw such consent (*n*).

In criminal matters, the solicitor of the accused cannot make admissions nor, it seems, can his counsel at the trial (*o*). As to the accused himself, before the magistrates he is always asked whether he wishes to make a statement, and at the same time is cautioned that what he says will be taken down in writing and may be given

(*g*) *Per* ALDERSON, B., in *Stracy* v. *Blake*, 1 M. & W. at p. 173.
(*h*) *Duncombe* v. *Daniell*, 8 C. & P. 222; cf. *Machell* v. *Ellis*, 1 Car. & K. 682; *Darby* v. *Ouseley*, 1 H. & N. 1.
(*i*) *Swinfen* v. *Chelmsford*, 5 H. & N. 890.
(*k*) *Neale* v. *Gordon-Lennox*, [1902] A. C. 465; *Kempshall* v. *Holland*, 14 R. 336.
(*l*) *Van Wart* v. *Woolley*, Ry. & M. 4; *Swinfen* v. *Swinfen*, 18 C. B. 485.
(*m*) *Colledge* v. *Horn*, 3 Bing. 119.
(*n*) *Harvey* v. *Croydon Union Rural Sanitary Authority*, 26 Ch. D. 249.
(*o*) *R.* v. *Thornhill*, 8 C. & P. 575.

in evidence against him at his trial (*p*). The statement made in response to this inquiry often contains damaging admissions. It is almost invariably put in by the counsel for the prosecution as part of his case, whether it tells in favour of the prisoner or against him. When the prisoner is arraigned, he frequently pleads "Guilty," and on this admission he is sentenced without any other evidence of his guilt being given. So, in criminal proceedings for libel, if the defendant does not plead a justification under Lord Campbell's Libel Act, in addition to a plea of "Not guilty," he will be deemed to have admitted that the words are false. Again, if a prisoner elects to go into the witness box and give evidence on oath, he will be cross-examined with the object of proving that he is guilty of the crime of which he then stands charged, and, under such cross-examination, he frequently makes admissions which will be pressed upon the jury against him. But it appears still to be the law that an accused person cannot in any other way make incidental admissions in the course of the trial to facilitate the proof of the case for the prosecution.

## II. INFORMAL ADMISSIONS.

Informal admissions may be either in writing or oral, or even by conduct. They may have been made in business correspondence or in casual conversation long before any litigation began or was even contemplated, and with no intention of making a binding admission. They are therefore more easily explained away than formal admissions. But if sufficiently clear they shift the *onus* of proof.

Admissions need not be in express words. They may be gathered from a mere narrative or description. Thus

(*p*) See *ante*, pp. 111, 112.

a catalogue of goods, described as belonging to A., "a bankrupt," was held to be an admission of the auctioneer issuing the catalogue that A. was bankrupt (*q*).

Admissions may also be made by conduct, and even sometimes by mere silence. Thus it has been said that a declaration in the presence of a party to a cause is evidence, as we have seen, because it is important to observe the conduct of the party upon hearing it. He may admit it or deny it, and even silence may be significant (*r*). Silence, indeed, is worth very little where the party hearing it has no means of knowing the truth or falsehood of the statement (*s*), or where the circumstances are such that he could not be expected to contradict the statement (*t*); *e.g.*, when he is in court during the examination of a witness. A mere conditional acknowledgment of liability, in the event of a party primarily liable not paying, will not dispense with the necessity of formal notice of dishonour of a bill (*u*). Where, however, the indorser of a bill, being told that the holders were about to take proceedings against him, said he would pay if time was given him, it was held that he had waived his right to notice of dishonour (*x*). In settlement cases, proof that a parish has given relief to a pauper for seven years has been held to be evidence that the pauper was settled in that parish (*y*). So, the fact that relief was given to a pauper residing out of the relieving parish admits a settlement (*z*); but mere relief of casual paupers is no evidence of a settlement (*a*), even where the relieving parish has enabled the pauper to remove to

(*q*) *Maltby* v. *Christie*, 1 Esp. 340; Cockle, 102.
(*r*) *Price* v. *Burva*, 6 W. R. 40.
(*s*) *Per* PARKE, B. in *Hayslep* v. *Gymer*, 1 A. & E. 163; cf. *Neile* v. *Jakle*, 2 Car. & K. 709.
(*t*) *Boyd* v. *Bolton*, Ir. R. 8 Eq. 113; *Bessela* v. *Stern*, 2 C. P. D. 265; Cockle, 102.
(*u*) *Hicks* v. *Duke of Beaufort*, 4 Bing. N. C. 229.
(*x*) *Woods* v. *Dean*, 3 B. & S. 101.
(*y*) *R.* v. *Barnsley*, 1 M. & S. 377.
(*z*) *R.* v. *Edwinstowe*, 8 B. & C. 671.
(*a*) *R.* v. *Chatham*, 8 East, 498.

another parish (*b*). Proof that a party to an action (though not himself examined) has requested others to give false evidence, is evidence against him as an admission against his own case (*c*).

Acquiescence in an act is evidence of an admission; but, to make it so, it has been said that it must exhibit some act of the mind, and amount to voluntary demeanour or conduct of the party. In order that the non-repudiation by a principal of an unauthorised act of an agent should bind the principal, it must be shown that the latter had present to his mind proper materials on which to exercise his election (*d*).

"Acquiescence and ratification must be founded on a full knowledge of the facts; and further, it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction" (*e*).

If an account be delivered and retained for a considerable time without objection, the recipient will be taken to admit that it is correct (*f*); and where an account has been stated, and a bill given for the amount, the debtor cannot, in an action on the bill, impeach the charges (*g*). An objection to one of several items in an account, without remark as to the others, is evidence of an admission that the others are correct (*h*). The fact that a course of dealing has taken place between the parties for a considerable time, and one of them never objected, is evidence against him that he acquiesced in that course as being a proper one (*i*). An account sent by a creditor to a debtor is an admission by the creditor

(*b*) *R.* v. *Trowbridge*, 7 B. & C. 252.
(*c*) *Moriarty* v. *London, Chatham and Dover Rail. Co.*, L. R. 5 Q. B. 314; Cockle, 105.
(*d*) See *De Bussche* v. *Alt*, 8 Ch. D. 286.
(*e*) *Per* Lord FITZGERALD in *La Banque Jacques Cartier* v. *La Banque d'Epargne, etc. de Montreal*, 13 App. Cas. 118.
(*f*) *Willis* v. *Jernegan*, 2 Atk. 252.
(*g*) *Knox* v. *Whalley*, 1 Esp. 159.
(*h*) *Chisman* v. *Count*, 2 Man. & G. 307.
(*i*) See *Williamson* v. *Williamson*, L. R. 7 Eq. 542.

of the terms of the contract so far as they are stated therein (*k*); and this will be so even if the account, although made out, was not sent in (*l*).

A notice to quit lands, which has been served and not objected to, is evidence against the tenant that the tenancy commenced at the season of the year when the notice to quit expires (*m*). So, in an action for use and occupation, payment of rent is evidence of a holding, and of its terms (*n*). The mere omission to take legal proceedings in respect of a wrongful act is not acquiescence in it (*o*).

A party's own statements as to any matter of fact are always evidence against himself, even where they relate to the contents of a deed, or other written instrument (*p*). Thus an abstract or affidavit used by a person on a reference before a master in order to prove title in himself may be received in evidence against him in subsequent litigation (*q*). It will be otherwise if the statement only amounts to an expression of opinion, *e.g.*, on a matter of law (*r*). In *Richards* v. *Morgan* (*s*), CROMPTON, J., said:

"A document knowingly used as true, by a party in a court of justice, is evidence against him as an admission even for a stranger to the prior proceedings, at all events, when it appears to have been used for the very purpose of proving the very fact, for the proving of which it is offered in evidence in the subsequent suit."

So it was held, that an examined copy of answers to interrogatories, filed in the usual way, may be read in evidence against the person making them in a

(*k*) *Morland* v. *Isaac*, 20 Beav. 392.
(*l*) *Bruce* v. *Garden*, 17 W. R. 990.
(*m*) *Thomas* v. *Thomas*, 2 Camp. 647.
(*n*) *Harden* v. *Hesketh*, 4 H. & N. 175.
(*o*) *Fulwood* v. *Fulwood*, 9 Ch. D. 176; cf. *Rowland* v. *Mitchell*, 15 R. P. C. 457; *London, Chatham and Dover Rail. Co.* v. *Ball*, 47 L. T. 413.
(*p*) *Slatterie* v. *Pooley*, 6 M. & W. 664.
(*q*) *Pritchard* v. *Bagshawe*, 11 C. B. 459.
(*r*) *Morgan* v. *Couchman*, 14 C. B. 100.
(*s*) 4 B. & S. 641.

subsequent action to which he is a party, without proof of his handwriting or production of the interrogatories themselves (*t*).

The fact that no reply has been sent to a letter received is, as a rule, not regarded as an admission that the statements in it are correct (*u*). To some letters the only possible reply is a dignified silence. But the circumstances or the relations between the parties may be such that a reply might properly be expected, and in such cases the failure to reply is some evidence that the statements in the letter are true (*x*). The value of the evidence depends upon the circumstances. The subsequent statements of the receiver of the letter are also admissions (*y*).

A wife's confession of her adultery is evidence which is sufficient against her but not against the adulterer (*z*). But the Court is loath to act upon such an admission without corroboration (*a*). Where, however, the confession is clear, distinct, and unequivocal, the Court may act on it without any corroboration (*b*).

It should be remembered that admissions, whether written or oral, which do not create an estoppel, constitute only *primâ facie* and rebuttable evidence against their makers, and those claiming under them.

Thus, by s. 55 of the Conveyancing Act, 1881—

"A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact

(*t*) *Fleet* v. *Perrins*, L. R. 3 Q. B. 536.

(*u*) *Per* BOWEN, L.J., in *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 539.

(*x*) *Per* WILLES, J., in *Richards* v. *Gellatly*, L. R. 7 C. P. 131; *Lucy* v. *Mouflet*, 5 H. & N. 229; but see the remarks of Lord HATHERLEY in *Challis's Case*, L. R. 6 Ch. 266.

(*y*) *Gaskill* v. *Skene*, 14 Q. B. 664.

(*z*) *Robinson* v. *Robinson*, 1 S. & T. at p. 393.

(*a*) *White* v. *White*, 62 L. T. 663.

(*b*) *Robinson* v *Robinson*, *supra*; *Williams* v. *Williams*, L. R. 1 P. & D. 29.

paid or given wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof" (*c*).

A receipt in writing or a parol acknowledgment of the receipt of money is only *primâ facie* evidence of payment. Thus a plaintiff, who had given the defendant a receipt for goods sold with a view to defraud his creditors, can show that no money had passed, and that no sale had ever taken place (*d*). So entries of moneys in the creditor's own books as received are *primâ facie* evidence against the creditor. Entries of payments are not, as a general rule, evidence in his favour, but entries of payments may be so connected with entries of receipts, that if the latter are read against the maker, the former would be admissible in his favour (*e*). Under Order XXXIII., r. 3, of the R. S. C., 1883, the Court or a judge may direct that, in taking an account, the books of account in which the accounts in question have been kept shall be taken as *primâ facie* evidence of the truth of the matters therein contained.

The admission by a partner concerning the partnership affairs is evidence against his co-partners, if made in the ordinary course of business (*f*); that of an agent is evidence against his principal; that of one of several parties jointly interested is evidence against the others or other of them; and that of a predecessor in title or privy in estate is evidence against the successor in title or interest (*g*).

Thus, the admission by one of several plaintiffs, who are sued as partners, that the subject-matter of the action was his own personal contract, has been received as evidence to bar the action (*h*). And generally, in

(*c*) 44 & 45 Vict. c. 41.
(*d*) *Bowes* v. *Foster*, 2 H. & N. 779; *Abner* v. *George*, 1 Camp. 392, is no longer law.
(*e*) *Per* KINDERSLEY, V.-C., in *Reeve* v. *Whitmore*, 2 D. & S. 450.
(*f*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 15.
(*g*) *Woolway* v. *Rowe*, 1 A. & E. 114; Cockle, 109
(*h*) *Lucas* v. *De la Cour*, 1 M. & S. 249.

partnership transactions, the representations, although tortious or fraudulent, of a partner are binding on his co-partners (*i*). So, the admission of a retired partner as to a partnership transaction while he was in the firm, is evidence in an action against a continuing partner (*k*); and admissions made by one partner after dissolution are admissible to prove payment of a partnership debt before dissolution (*l*).

When there is a joint interest, the admissions of one party concerning a fact material to the joint interest are generally evidence against another joint party (*m*). Thus, an admission by an executor, *qua* executor, is evidence against his co-executor (*n*), except perhaps under special circumstances (*o*). A receipt by one of two trustees is evidence against both of the payment (*p*).

The law is different in the case of joint contractors; for by s. 1 of Lord Tenterden's Act (*q*), it was enacted, that no joint contractor shall lose the benefit of the statute by the written acknowledgment or promise of another; though the effect of payment by one of such joint contractors is expressly reserved to continue as before the statute (*r*); but by the Mercantile Law Amendment Act, 1856 (*s*), no co-contractor or co-debtor, whether liable jointly only, or jointly and severally, will lose the benefit of the Statutes of Limitation, by reason only of payment of any principal, interest, or other money by any other co-contractor or co-debtor.

Before the acts or acknowledgment of one party can be made evidence against another, it must be proved

(*i*) *Rapp* v. *Latham*, 2 B. & Ald. 795.
(*k*) *Wood* v. *Braddick*, 1 Taunt. 104.
(*l*) *Pritchard* v. *Draper*, 1 Russ. & My. 191.
(*m*) *Per* LE BLANC, J., in *R.* v. *Hardwick*, 11 East, at p. 589.
(*n*) *Fox* v. *Waters*, 12 A. & E. 43.
(*o*) See judgment of KAY, L.J., in *Peek* v. *Ray*, [1894] 3 Ch., p. 289.
(*p*) *Scaife* v. *Johnson*, 3 B. & C. 421.
(*q*) 9 Geo. IV., c. 14, reversing the rule laid down by Lord MANSFIELD in *Whitcomb* v. *Whiting*, 2 Doug. 652.
(*r*) *Bradfield* v. *Tupper*, 7 Ex. 27.
(*s*) 19 & 20 Vict. c. 97, s. 14.

that such a joint interest existed as creates an express or implied authority to bind (*t*). It is not enough that there should be a mere community without an actual privity of interest. In actions of tort, the admissions of one defendant will not as a general rule affect another defendant. In settlement cases, however, it has been held that the declarations of a rated parishioner are evidence against his own parish (*u*).

In cases of principal and agent, the ordinary rule applies, *Qui facit per alium facit per se*. The distinction between a general agent and a particular agent is well known. In the former case, the agent has an authority to bind his principal when acting within the scope of his authority (*x*). In the latter case, the agent has merely the authority expressly given to him by his principal, and then only on the occasions for which he was employed. Thus, it was said by an eminent judge that when it is proved that A. is general agent of B., whatever A. does, or says, or writes in the making of a contract as agent of B., is admissible in evidence because it is part of the contract which he makes for B., and therefore binds B. (*y*); and the principal's liability towards third parties cannot be restricted by any private arrangement between him and his agent (*z*). It is not necessary to call the agent to prove his admission (*a*). So evidence of an interpreter's version of an agent's language is *primâ facie* correct, and is evidence against the principal without calling the interpreter (*b*).

(*t*) *Dickinson* v. *Valpy*, 10 B. & C. 128.
(*u*) *R.* v. *Hardwick*, 11 East, 578.
(*x*) *Kirkstall Brewery Co.* v. *Furness Rail. Co.*, L. R. 9 Q. B. 468; Cockle, 106; *Great Western Rail. Co.* v. *Willis*, 18 C. B. (N.S.) 748; Cockle, 107.
(*y*) *Per* GIBBS, C.J. in *Langhorn* v. *Allnutt*, 4 Taunt. 519.
(*z*) *Maddick* v. *Marshall*, 18 C. B. (N.S.) 829; *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97.
(*a*) *Irving* v. *Motley*, 7 Bing. 543; *Peyton* v. *St. Thomas' Hospital*, 4 M. & R. 625, n.
(*b*) *Reid* v. *Hoskins*, 6 E. & B. 953.

The admissions of an agent do not bind the principal unless they are made at the very time of the contract (*c*). Thus, a letter from an agent to his principal, containing merely an account of his transactions, is not evidence against the latter (*d*); but where an agent, acting within the scope of his authority, wrote to his principals that he had received a sum of money on their account, and they replied, giving directions as to its disposition, it was held that the agent's statement was evidence that the principals had received the money (*e*). Such admissions, however, do not bind the principal if made on a subsequent occasion, or if they refer to something other than the subject-matter of the agency business (*f*). Thus, to prove possession of goods against a pawnbroker, a statement by his shopman, that it was a hard case on his master, who had advanced money on the goods, was rejected, because making such a statement was not within the scope of the shopman's authority; TINDAL, C.J., said:—

"It is dangerous to open the door to declarations by agents beyond what the cases have already done. The declaration itself is evidence . . . not given upon oath; it is made in his absence, when he has no opportunity to set it aside, if incorrectly made, by any observation, or any question put to the agent. . . . Evidence of such a nature ought always to be kept within the strictest limits to which the cases have confined it" (*g*).

Joint stock companies are bound by the admissions of their directors and other agents who are acting within the scope of their authority, unless they refer to matters *ultra vires* of the company. The secretary of a company is only its agent in so far as he is acting strictly within the powers conferred on him by the directors (*h*). If there are two principals, the statements

(*c*) *Peto* v. *Hague*, 5 Esp. 134; Cockle, 108.
(*d*) *Langhorn* v. *Allnutt*, 4 Taunt. 511; *Admiralty Commissioners* v. *Aberdeen Steam Trawling Co.*, [1909] S. C. 335.
(*e*) *Coates* v. *Bainbridge*, 5 Bing. 58.
(*f*) Story on Agency, s. 135.
(*g*) *Garth* v. *Howard*, 8 Bing. 453.
(*h*) *George Whitechurch, Ltd.* v. *Cavanagh*, [1902] A. C. 117.

of their agent are not evidence for one of such principals against the other (*i*).

Agency must be proved before the admissions can be received; though comparatively slight evidence is received as *primâ facie* evidence of authority. It has even been held that referring one person to another for information may make the latter an agent for the purpose (*k*). And to prove authority to sign a guarantee, evidence that the alleged agent, the defendant's son, had signed for the defendant in three or four instances and accepted bills, was held sufficient *primâ facie* evidence of agency (*l*). So, production of a writ purporting to be signed by the plaintiff's town agent, coupled with a receipt for the sum claimed, purporting also to be signed by such agent, was received to prove a plea of payment (*m*).

If in a criminal prosecution it is necessary to establish that an agent of the accused received certain moneys, this may be proved by the admission of that agent. Thus, on Lord Melville's trial for embezzlement, evidence was received of a receipt of public money by an authorised agent, to show that the money was actually received. Lord ERSKINE said:—

> "The first steps in the proof of the charge must advance by evidence applicable alike to civil and criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a civil or criminal consequence; but it is a totally different question, in the consideration of criminal justice, as distinguished from civil, how the noble person now on trial may be affected by the fact, when so established. The receipt by the paymaster would in itself involve him civilly, but could, by no possibility, convict him of a crime" (*n*).

So, where the wife of a prisoner charged with receiving stolen goods had made out a list of goods and prices at his request, and subsequently handed it to the police

(*i*) *In re Decala Mining Co.*, 22 Ch. D. 593.
(*k*) *Williams* v. *Innes*, 1 Camp. 364; Cockle, 106.
(*l*) *Watkins* v. *Vince*, 2 Stark. 368.
(*m*) *Weary* v. *Alderson*, 2 M. & Rob. 127.
(*n*) 29 How. St. Tr. at p. 746.

in his presence, it was held that such list could be given in evidence against the prisoner (*o*). But an admission of the larceny by the thief cannot be given in evidence on the trial of the receiver to prove that the goods received were stolen (*p*).

The instructions of a principal to his agent are not evidence against the other party to a contract, unless they were communicated to the latter (*q*). The admissions of an infant are generally not evidence against him (*r*); nor, generally, are the admissions of a guardian, or next friend, evidence against an infant who sues by him (*s*). But infants and their guardians and next friends are now compellable to make discovery of documents and to answer interrogatories in the same way as other litigants. An admission by the committee of a lunatic does not bind the lunatic at all (*t*).

A wife has no implied authority to make admissions in prejudice of her husband's rights, even though he may possess such rights *jure uxoris* (*u*); nor can her admission of a tort committed by her be given in evidence to affect her husband in an action in which he is liable for costs and damages (*x*). Where a wife was carrying on business at a distance from her husband, it was held that her admission as to the amount of rent, and the terms of tenancy, was not evidence of the facts against him. ALDERSON, B., said:—

"A wife cannot bind her husband by her admissions, unless they fall within the scope of the authority which she may be reasonably presumed to have derived from him; and where she is carrying on a trade, if it be necessary for that purpose that she should have such a power, she may be his agent to make admissions with

(*o*) *R.* v. *Mallory*, 13 Q. B. D. 33.
(*p*) *R.* v. *Turner*, 1 Moo. 347; *R.* v. *Smith*, 18 Cox, 470.
(*q*) *Smithurst* v. *Taylor*, 12 M. & W. 545.
(*r*) *Holden* v. *Hearn*, 1 Beav. 455.
(*s*) *Cowling* v. *Ely*, 2 Stark. 366; but see *James* v. *Hatfield*, 1 Stra. 548.
(*t*) *Stanton* v. *Percival*, 24 L. J. Ch. 309.
(*u*) *Alban* v. *Pritchett*, 6 T. R. 680.
(*x*) *Denn* v. *White*, 7 T. R. 112.

respect to matters connected with the trade. . . . Here it could not be necessary, for the purpose of carrying on the business of the shop, that she should make admissions of an antecedent contract for the hire of the shop" (*y*).

Whenever it can be inferred, from the antecedents of a case, that a wife had an express or implied authority, as an agent, to bind her husband, her admissions will affect him (*z*). As regards her separate property, the admissions of a married woman are on the same footing as if she were unmarried.

Admissions by a principal are not evidence against a surety, unless connected and contemporaneous with the original transaction. Thus, a surety by bond for the conduct of a clerk has been held not bound by the admissions of the clerk that he had embezzled money (*a*); nor, on a guarantee to pay for goods, is the surety bound by the admission of his principal as to delivery (*b*). Receipts in the books of a deceased collector or clerk may be evidence against a surety, as declarations in the course of business or against interest (*c*).

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

A similar rule holds in cases of partnership and agency, *i.e.*, that the acts or parol arrangements of a partner or agent, made in the ordinary course of business, bind a

(*y*) *Meredith* v. *Footner*, 11 M. & W. 202.
(*z*) *Manby* v. *Scott*, 2 Smith, L. C. 446.
(*a*) *Smith* v. *Whittingham*, 6 C. & P. 78.
(*b*) *Evans* v. *Beattie*, 5 Esp. 26.
(*c*) *Middleton* v. *Melton*, 10 B. & C. 317; *Whitmarsh* v. *George*, 8 B. & C. 556.
(*d*) *Bauerman* v. *Radenius*, 7 T. R. 663.
(*e*) *North* v. *Miles*, 1 Camp. 389.

co-partner or principal respectively, and may therefore be given in evidence for or against him (*f*).

An admission by a person in one capacity does not bind him in another (*g*). Thus declarations by a person before he becomes an executor, administrator, or trustee, are not evidence against him as the holder of such office.

Admissions bind parties and privies, but not strangers. There are three classes of privies, viz., privies in blood (*h*) (*e.g.*, an heir in relation to his ancestor), privies by law (*e.g.*, an executor in relation to his testator), and privies by estate or interest (*e.g.*, purchaser to vendor, donee to donor) (*i*). Thus the admission of the plaintiff's father, who formerly owned the land, that he had not the right claimed by the plaintiff is admissible and can be proved even if the father be alive and present in court (*k*). The estate or interest of a privy by estate may be either legal or equitable; and therefore the admissions of a party to the record are receivable to defeat the interest of a third person, although the person is only a nominal party and trustee for the latter, for the Court will not look on any party to the record as a cipher (*l*). It is doubtful, however, how far the admission of a *cestui que trust* can be received to defeat the claim of the trustee on the record (*m*). The admission of a tenant as to the extent of his landlord's interest does not bind his landlord. Hence, a declaration by a tenant that he was not entitled to a right of common in respect of his farm, has been held to be no evidence that such right did not belong to the landlord (*n*).

It is to be observed that the whole of a statement,

(*f*) *Sandilands* v. *Marsh*, 2 B. & Ald. 673; *Doe* v. *Hawkins*, 2 Q. B. 212.
(*g*) *Legge* v. *Edmonds*, 25 L. J. Ch. 125.
(*h*) As to the effect, on privity in blood, of the Inheritance Act, 1833 (3 & 4 Will. IV. c. 106), see *Weeks* v. *Birch*, 69 L. T. 759.
(*i*) 2 Smith, L. C. (9th ed.) p. 845.
(*k*) *Woolway* v. *Rowe*, 1 A. & E. 114; Cockle, 109.
(*l*) *Bauerman* v. *Radenius*, 7 T. R. 663.
(*m*) *Doe* v. *Wainwright*, 8 A. & E. 691.
(*n*) *Papendick* v. *Bridgwater*, 5 E. & B. 166; Cockle, 125.

whether verbal or in writing, containing an admission is to be construed together. But every part of the statement may not have the same legal operation. Thus, in an action against a firm for goods supplied between June, 1893, and February, 1894, the only evidence that one of the defendants had ever been a member of the firm at all was a letter written by him, on January 2nd 1893, to the manager of a bank, with whom the firm had an account, in answer to an inquiry as to whether he claimed any interest in the balance standing to the credit of the firm at the bank, which letter was as follows: "I have not banked any money this last eight months, as I have dissolved partnership with my brother last April." It was contended, for the defendant, that the admission of the partnership could not be separated from the statement of the dissolution. This the County Court judge held, but on appeal the Divisional Court held otherwise. WILLS, J., said:—

"The letter clearly contains an admission that William was a partner in Wren Brothers in April, 1892, and it must be presumed that the state of things so admitted to have existed at that date continued to exist, unless the contrary be proved. No doubt the statement that the partnership had been dissolved is evidence in the defendant's favour; but it is for the jury to say what weight is to be attached to it" (*o*).

A statement will not be inadmissible merely because portions of it contain hearsay; but the fact will be matter of comment by the judge to a jury, and he should also remind them that it is their duty to consider the whole statement, although an omission in this respect will not vitiate a verdict, if it appear that the whole admission has been otherwise brought fairly before them.

A party against whom a deed is produced has a right to insist on the whole deed being read. But a mutilated document may nevertheless be given in evidence (*p*).

(*o*) *Brown* v. *Wren Brothers*, [1895] 1 Q. B. 390.
(*p*) *Roe* d. *Trimlestown* v. *Kemmis*, 9 Cl. & F. 775.

It should be particularly observed that, notwithstanding the general rule that secondary evidence of a document cannot be given without accounting for the absence of the original (*q*), yet the contents of all documents may be proved by admissions, which are regarded as primary evidence thereof.

Thus, in the case of *Slatterie* v. *Pooley* (*r*), it was necessary to show that a certain debt was included in an insolvent's schedule. The schedule itself was tendered and rejected, because it was not duly stamped. Evidence was then tendered and rejected of a verbal admission by the defendant that the debt was included in the schedule. On a rule for a new trial, for improper rejection of this evidence, the Court held that it ought to have been received as primary evidence, PARKE, B., saying:—

"The rule as to the production of the best evidence is not at all infringed. It does not apply to the present case. That rule is founded on the supposition that a party is going to offer worse evidence than the nature of the case admits. But what is said by a party to the suit is not open to that objection. . . . We therefore think it is a sound rule that admissions made by a party to a suit may be received against him, although they relate to the contents of a written document."

This decision has been severely attacked both in England (*s*) and Ireland (*t*). But it has survived those attacks. On a similar principle, where, on an action for contribution towards money paid on a written contract, there was evidence of the express authority of the defendant to enter into the contract, of the execution thereof, and that the defendant, when informed of the amount paid, did not dispute his liability, it was held that the contract need not be put in evidence (*u*).

(*q*) See *ante*, p. 361 *et seq.*

(*r*) 6 M. & W. 664; Cockle, 109. See also *R.* v. *Basingstoke*, 14 Q. B. 611.

(*s*) See Taylor, Ev. I. 319; Best, Ev. 446; Phillipps, Ev. I. 323; *Sanders* v. *Karnell*, 1 F. & F. 356.

(*t*) See *Lawless* v. *Queale*, 8 Ir. L. R. 382.

(*u*) *Chappell* v. *Bray*, 6 H. & N. 145.

The rule laid down in *Slatterie* v. *Pooley* (*x*) is limited to cases in which the admission was made voluntarily by the party making it, since he cannot be compelled to make such admissions, nor ought questions which tend to elicit them to be allowed (*y*). As to informal admissions in criminal cases, see "Confessions" (*z*).

(*x*) 6 M. & W. 664.
(*y*) *Darby* v. *Ouseley*, 1 H. & N. 1; but see *R.* v. *Merceron*, 2 Stark. N. P. 366.
(*z*) See *ante*, p. 105.

## CANADIAN NOTES.

### ADMISSIONS.

Where the plaintiff was suing on a lost bond and the loss was not traversed, it was held that the plaintiffs were entitled to prove the contents of the bond without proving its loss. 4 U. C. C. P. 434.

In an action against two defendants, where it is sought to charge them as partners, a declaration by one is inadmissible to prove the partnership. At all events, before such evidence is admissible at all, defendant's counsel has a right to interpose and cross-examine the witness called to prove the declaration. *Burpee* v. *Smith and Mann*, 20 N. B. 408.

The books of the agent or clerk of a public company, during his lifetime, are not good evidence against his surety, sued on his bond, for a deficiency in the agent's accounts.

*Per* BURNS, J.: "I have examined all the cases carefully, and in every one of them in which the evidence of the principal was received, that is, what would have been good evidence as against himself when offered against the surety, it has only been offered after the death of the principal. The general rule is that no evidence shall be given against a person where it is not given under the sanction of an oath or its equivalent, and that the witness should be subject to the ordeal of a cross-examination of the party against whom he is called. The admission of testimony contrary to this rule is the exception, and the question is whether what the plaintiff

seeks to do comes within any of the exceptions, or whether it is now to be made an exception. I do not think the case comes under any exception already established, and I do not think we are warranted in extending the exceptions." *Ferrie* v. *Jones*, 8 U. C. Q. B 192.

The question being as to knowledge by a claimant in set-off of the dissolution of a partnership, he was asked as to entries in his books of accounts which were made against one of the members of the firm only and not against the partnership. To rebut the evidence given in answer to this question, the claimant put in other entries showing that the account had been kept in the same way before as after the dissolution. WETMORE, J., held that this evidence could not be given. The claimant's books could not be evidence in his own favour; but the majority held *contra* that, although the claimant's books could not be evidence in themselves for the claimant, the entries were admissible to show that the account had been kept in the same way before the dissolution as afterwards, and this ruling was sustained by the Supreme Court of Canada. *O'Brien* v. *O'Brien*, 27 N. B. 145; Cassell's Dig., 2nd ed. 297.

Where the plaintiffs declared, as executors, laying promises to the testator in his lifetime, promises to the plaintiffs as executors after his death, and an account stated with plaintiffs as executors, and proved an acknowledgment of the debt to the plaintiffs, it was held that there was nothing in the objection taken at the trial that the plaintiffs had not produced the probate. The learned Chief Justice said: "At the trial it was proved that the defendant had in writing acknowledged to be debtor to the plaintiffs as executors of Hamilton, that is, in the very capacity in which they sued, and had also admitted the debt verbally to the clerk of the plaintiff's attorney." MACAULAY, J., said: "The question is not without nicety, but in the best

consideration in my power I think that when the party plaintiff declares as executor and in separate counts alleges debts and promises to the testator in his lifetime, debts to the testator and promises to the executors after his death, and an account stated with the plaintiff as executor, with a profert of the letters testamentary, to the whole of which the defendant pleads the single plea of *non assumpsit*, the representative character must be taken to be *primâ facie* at least admitted." *Dickson et al., executors of Hamilton* v. *Markle*, Draper, U. C. K. B. 286 (1830).

On the trial of an interpleader issue the defendants offered in evidence a letter from the judgment debtor to them. It appeared from the evidence that the plaintiff had allowed the judgment debtor to make other declarations with respect to the property than those contained in the letter referred to, and it was held that it might be presumed he had permitted him to make those contained in the letter which had been offered in evidence and rejected. There being such a foundation laid at the trial as showed *primâ facie* a joint interest, or an interest of some kind, between the plaintiff and the judgment debtor with regard to the goods in question, it was held that the letter was admissible in evidence. *Harnden* v. *Bank of Toronto*, 14 U. C. C. P. 496.

In an action of ejectment it was held to be no admission of the title of the parties through whom defendant claimed, that the party through whom plaintiff derived title had, long after his title by possession had matured, filed a bill in Chancery against the former for specific performance of an agreement for the sale of the land in question to him, first, because the statements contained in such a bill were not under *Nolican* v. *Rutlin* (2 Ex. 65) evidence; and secondly, because the title was absolute at the time the bill was filed, and could not be set aside by an admission that at some former period

the land had belonged to another than the one claiming by possession. *Mulhollond* v. *Conqulin*, 22 U. C. C. P. 372.

In an action of ejectment the point in dispute was whether Timothy Rogers, one of the plaintiffs, had ever conveyed the premises in question to one James Rogers, deceased, under whom the defendant derived title. Evidence was given of a conversation in which Timothy Rogers had stated either that he had given a deed to James Rogers of the property in question, or that all the title to it was vested in James Rogers, and a letter from Timothy Rogers was also produced referring to such deed, but no strictly legal evidence was given of the contents of such deed. It was held that such evidence under the circumstances was admissible on the part of the defendants as primary evidence, and that notice to the plaintiffs to produce such deed was unnecessary. *Per* DRAPER, C.J.: "That such admission could not have been rejected unless by expressly overruling the authority of *Slattery* v. *Pooley* is clear, for that case goes the whole length of determining that such admissions are primary evidence against the party making them and those claiming under him, although they relate to the contents of the deed which is directly in issue in the cause; and this case, as is said by MAULE, J., in *Boulter* v. *Tetlow* (9 C. B. 493), has frequently been recognised and acted upon." *Rogers et al.* v. *Card*, 7 U. C. C. P. 89.

In an action of dower general reputation was held *primâ facie* evidence of marriage. In the case of *Beatty* v. *Beatty*, irrespective of general reputation there was evidence that the defendant had told a third party he was to give the defendant's husband, his brother, one hundred dollars to bring out his wife and children from Scotland, who was to execute to him in return a deed of the land in question. Defendant afterwards said he had

received the deed and that the wife would bar her dower on her arrival in this country. On her arrival, defendant received her into his house as his brother's wife and recognised her as such until his brother's death. *Held*, good *primâ facie* evidence of the marriage and, *semble*, that the recognition by defendant of demandant as his brother's wife would of itself alone have been sufficient *primâ facie* evidence of their marriage as against him in the action. *Beatty* v. *Beatty*, 17 U. C. C. P. 484.

An admission by the defendant's car driver, who was in charge of the sleigh at the time of the accident, by which plaintiff was injured, made a few days after the accident, that the harness and brake were defective, was held to be not within the scope of the driver's authority and, therefore, inadmissible. *Rainnie* v. *St. John City Rail. Co.*, 31 N. B. 552.

The admissions of the holder of an overdue note are admissible in evidence, without calling him, against a person to whom he has subsequently transferred the note in an action brought upon the note by such subsequent assignee. *Myers* v. *Cornell*, 2 U. C. Q. B. 279.

In *R.* v. *Peters*, 16 N. B. 77, an action against carriers, it was held that an admission by the freight agent of the company, who were common carriers, that a claim made against them by plaintiff for injury to goods carried by them, was all right, such admission being made two days after delivery, and after the agent had examined the goods, rendered it unnecessary for plaintiff to prove by other evidence that the goods were actually injured at the time of delivery.

The plaintiff entered into an agreement with the defendant to get out lumber for him, and also to take charge of supplies furnished by the defendant, etc. A book was kept by plaintiff in which he entered all supplies delivered by him to the other operators, and

defendant settled with them according to the entries in the book. It was held, in an action by plaintiff for a balance due to him on account of the lumber, that the book was evidence of the supplies delivered by him to the defendant's operators, the settlement by the defendant with them according to the entries in the book being an admission by him of their correctness. *Pheeny* v. *Aikin*, 22 N. B. 635.

The defendant's attorney, being the subscribing witness to certain deeds, was asked before the trial by the attorney for the plaintiff to admit their execution. He said he would do so when put into the box, and insisted upon being called as a witness. While the jury were being called for the trial of the cause, he absented himself from the court, and did not return. It was held that the deeds could not be received as proved on evidence of such agreement to admit, and, *quære*, whether it would have been sufficient to warrant the reception of proof of the witness's handwriting. *Doe* d. *Wilkins* v. *John Moore et al.*, 9 U. C. Q. B. 445.

# CHAPTER XIII.

## ESTOPPELS.

Most admissions can be withdrawn: the fact that they were made remains, but the party who made them can be heard to explain that he made them rashly and carelessly, or under an honest misapprehension, or even that he knew what he said to be false. But an admission or statement may be made in so conclusive a manner or under such special circumstances that the law will not permit the person who made it to contradict it. He is said to be estopped from denying his former statement. In other words, an estoppel is a "bar which the law sometimes sets in the way of one who is endeavouring to maintain the contrary of that which he once asserted in words, or unequivocally implied by his conduct." The rules of evidence forbid him to allege the existence of a state of things inconsistent with his previous representation, when to do so would be inequitable or contrary to the policy of the law. Neither he nor any one claiming under him can give any evidence to contradict it. This is what Lord Coke meant by his quaint definition, "An estoppel is where a man is concluded by his own act or acceptance to say the truth."

But it is always open to any party alleged to be

estopped to give evidence to disprove the existence of the facts upon which the estoppel rests. Thus he may dispute the existence of the record which is supposed to create the estoppel, or destroy its effect by showing that the judgment it records has been set aside, or that the judgment was obtained by fraud or collusion (*a*). So, too, he may prove that he never executed the deed, or that it was obtained by fraud, or duress, or otherwise tainted with illegality (*b*). Such evidence does not deny that the estoppel, if it existed, would be conclusive against him, but merely incapacitates the other party from taking advantage of the estoppel.

An estoppel is not a cause of action (*c*); no one can sue upon it. It exists only to prevent a party, whether plaintiff or defendant, from raising a particular contention in an action. If A. has been party to an action in which an issue has been decided in favour of B., or has deliberately made a statement to B. upon the faith of which B. has acted to his prejudice, neither A. nor any person claiming through or under him will be allowed, in any action between him or them and B. or any one claiming through or under B., to plead or to attempt to prove at the trial allegations which are directly contrary to the issue so decided or to the statement so made.

(*a*) *Duchess of Kingston's Case*, 2 Sm. L. C. 731.

(*b*) *Collins* v. *Blantern*, 1 Sm. L. C. 369; and see *Priestman* v. *Thomas*, 9 P. D. 70, 210; *R.* v. *Hutchings*, 6 Q. B. D. 300; and *Poulton* v. *Adjustable, etc. Co.*, [1908] 2 Ch. 430.

(*c*) Every estoppel must be specially pleaded, for it is a material fact, within Order XIX., r. 4; but it cannot be pleaded in a Statement of Claim, only in a subsequent pleading.

Estoppels are usually classed under three heads :—

I. By Record ;

II. By Deed ; and

III. By Conduct.

I. Estoppel by Record, *i.e.*, by the judgment of a competent Court. *Res transit in rem judicatam.* The law allows a party ample opportunity, by way of appeal and otherwise, of upsetting a wrong decision. And if he takes the opportunity and fails, or does not choose to avail himself of it, he cannot subsequently re-open or dispute that decision. And not only the parties themselves, but also the heir, executor, administrator, and assign of each of them are bound by the decision, for, in the old phrase, they are "privy to the estoppel" (*d*).

II. *Estoppel by Deed.*—A party to a deed cannot, in any action between him and the other party, set up the contrary of his assertion in that deed. Both parties and all claiming through or under them are bound by the language of the deed. But where the recitals in a deed are obviously the statements of one party alone, he and his privies alone will be estopped by them.

III. *Estoppel by Conduct.*—This estoppel was formerly called "Estoppel *in pais*" (*i.e.*, in the country), or, more fully, "Estoppel *in pais dehors* the instrument" (*i.e.*, with regard to matters outside a record or deed). This class of estoppels obviously stands on a very different ground from the two preceding. To raise an estoppel by conduct a person must by word or conduct induce another to believe that a certain state of things exists, and so cause that other to act on that belief in a way he would not have done had he known the facts, so that if in an action between them the person making the representation were allowed to prove the true facts—to tell the truth—the other person would be prejudiced. If those two conditions are fulfilled, then the person

(*d*) Estoppels resemble Admissions in this respect; see *ante*, p. 442.

making the representation will not be allowed to deny its truth in any action between him and the person to whom he made it or the persons who claim in the same right. But in any other action he can deny its truth.

"The doctrine of estoppel is that the person estopped is precluded from denying in the same transaction as that in which the estoppel arises the truth of the statement acted on" (*e*).

The ways in which a person may make such a representation are infinite. He may speak or write, act or omit to act or act negligently, but, if he says nothing, the fact that another is deceived thereby does not estop him, unless the circumstances are such that he is under a duty to speak. "Nobody ought to be estopped from averring the truth or asserting a just demand, unless" his now doing so "would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by" some act, word, omission, or neglect of his (*f*).

Lastly, estoppel is a rule of civil actions. It has no application to criminal proceedings, though in such proceedings matters which in civil actions create an estoppel are usually so cogent that it would be almost useless to set up a different story.

## I. ESTOPPEL BY RECORD.

THIS is the highest kind of Estoppel. The judgment of a competent Court, so long as it stands, binds both parties, and all claiming through or under them. This rule of evidence is based upon considerations of policy which have been embodied in three well-known maxims: "*Interest reipublicæ ut sit finis litium*"; "*Res transit in rem judicatam*";

(*e*) *Per* CHANNELL, J., in *Compania Naviera Vasconzada* v. *Churchill & Sim*, [1906] 1 K. B. at p. 251.

(*f*) *Per* JAMES and BAGGALLAY, L.JJ., in *Ex parte Adamson, In re Collie*, 8 Ch. D. at pp. 817, 818.

and "*Res judicata pro veritate accipitur.*" A judgment is conclusive not only as to the point in dispute between the parties, but also as to all matters which were material to be decided as a basis for the decision actually arrived at (*g*).

Judgments are of two kinds—*in rem* and *in personam* (*h*). Judgments *in rem*, *i.e.*, affecting the status of a person or thing, *e.g.*, a decision of a Prize Court, Probate, Divorce or Admiralty Court, or Ecclesiastical Court, bind all the world. Judgments *in personam* are only binding between the parties and their privies, be they privies in blood, (*e.g.*, father and son), or in law (*e.g.*, husband and wife), or in interest (*e.g.*, vendor and purchaser).

*Judgments in rem.*—No perfectly satisfactory definition of a judgment *in rem* has yet been given (*i*). The chief instances in modern times are to be found in the Ecclesiastical, Admiralty, Probate, and Prize Courts (*j*); and upon questions of legitimacy, marriage, divorce, and the like. The decision of a Court of summary jurisdiction under the Private Street Works Act, 1892 (*k*), that a street is a highway repairable by the inhabitants at large, is a judgment *in rem* and will estop anyone else from subsequently denying that that highway is repairable by the inhabitants at large (*l*). A certificate of a judge under the Parliamentary Elections Act, 1868 (*m*), finding that a person claiming a seat has been duly elected is a judgment *in rem* (*n*), and so is an order adjudicating on the

(*g*) See *Poulton* v. *Adjustable, etc. Co.*, [1908] 2 Ch. p. 433.
(*h*) See *ante*, p. 66.
(*i*) See *ante*, pp. 66, 67.
(*j*) *Hughes* v. *Cornelius*, 2 Shower, 232; 2 Sm. L. C. 741.
(*k*) 55 & 56 Vict. c. 57.
(*l*) *Mayor, etc. of Wakefield* v. *Cooke*, [1904] A. C. 31.
(*m*) 31 & 32 Vict. c. 125.
(*n*) *Waygood* v. *James*, L. R. 4 C. P. 361.

settlement of a pauper (*o*). A judgment in bankruptcy proceedings has the effect of a judgment *in rem*, but this effect it owes to the Bankruptcy Act (*p*). Judgments *in rem* are binding not only on the parties to the proceedings but upon all the world, and not only on the tribunals of the country where pronounced, but on the tribunals of other countries; but such a judgment must not have been obtained by fraud, must not carry a manifest error on its face, and must not be contrary to natural justice.

*Judgments in personam.*—A judgment *in personam*, or more correctly *inter partes*, also creates an estoppel; but such a judgment is conclusive only between the parties to the record and their privies: "*Res inter alios acta alteri nocere non debet.*" Between such persons, the facts actually decided by a Court of competent jurisdiction cannot be again litigated (*q*). Any judgment, however (even a judgment by default), can be impeached on the ground of fraud or collusion (*r*). Hence, where a judgment *inter partes* is relied upon as an estoppel, the person against whom it is set up can impeach it on the ground of fraud, if he was not himself guilty of or privy to the fraud. There may be an exception to this rule when the person alleging fraud was a party to the original action, where the action was brought in England (*s*); as in that case he ought first to apply to have the judgment or order set aside on the ground of fraud. But in the case of a foreign judgment he clearly cannot do so (*t*). Lord COLERIDGE, C.J., indeed, drew no distinction between a foreign

(*o*) *Uxbridge Union* v. *Winchester Union*, 91 L. T. 533.
(*p*) 46 & 47 Vict. c. 52, s. 132 (2). See *Ex parte Learoyd*, *In re Foulds*, 10 Ch. D. 3.
(*q*) *Boileau* v. *Rutlin*, 2 Ex. 665.
(*r*) *Wyatt* v. *Palmer*, [1899] 2 Q. B. 106.
(*s*) *I.e.*, in the case of an English judgment; in the case of a foreign judgment it is clear that he can from *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295.
(*t*) *Per* BRETT, L.J., in *Abouloff* v. *Oppenheimer*, at p. 306.

and an English judgment, for he lays down (*u*) the principle that—

"No action can be maintained on the judgment of a Court either in this country or any other, which has been obtained by the fraud of the person seeking to enforce it."

The judgment must have been pronounced by a Court having jurisdiction both over the persons and the subject-matter (*x*). Thus, if A. sues B. in a County Court for possession of land worth over £500 and gets judgment, B. will not be estopped, in any subsequent action, from disputing the facts (*y*). The judgment must also be final and not "interlocutory." It does not matter that it is open to appeal. A judgment on the trial of an action operates as an estoppel between the parties in a subsequent action raising a contention which is in substance *res judicata*, and not the less so because it is liable to be reversed on appeal (*z*).

"It is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision. . . . If the decision was wrong it ought to have been appealed against" (*a*).

The principle applies to the judgments of County Courts, to judgments obtained in chambers (*b*), and to the judgments of Courts of summary jurisdiction, but the judgment of a Court of summary jurisdiction cannot operate as an estoppel, (1) as to any matter as to which that Court had no authority to adjudicate directly and immediately between the parties; (2) as to any matter incidentally coming in question, as to which a finding,

(*u*) In *Abouloff* v. *Oppenheimer*, 10 Q. B. D. at p. 303.

(*x*) *Per* Lord HOBHOUSE in *Attorney-General of Trinidad* v. *Eriché*, [1893] A. C. 523; *Toronto Rail. Co.* v. *Corporation of Toronto*, [1904] A. C. 809.

(*y*) *Foster* v. *Reeves*, [1892] 2 Q. B. 255.

(*z*) *Huntley* v. *Gaskell*, [1905] 2 Ch. 656; and see *Mangena* v. *Wright*, [1909] 2 K. B. 958; *Humphries* v. *Humphries*, [1910] 1 K. B. 796.

(*a*) *Per* Lord MACNAGHTEN in *Badar Bee* v. *Habin Merican Noordin*, [1909] A. C. at p. 623.

(*b*) *Shaw* v. *Herefordshire County Council*, [1899] 2 Q. B. 282.

if held to be conclusive between the parties, would operate in prejudice of the rights of others not parties to the proceeding; or (3) as to any incidental matter not otherwise determined than as having been the particular ground on which the Court dismissed a charge or complaint (*c*).

If a public body with powers given by statute exceeds those powers, no estoppel arises (*d*).

In bankruptcy the consideration for a judgment debt can always be inquired into (*e*), and at the instance of the judgment debtor, as well as of the trustee (*f*). This enables the registrar to refuse to make a receiving order on a judgment debt. But such a decision of the registrar does not operate to set aside the judgment or as an estoppel to prevent, on a subsequent petition, a receiving order being made based on the same judgment (*g*). The file of proceedings in a bankruptcy does not create an estoppel (*h*).

The rule formerly was that a judgment to operate as *res judicata* must have been pronounced before the commencement of the action in which it is pleaded (*i*); but a doubt has been expressed whether this is so under the present practice (*j*). A judgment by consent has the same effect by way of estoppel as any other judgment (*k*). But payment into court, with denial of liability, by a defendant sued for damages and an injunction, followed by acceptance of the money paid in, was held

(*c*) *Per* Lord SELBORNE, L.C., in *R.* v. *Hutchings*, 6 Q. B. D. 304; cf. *North Eastern Rail. Co.* v. *Dalton Overseers*, [1898] 2 Q. B. 66; *Mayor, etc. of Wakefield* v. *Cooke*, [1904] A. C. 31.

(*d*) *Islington Vestry* v. *Hornsey Urban District Council*, [1900] 1 Ch. 695.

(*e*) *Ex parte Kibble*, L. R. 10 Ch. 373.

(*f*) *Ex parte Lennox*, 16 Q. B. D. 315.

(*g*) *In re Vitoria*, [1894] 2 Q. B. 387; approved in *King* v. *Henderson*, [1898] A. C. 720.

(*h*) *Ex parte Bacon*, 17 Ch. D. 447.

(*i*) *The "Delta,"* 1 P. D. 393.

(*j*) *Per* PEARSON, J., in *Houstoun* v. *Sligo*, 29 Ch. D. 454.

(*k*) *In re South American and Mexican Co.*, [1895] 1 Ch. 37; cf. *Shaw* v. *Herefordshire County Council*, [1899] 2 Q. B. 282.

not to estop the defendant from contesting the right to the injunction (*l*).

A judgment obtained against one of two joint debtors is a bar to proceedings against the other, whether in the same or in a subsequent action (*m*), and whether the judgment be by consent or not. And even if the judgment be set aside with the consent of the defendant, it will still be a bar to proceedings against the other joint debtor (*n*). There are four exceptions to this rule :—

(i.) Under Order XIII., rr. 4 and 6, in case of judgment in default of appearance (*o*) ;

(ii.) Under Order XXVII., r. 3, in case of judgment in default of defence ;

(iii.) Under Order XIV., r. 5, where one defendant is allowed to defend the action and the others not (*p*) ;

(iv.) In practice, a plaintiff is entitled to apply under Order XIV. against the defendants separately, where they appear separately at different times, and this is commonly done. Judgment so obtained against one defendant does not prevent the plaintiff from continuing the action against the others.

This defence must always be specially pleaded. If two joint debtors are sued in the same action, and one puts in a defence and the other consents to judgment, the first defendant should amend and plead the judgment in his defence (*q*).

A verdict and judgment, in a former divorce suit brought by a husband against his wife, that he had committed adultery, is conclusive evidence thereof in a

(*l*) *Coote* v. *Ford*, [1899] 2 Ch. 93.
(*m*) *King* v. *Hoare*, 13 M. & W. 494.
(*n*) *Hammond* v. *Schofield*, [1891] 1 Q. B. 453.
(*o*) *Pym Brothers* v. *Coyle*, [1903] 2 Ir. R. 457.
(*p*) *Weall* v. *James*, 68 L. T. 515 ; *Montgomerie* v. *Ferris*, 20 L. R. Ir. 282 ; *Walton* v. *Topakyan*, 53 W. R. 657.
(*q*) *McLeod* v. *Power*, [1898] 2 Ch. 295. As to how far a judgment against a husband or a wife is a bar to proceedings against the other, see *Morel* v. *Westmoreland*, [1904] A. C. 11 ; and see *French* v. *Howie*, [1906] 2 K. B. 674.

subsequent suit by him against his wife for the same purpose, but with a different co-respondent (*r*). This is so even if the decree be set aside on the intervention of the King's Proctor on grounds not affecting the propriety of the verdict (*s*).

It may be here noticed that as a general rule a verdict without a judgment will not create an estoppel (*t*), and in ordinary cases if a verdict be followed by a judgment, and this judgment is afterwards set aside, the verdict falls with the judgment, and neither party can give such verdict in evidence at a second trial (*u*).

The tests whether a good estoppel exists on the ground of *res judicata* are—1st, that the issues in the two proceedings must be the same; and one of the *criteria* as to such identity is the question whether the same evidence will support both (*x*); 2nd, that the party to be affected by the estoppel must be party or privy to the former proceedings. Thus, where an action was brought by A. against B. to enforce certain debentures, and C., who had covenanted to indemnify B., assisted B. in his defence, and paid his costs when he failed, in an action to enforce the debentures subsequently brought by A. against C., the latter was held not estopped by the judgment in the former action (*y*). Where, however, a person who is not a party to the proceedings but is cognizant of them stands by and takes the benefit of the judgment, he may be estopped by his conduct from re-opening the questions covered by the judgment (*z*).

Applying these tests, we find that judgment against a man in a civil suit is not evidence against him on a

(*r*) *Conradi* v. *Conradi*, L. R. 1 P. & D. 514.
(*s*) *Butler* v. *Butler*, [1894] P. 25.
(*t*) See judgment of SMITH, L.J., in *Butler* v. *Butler*, *supra*.
(*u*) *Ibid.*
(*x*) See Lord WESTBURY'S judgment in *Hunter* v. *Stewart*, 4 De G. F. & J. 168.
(*y*) *Mercantile Investment, etc. Co.* v. *River Plate, etc. Co.*, [1894] 1 Ch. 578.
(*z*) *Wilkinson* v. *Blades*, [1896] 2 Ch. 788.

criminal trial, and *vice versâ*. Where, by an act, injury is done to a man's property and also injury to his person, his recovering damages in an action for the former injury will not be a bar to an action by him to recover damages for the latter injury (*a*). This is because they are separate rights giving rise to distinct causes of action; but where two injuries of the same character occur to a person from the same act and in the same right, the judgment in an action brought upon one bars the right to bring an action upon the other (*b*). A judgment against a man in his individual character is not evidence against him when suing in a representative character, and *vice versâ*, because he would sue or be sued in a different right. In an action for infringement of a patent, it was declared invalid; the defendant then presented a petition for revocation of the patent, and it was held that the patentee was not estopped from setting up the validity of the patent on this petition, as the petition was really presented on behalf of the public, and was not personal to the petitioner (*c*). In an administration suit, a judgment recovered against executors, who were also trustees of the real estate, has been held not to operate against the real estate by way of estoppel, but to be *primâ facie* evidence of a debt against the persons interested in the real estate (*d*). An administratrix, who brought an action under Lord Campbell's Act, 1846 (*e*), was held not to be estopped by the judgment thereon in a subsequent action brought by her as administratrix against the same defendants for injury to the deceased's personal estate from the same cause (*f*). And where a mortgagee, having six charges on property given by the same mortgagor,

(*a*) *Brunsden* v. *Humphrey*, 14 Q. B. D. 141.
(*b*) *Macdougall* v. *Knight*, 25 Q. B. D. 1.
(*c*) *In re Deeley's Patent*, [1895] 1 Ch. 687 (but see S. C. in [1896] A. C. 496).
(*d*) *Harvey* v. *Wilde*, L. R. 14 Eq. 438.
(*e*) 9 & 10 Vict. c. 93.
(*f*) *Leggott* v. *Great Northern Rail. Co.*, 1 Q. B. D. 599.

obtained a foreclosure order on five of them, omitting the sixth from his proceedings, it was held that he could commence further proceedings for foreclosure in respect of the sixth, there being no estoppel by the former proceedings (*g*).

The general rule is that a party to an action is bound by the proceedings in the action (*h*), and even where a man was improperly made a party to a suit, but did not object to his having been joined, he was held to be estopped by the decree in that suit (*i*). A judgment against the principal debtor is not binding on a surety unless he is a party to the action (*k*).

It may here be noticed that a judgment pronounced by a magistrate will operate by way of estoppel in his favour in proceedings subsequently taken against him for acting without jurisdiction, even though the facts creating jurisdiction are erroneously found by the judgment (*l*). A similar rule would apply to all persons when exercising judicial functions.

It was laid down by DE GREY, C.J., in *The Duchess of Kingston's Case* (*m*), that a judgment only operates by way of estoppel upon the point actually decided, and is not even evidence of any matter which came collaterally in question, although within the jurisdiction of the Court, or of any matter to be inferred by argument from the judgment. Thus, a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forging in an action on the bill (*n*); but when a question is necessarily decided in effect,

(*g*) *Bake* v. *French*, [1907] 1 Ch. 428.
(*h*) *Beardsley* v. *Beardsley*, [1899] 1 Q. B. 746.
(*i*) *Collier* v. *Walters*, L. R. 17 Eq. 252.
(*k*) *Ex parte Young, In re Kitchin*, 17 Ch. D. 668.
(*l*) *Brittain* v. *Kinnaird*, 1 Brod. & B. 432; see also *Mold* v. *Williams*, 5 Q. B. 473.
(*m*) 2 Sm. L. C. 731; Cockle, 26.
(*n*) *Per* BLACKBURN, J., in *Castrique* v. *Imrie*, L. R. 4 H. L. 434.

though not in express terms, between the parties to an action, they cannot raise the same question as between themselves in any other action in any other form (*o*). For, as WIGRAM, V.-C., remarked in *Henderson* v. *Henderson* (*p*):—

"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."

Where the decision in an action in the Chancery Division was that a compromise was invalid on the ground that a will which had been admitted to probate was a forgery, it was held that the persons to whom probate was granted were estopped from denying the will to be a forgery in a suit in the Probate Division to revoke the probate (*q*). In this case COTTON, L.J., said:—

"Although the object of the present action is different from that of the Chancery action, and although that object is not within the jurisdiction of the Chancery Division, yet, inasmuch as the point for decision here is the same and the parties are the same as in the former action, I do not think we ought to allow the question to be litigated again. The former action decided the question on which the decision in the present action must turn."

In an action for infringement of a patent, when the validity of the patent had been upheld in a previous action between the same parties, the defendants were not allowed to question the validity of the patent on fresh materials for impeaching it, which they alleged

(*o*) *Gregory* v. *Molesworth*, 3 Atkyns, 626. See *Furness* v. *Hall*, 25 T. L. R. 233.

(*p*) 3 Hare, at p. 115.

(*q*) *Priestman* v. *Thomas*, 9 P. D. 210.

they had discovered since the previous action. ROMER, J., in the course of his judgment, said :—

"But a further point is now taken on behalf of the defendants. It is said that they are entitled in this action to retry the question of the validity of the patent, because they have discovered fresh materials for impeaching it, fresh alleged anticipations, and are entitled to have the issue of validity retried on the footing of these further materials. In my opinion they are not so entitled. If they were held to be so entitled I do not see how there could be any finality of the questions in an action as between parties such as these. According to this contention, a defendant might try his case piecemeal. He might raise such objections as he thought convenient, and when he was defeated he might then raise other points at his leisure, and might in that way try the case piecemeal, and, so far as I can see, extend it over as long a period as he pleased. In my opinion, a defendant is not entitled to do that. When the question of the validity of a patent is brought to trial by reason of the defendant's contesting the question, he is bound to put his whole case before the Court; and if he does not do so then, it is his own fault or his misfortune. He cannot be allowed to put part of his case, or to put his case in an incomplete manner. He is bound when the question is raised to search and find out all that he intends to rely upon in support of his contention that the patent is invalid. For these reasons it appears to me that the defendants are not entitled to have this question of validity retried, because, as they say, they have found further materials which would have assisted them if they had known of them at the first trial" (*r*).

But, as was said by KNIGHT BRUCE, V.-C., in *Barrs* v. *Jackson* (*s*):—

"The rule against re-agitating matters adjudicated is subject to this restriction—that however essential the establishment of particular facts may be to the soundness of judicial decisions, however it may proceed on them as established, and however binding and conclusive the decision may be as to its immediate and direct object, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided *the immediate subject of the decision* be not attempted to be withdrawn from its operation *so as to defeat its direct object*."

But where a judge expresses his opinion or gives a finding upon a matter of fact, when that matter of fact

(*r*) *Shoe Machinery Co.* v. *Cutlan*, 13 R. P. C. 141 (in C. A., [1896] 1 Ch. 108); see *Poulton* v. *Adjustable, etc. Co.*, [1908] 2 Ch. 430; *Gillette Safety Razor Co.* v. *Gamage*, 25 T. L. R. 808; and cf. *Marriott* v. *Hampton*, 2 Sm. L. C. 441.

(*s*) 1 Y. & C., Ch. 585; approved by Lord SELBORNE in *R.* v. *Hutchings*, 6 Q. B. D. 304.

is not essential to his decision, such matter of fact does not thereby become *res judicata*, and such opinion or finding does not operate as an estoppel, whether treated as a judgment *in rem* or as a judgment *inter partes* (*t*).

Where the decree of a Court is capable of more than one construction, it is necessary to look at the pleadings to ascertain what was the issue which the Court intended to decide (*u*). It is also important to bear in mind that the validity of a judgment of a Court of competent jurisdiction upon parties legally before it may be questioned not only on the ground that it was pronounced through fraud, collusion or covin (*x*), but that it was not pronounced in a real suit, or, though in a real and substantial suit, yet between parties who were really not in contest with each other (*y*). Where a judgment roll was erroneously made up by the plaintiff, and did not represent accurately that which the jury had really found at the trial, the Court, in a subsequent action between the same parties, would not treat the judgment roll as establishing an estoppel, but admitted parol evidence of the actual finding of the jury (*z*).

Previous proceedings of a criminal or penal nature in a Court of competent jurisdiction operate as an estoppel in favour of the accused, and therefore when a person has been once convicted for, or acquitted of, an offence by a Court of competent jurisdiction, the conviction or acquittal is a bar to all further criminal proceedings for the same offence, for, as has been stated, "a man should not twice be put in jeopardy for the same offence" (*a*).

On this general principle, a verdict and conviction for non-repair of a highway estops the convicted party or

(*t*) *Concha* v. *Concha*, 11 App. Cas. 541.
(*u*) *Robinson* v. *Duleep Singh*, 11 Ch. D. 798.
(*x*) *Girdlestone* v. *Brighton Aquarium Co.*, 4 Ex. D. 107.
(*y*) *Earl of Bandon* v. *Becher*, 2 Cl. & F. 510.
(*z*) *Want* v. *Moss*, 70 L. T. 178.
(*a*) *R.* v. *Drury*, 18 L. J. M. C. 189.

parish from disputing subsequently their liability to repair the highway (*b*); but a conviction for obstructing a highway does not estop the convicted person from maintaining trespass against the prosecutor in respect of the same highway; for the proceedings are not between the same parties in respect of the same right (*c*).

It was held that the dismissal by justices of a bastardy summons on the merits, under 7 & 8 Vict. c. 101, s. 2 (*d*), was no bar to a subsequent summons under the same statute (*e*). This was so held because there was no power given by the statute to adjudicate finally against the mother, the dismissal being rather in the nature of a nonsuit, and so not barring a further application; although the justices ought to give due weight to their previous decision. But when an affiliation order made under the above statute was quashed by the Court of Quarter Sessions on its merits, on appeal by the defendant, the decision of the Court of Quarter Sessions operated as an estoppel (*f*). The principles of the cases under notice would appear to apply equally to the dismissal of a summons under the Bastardy Act, 1872 (*g*). And it has been held that where under that Act an affiliation order is made for a certain payment, the mother cannot subsequently apply for another order, *i.e.*, she is barred by the first order (*h*). And it has been held (*i*) that a dismissal of a summons for an affiliation order on the ground that the defendant was not the father of the child, did not operate by way of estoppel in an action subsequently brought by the mother of

(*b*) *R.* v. *Haughton*, 1 E. & B. 501.
(*c*) *Petrie* v. *Nuttall*, 11 Ex. 569.
(*d*) The Poor Law Amendment Act, 1844, repealed but substantially re-enacted by the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. 65).
(*e*) *R.* v. *Gaunt*, L. R. 2 Q. B. 466; see also *R.* v. *Machen*, 14 Q. B. 74.
(*f*) *R.* v. *Glynne*, L. R. 7 Q. B. 16.
(*g*) 35 & 36 Vict. c. 65.
(*h*) *Williams* v. *Davies*, 11 Q. B. D. 74.
(*i*) *Anderson* v. *Collinson*, [1901] 2 K. B. 107.

the complainant for damages for seduction of her daughter, on the ground that the parties were not the same in the two proceedings. But in the course of the judgments, the decision of a Court of Quarter Sessions in affiliation proceedings seems to be treated as operating as an estoppel between the actual parties to the proceedings.

A statute staple, statute merchant, a *cognovit actionem*, a recognizance, and every other "judicial contract" also creates an estoppel. So, too, Crown grants, letters patent, etc., are said to create estoppels by record (*k*).

*Foreign Judgments.*—Not only the majority of foreign judgments *in rem*, but all foreign judgments *in personam*, are, if pronounced by a competent Court, for the purposes of estoppel, on a footing analogous to home judgments (*l*), provided they are final and unalterable by the Court pronouncing them (*m*), and it makes no difference that a man has appeared in a foreign Court only under the duress of wishing to protect his property (*n*). It is an important and interesting question how far a foreign judgment is liable to examination in a home tribunal. It was finally decided by the House of Lords in *Castrique* v. *Imrie* (*o*), and the Judicial Committee of the Privy Council in *Messina* v. *Petrococchino* (*p*), that the home tribunal cannot act as a Court of Appeal from the foreign tribunal, *i.e.*, a foreign judgment cannot be impeached as being erroneous on the merits, or founded on a mistake either of fact or law. Even where the law applied is English law, and a mistake of English law is apparent on its face, the judgment of the foreign Court is still binding (*q*). There still remains the

(*k*) See *per* FRY, L.J. in *Cropper* v. *Smith*, 26 Ch. D. at p. 712.
(*l*) *Duchess of Kingston's Case*, 2 Sm. L. C. 731. *Ricardo* v. *Garcias*, 12 Cl. & F. 368.
(*m*) *Nouvion* v. *Freeman*, 15 App. Cas. 1.
(*n*) *Voinett* v. *Barrett*, 55 L. J. Q. B. 39.
(*o*) L. R. 4 H. L. 414.
(*p*) L. R. 4 P. C. 144.
(*q*) See *Godard* v. *Gray*, L. R. 6 Q. B. 139.

question—supposing the foreign Court to have wilfully refused to apply English law, when by the comity of nations it is applicable, is its judgment then impeachable in an English Court? Lord HATHERLEY was evidently of opinion that it is (*r*), and this opinion is probably correct. A foreign judgment obtained by the fraud of a party cannot be enforced by law in England, even though the foreign Court may have decided that no fraud was perpetrated (*s*), and a foreign judgment can be impeached on the ground of fraud, even where to establish the fraud it is necessary to go into the merits of the case (*t*). Finally, it may be remarked that an irregularity in the procedure of the foreign Court does not prevent a judgment from operating by estoppel (*u*). In short, the judgment of a foreign Court will be treated as valid by an English Court until set aside by the foreign Court, unless there has been some defect in the initiation of the proceedings, or in the course of the proceedings, which would make it contrary to natural justice to treat the foreign judgment as valid (*x*).

Where a settlement was made in England on a marriage between a Turk domiciled in England and an English lady, the former promising to reside always in England, HALL, V.-C., held that a Turkish Court could not, by a decree of divorce pronounced without notice to the wife or other persons interested under the settlement, make void the settlement (*y*). An English composition deed made before a colonial judgment was pronounced, is no defence to an action on such judgment in an English Court, the deed not having been pleaded in the colonial action (*z*).

As previously stated, for a foreign judgment to operate

(*r*) See *Simpson* v. *Fogo*, 1 J. & H. 18.
(*s*) *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295.
(*t*) *Vadala* v. *Lawes*, 25 Q. B. D. 310.
(*u*) *Pemberton* v. *Hughes*, [1899] 1 Ch. 781.
(*x*) *Per* VAUGHAN WILLIAMS, L.J., in *Pemberton* v. *Hughes*, *supra*.
(*y*) *Collis* v. *Hector*, L. R. 19 Eq. 334.
(*z*) *Ellis* v. *M'Henry*, L. R. 6 C. P. 228.

by estoppel it must have been pronounced by a competent Court. An English Court, in deciding on the competence of a foreign Court, tries that question by its own maxims (*a*); one of which is that the Courts of a foreign State have authority to decide all questions touching the personal status and personal property of individuals domiciled in such State. Therefore, a decree of divorce pronounced by a foreign Court in the case of parties domiciled within its jurisdiction will be recognised as valid in England, although the marriage may have been solemnised in England, and although it may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England (*b*).

## II. ESTOPPEL BY DEED.

The next species of estoppel is by instruments under seal; and this kind of estoppel binds both parties to the deed and those who claim under them (*c*). The principle is, that where a man has entered into a solemn engagement under his hand and seal, as to certain facts, he shall not be permitted to deny any facts which he has so asserted (*d*); but this only applies in an action or proceeding based on the deed in question; in a collateral action there is no such estoppel (*e*).

A lease is evidence for and against a lessee of the terms on which he holds, and also for or against an assignee

(*a*) See Westlake's Private International Law, 4th ed., Chap. XVII., cf. *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155.

(*b*) *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517; *Bater* v. *Bater*, [1906] P. 209; *Harvey* v. *Farnie*, 8 App. Cas. 43; cf. *Pemberton* v. *Hughes*, [1899] 1 Ch. 781.

(*c*) *Bateman* v. *Hunt*, [1904] 2 K. B. 530.

(*d*) *Per* TAUNTON, J., in *Bowman* v. *Taylor*, 2 A. & E. at p. 291.

(*e*) See judgment of WOOD, V.-C., in *Carter* v. *Carter*, 3 K. & J. at p. 644.

who claims under him (*f*). So, a recital in a deed is evidence against him who executed the deed (*g*), and against every person claiming under him (*h*). But a recital must be the language of both parties to the deed to estop both. Where a recital in a deed obviously emanates from one party, that party alone will be estopped, and not the other (*i*).

There must be a positive statement of a fact in a deed or it will not operate by way of estoppel in relation to such fact (*k*). The rule is that an estoppel should be certain to every extent, and therefore if the thing be not precisely and directly alleged on the mere matter of supposal it shall not be an estoppel (*l*). A receipt clause for money purporting to have been advanced, in a mortgage deed, was, as against a sub-mortgagee, held to be "the simplest possible case of estoppel" (*m*). The recital in a deed of a former deed between the same parties proves, as between such parties, so much of the former deed as is recited, and no more (*n*). If a party to a deed, or his privy, attempts to set the deed aside on the ground of misrepresentation or mistake in regard to statements which happen to be embodied in the recitals, the burden of proving them to be falsehoods rests upon such party or privy who is *primâ facie* bound by such recitals or admissions (*o*).

A recital is conclusive evidence against parties only where it is distinctly antecedent to, and related to, the

(*f*) *Houghton* v. *Kœnig*, 18 C. B. 235.
(*g*) *Bowman* v. *Taylor*, 2 A. & E. 278; Cockle, 28.
(*h*) *Gwyn* v. *Neath*, L. R. 3 Ex. 209; but not in favour of strangers to the deed (see *Trinidad Asphalte Co.* v. *Coryat*, [1896] A. C. 592).
(*i*) *Stroughill* v. *Buck*, 14 Q. B. 781.
(*k*) *General Finance and Discount Co.* v. *Liberator Building Society*, 10 Ch. D. 15.
(*l*) *Per* Lord TENTERDEN in *Right* v. *Badinall*, 2 B. & Ad. 278.
(*m*) *Per* COZENS-HARDY, M.R., in *Powell* v. *Browne*, 97 L. T. 854. See also, on same question, *Bateman* v. *Hunt*, [1904] 2 K. B. 530.
(*n*) *Gillett* v. *Abbott*, 7 A. & E. 783.
(*o*) *Melbourne Banking Corporation* v. *Brougham*, 7 App. Cas. 307.

substance of the deed. The law on this point is thus laid down by PARKE, B., in *Carpenter* v. *Buller* (*p*):—

"If a distinct statement of a particular fact is made in the recital of an instrument under seal, and a contract is made with reference to that recital, it is unquestionably true that as between the parties to that instrument and in an action upon it, it is not competent for the party bound to deny the recital."

The same learned judge also laid down that a recital, even in an instrument not under seal, may be conclusive to the same extent (*q*). In other cases recitals are treated as *primâ facie* evidence which may be rebutted. A recital in a policy of insurance that a premium has been paid is conclusive against the insurance company (*r*). A covenant will not create an estoppel (*s*).

A party to a deed is not estopped from showing that it is voidable or void from fraud or illegality (*t*) or from having been executed by him while under duress or while a minor. When an educated person, who, by very simple means, might have ascertained what are the contents of a deed, is induced to execute it by a false representation of such contents, it is doubtful whether he may not, by executing it negligently, be estopped between himself and a person who innocently acted upon the faith of the deed being a valid one (*u*). The engrossment of a deed tendered for execution will operate as an admission by, but not as an estoppel against, the party tendering it (*x*).

Infants are not bound by recitals in deeds executed by their guardians (*y*). Married women are estopped by

(*p*) 8 M. & W. 212; cf. *Lainson* v. *Tremere*, 1 A. & E. 792.
(*q*) *Ibid.*
(*r*) *Roberts* v. *Security Co.*, [1897] 1 Q. B. 111.
(*s*) See *General Finance and Discount Co.* v. *Liberator Building Society*, 10 Ch. D. 15.
(*t*) *Collins* v. *Blantern*, 2 Wilson, 341; 1 Sm. L. C. 369.
(*u*) *Per* MELLISH, L.J., in *Hunter* v. *Walters*, L. R. 7 Ch. 75; *Howatson* v. *Webb*, [1908] 1 Ch. 1.
(*x*) *Bulley* v. *Bulley*, L. R. 9 Ch. 739.
(*y*) See *Milner* v. *Lord Harewood*, 18 Ves. 274.

any deed which binds their separate estate and also by the recitals in any such deeds (*z*). But although a married woman is bound by estoppel *quoad* her separate estate, yet, as a legal disability cannot be evaded by estoppel, she cannot get rid of a fetter on anticipation by means of the doctrine of estoppel (*a*).

If a tenant or other limited owner grants a lease under seal for a term of years greater than he has power to grant, he is estopped, as against his tenant, from denying the validity of his lease. He creates what is called "a tenancy by estoppel," and should he afterwards acquire the fee simple he can be compelled to permit the tenant to continue in occupation for the full term. The same rule applies if such a term be created by a man who has no interest whatever in the land he professes to demise. A tenancy by estoppel gives the landlord a right to distrain; but should he take, as distress, goods which are the property not of his tenant but of a stranger, that stranger will not be estopped from asserting that the lessor had no title (*b*).

## III. ESTOPPEL BY CONDUCT.

If A. by word or conduct induces B. to believe that a certain state of things exists, and B. in that belief acts in a way in which he would not have acted unless he so believed, and is thereby prejudiced, then A. cannot in any subsequent proceeding between himself and B. or anyone claiming under B. be heard to deny that that state of things existed. But A. will not be estopped from averring the truth in any other proceeding. The estoppel only arises in favour of some person whom A. has

(*z*) *Jones* v. *Frost*, L. R. 7 Ch. 776.
(*a*) *Bateman* v. *Faber*, [1898] 1 Ch. 144.
(*b*) *Tadman* v. *Henman*, [1893] 2 Q. B. 168.

induced by word or conduct to do or abstain from doing some particular thing.

The words may be written or spoken; the conduct may be any act, omission or neglect, provided it be an omission to do something which A. ought to do—the neglect of some legal duty which A. owes B.; provided also that such omission or neglect misleads B. and misleads him to his prejudice. Even silence may be sufficient where there is a duty to speak (*c*), and where silence will create an erroneous impression which causes B. to alter his position for the worse.

An estoppel, as we have said, is not a cause of action. Nevertheless the same representation which creates an estoppel may also be good ground for an action against the person who made it, *e.g.*, to rescind a contract induced thereby (*d*), or to recover damages in case the representation was fraudulently made.

The law on this subject is stated with great clearness and precision in the judgment of the Court in *Carr* v. *L. & N. W. Rail. Co.* (*e*), where Brett, J., classifies the ordinary instances of estoppel by conduct under four heads: Fraud; Intentional but Innocent Misrepresentation; Foolish but Misleading Conduct; and Culpable Negligence.

It must not be taken, however, that this classification is exhaustive; a man's conduct may give rise to estoppel in an infinite number of ways. In fact, whenever one, by his words or conduct, wilfully causes another to

(*c*) *Lewis* v. *Lewis*, [1904] 2 Ch. 656.

(*d*) *Smith* v. *Kay*, 7 H. L. Cas. 750; *Redgrave* v. *Hurd*, 20 Ch. D. 21; *Vaughan* v. *Vanderstegen*, 2 Drew. 363; *Sharpe* v. *Foy*, L. R. 4 Ch. 35.

(*e*) L. R. 10 C. P. 307; approved by C. A. in *Seton* v. *Lafone*, 19 Q. B. D. 68; and see *Ex parte Adamson, In re Collie*, 8 Ch. D. 807.

believe the existence of a certain state of things and induces him to act on that belief so as to alter his previous position, the former is precluded from averring against the latter a different state of things as existing at the same time (*f*). By the term "wilfully" in the above rule it has been laid down (*g*), that—

"we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it, and does act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons on the faith of their being so authorised."

One of the earliest cases on this subject is *Savage* v. *Foster* (*h*), decided in 1723, where the defendant and her husband, knowing that she was entitled in remainder on her mother's life estate, solicited her mother to make a settlement of the property as though she had an estate in fee simple. They were held to be estopped from asserting the title in remainder against the plaintiff, who had acquired the property from the person in whose favour the settlement had been made. In cases earlier than this, a person entitled to land was held to be estopped, because he had attested a deed which was inconsistent with his title (*i*); and even because he

(*f*) *Per* Lord DENMAN, in *Pickard* v. *Sears*, 6 A. & E. 474; cf. *Attorney-General* v. *Stephens*, 1 K. & J. 724.

(*g*) *Per* PARKE, B., in *Freeman* v. *Cooke*, 2 Ex. at p. 663; Cockle, 29. Approved and followed in *M'Kenzie* v. *British Linen Co.*, 6 App. Cas. 82, where a duty was under the circumstances held to be cast on a customer of a bank to inform the bank of a forgery; but in *Squire* v. *West Australian Mortgage, etc. Co.*, [1896] A. C. 257, no such duty was, under the circumstances, held to be cast.

(*h*) 9 Mod. 35; and see note to this case in White and Tudor, 8th ed., I., 469.

(*i*) *Watts* v. *Creswell*, 9 Vin. Ab. 415.

had prepared the engrossment in the course of his employment as a solicitor's clerk (*k*).

Where in bankruptcy proceedings a bill of sale given by a debtor was treated as valid with the knowledge and acquiescence of the debtor, and on that footing he obtained a release on payment of a composition to his creditors including the grantees, it was held that the debtor could not, in a subsequent action against the grantees, say that the bill of sale was invalid (*l*). It has even been suggested that a man may, by his conduct, estop himself from relying on a statutory defence to an action of contract such as a plea of the Gaming Act, 1892 (*m*). And an employer has been estopped by his conduct from setting up the statutory defence that he has received no proper notice of an accident under the Workmen's Compensation Act (*n*). But where the defendants, a public authority, had so conducted themselves as to lead the plaintiff to believe that they were prepared to pay her reasonable compensation, and she in consequence delayed issuing the writ until the period of limitation under the Public Authorities Protection Act, 1893 (*o*) had expired, it was held they were not estopped from setting up the Act (*p*). Nor is an infant estopped from setting up the Infants Relief Act, 1874, as a defence to a claim for money lent, by the fact that he represented himself to be of full age at the time of the loan (*q*). For an estoppel cannot give capacity where it does not exist in fact.

It is not necessary that the conduct which creates an estoppel should be fraudulent; there need not be any

(*k*) *Clare* v. *Earl of Bedford*, 13 Vin. Ab. 536, 537.
(*l*) *Roe* v. *Mutual Loan Fund*, 19 Q. B. D. 347.
(*m*) 55 Vict. c. 9. See *per* WILLS, J., in *Tatam* v. *Reeve*, [1893] 1 Q. B. at p. 48.
(*n*) *Wright* v. *Bagnall*, [1900] 2 Q. B. 240; *Rendall* v. *Hill's Dry Docks, etc. Co.*, [1900] 2 Q. B. 245.
(*o*) 56 & 57 Vict. c. 61.
(*p*) *Hewlett* v. *London County Council*, 24 T. L. R. 331.
(*q*) *Levene* v. *Brougham*, 25 T. L. R. 265.

conscious intention to mislead. As laid down in *Carr* v. *L. & N. W. Rail. Co.* (*r*) :—

"If in the transaction itself which is in dispute one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist."

In that case it was held that the defendants were not, under the circumstances, estopped from showing that certain goods alleged to have been delivered to them as carriers had never reached their hands, although the plaintiff had received from them advice notes for such goods (*s*). So, in a recent case, it was laid down that to entitle a person to recover on the ground of estoppel a loss occasioned through culpable neglect of the defendant, the plaintiff must prove that the negligence complained of occurred in the particular transaction in which his loss arose, and also that such negligence was the proximate, direct, or real cause of the loss (*t*). This rule applies to a statement of a material fact which is untrue, even though the person making it believed it to be true (*u*) ; but it does not apply to a statement that something not yet in existence will come to pass, nor to a matter of intention as to the future (*v*) ; a promise *de futuro* to be binding at all must be binding as a contract (*x*). It is generally considered that the rule is, that a person

(*r*) L. R. 10 C. P. at p. 318.

(*s*) But see *Coventry* v. *Great Eastern Rail. Co.*, 11 Q. B. D. 776; and *Compania Naviera Vasconzada* v. *Churchill*, [1906] 1 K. B. 237, where shipowners were estopped from denying to a purchaser of goods shipped that they had been shipped "in good order and condition," as acknowledged by their captain in the bill of lading.

(*t*) *Longman* v. *Bath Electric Tramways, Ltd.*, [1905] 1 Ch. 646.

(*u*) See Lord SELBORNE'S judgment in *Vagliano* v. *Bank of England*, [1891] A. C. 107.

(*v*) *Bank of Louisiana* v. *Bank of New Orleans*, 43 L. J. Ch. 269; cf. *Jorden* v. *Money*, 5 H. L. Cas. 185; and *George Whitechurch, Limited* v. *Cavanagh*, [1902] A. C. 117.

(*x*) *Maddison* v. *Alderson*, 8 App. Cas., at p. 473.

cannot be made liable for a misrepresentation, unless it is a misrepresentation in point of fact, and not merely in point of law (*y*); but this has been questioned (*z*), and it is probable that the rule is not applicable to any but cases where both parties have the same means of knowing what is the law on a given point. A statement of fact, whether written or oral, to operate as an estoppel, must be clear and unambiguous (*a*).

The result of the previous authorities on the above points was thus stated by KAY, L.J., in the case of *Low* v. *Bouverie* (*b*) :—

"(1) There has been from ancient time a jurisdiction in Courts of Equity in certain cases to enforce a personal demand against one who made an untrue representation, upon which he knew that the person to whom it was made intended to act, if such person did act upon the faith of it and suffered loss by so acting. (2) This was readily done where the representation was fraudulently made, in which case an action of deceit would lie at law. (3) Relief would also be given at law and in equity, even though the representation was innocently made without fraud, in all cases where the suit will be effective if the defendant is estopped from denying the truth of his representation. (4) Where there is no estoppel, an innocent misrepresentation will not support an action at law for damages occasioned thereby. (5) Estoppel is effective where an action must succeed or fail, if the defendant or plaintiff is prevented from disputing a particular fact alleged."

The six following are among the most important illustrations of estoppel by conduct :—

(1) A tenant, during his possession of the premises, cannot deny that the landlord, under whom he has entered or to whom he has paid rent, had title at the time of his admission; and this rule extends to the case of lodgers. "The security of landlords would be infinitely

(*y*) *Per* MELLISH, L.J., in *Beattie* v. *Lord Ebury*, L. R. 7 Ch. 802 (affd., L. R. 7 H. L. 102).

(*z*) *Per* BOWEN, L.J., in *West London Commercial Bank* v. *Kitson*, 13 Q. B. D. 363.

(*a*) *Low* v. *Bouverie*, [1891] 3 Ch. 82; cf. *Colonial Bank* v. *Cady*, 15 App. Cas. 267.

(*b*) *Supra*. In this case a trustee was held not to be estopped by his conduct concerning the trust estate. Other recent cases concerning trustees are *Porter* v. *Moore*, [1904] 2 Ch. 367; and *Lewis* v. *Lewis*, [1904] 2 Ch. 656.

endangered if such a proceeding were allowed" (*c*). And even if a tenant consents to give up possession to a person claiming to be the landlord, such person is estopped as the tenant would have been from disputing the landlord's title (*d*). So, where a person had dealt with property as an executor *de son tort*, his payment of rent to the superior landlord was held to estop him from denying his liability as assignee to perform the covenants in the lease (*e*). Nevertheless a tenant, although he cannot be permitted to prove that his landlord had no title at the time of entry, may show that his title has expired (*f*), and may prove that a parcel of land, about which he and the lessor are disputing, was never comprised in the lease at all (*g*). When a tenant took a lease of land from a coparcener who was only entitled to a portion of the rents and profits, he was held estopped from denying the title of the heir and privy in blood of the lessor to the whole land (*h*). Conversely, a landlord who has granted a lease is estopped from alleging his want of title, and this whether the lease is by deed or not. But where a corporation had granted a new lease, in consideration of the surrender of an old lease, and the new lease was invalid because the consent of the Local Government Board had not been obtained, it was held that they were not estopped from showing that the surrender was thereby rendered inoperative (*i*). Payment of rent and receipt of rent alike raise strong presumptions of tenancy, but do not operate by way of estoppel; for, when a tenancy is attempted to be established by mere payment of rent, without any proof of an actual demise or of the tenant's having been let into possession by

(*c*) *Per* Lord ELLENBOROUGH, in *Balls* v. *Westwood*, 2 Camp. 12.
(*d*) *Doe* v. *Mills*, 2 A. & E. 17.
(*e*) *Williams* v. *Heales*, L. R. 9 C. P. 171.
(*f*) *England* v. *Slade*, 4 T. R. 682; cf. *Langford* v. *Selmes*, 3 K. & J. 220. See *Serjeant* v. *Nash, Field & Co.*, [1903] 2 K. B. 304.
(*g*) *Per* Lord BLACKBURN in *Clark* v. *Adie*, 2 App. Cas. 435.
(*h*) *Weeks* v. *Birch*, 69 L. T. 759.
(*i*) *Canterbury Corporation* v. *Cooper*, 99 L. T. 612.

the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent and to show on whose behalf such rent was received (*k*) ; or to show that it was made under a supposed legal obligation which did not exist (*l*).

(2) A bailee is estopped from denying that his bailor had, at the time the bailment was made, authority to make it (*m*). But when the bailee is evicted by title paramount, he can set up that title against the bailor with the consent of the person whose title is set up (*n*).

(3) A licensee is estopped from denying the title of the licensor to grant the licence. So, a person who enters on land by the licence of the party in possession is estopped from denying the title of such party to such possession (*o*). And a licensee of a patent cannot dispute the title of the patentee; but a licensee can show that what he has done does not fall within the ambit of the patent (*p*), and for this purpose he may refer to former patents to show what is a proper construction of his licensor's patent (*q*). He can of course prove that the patent has come to an end (*r*). It may here be observed that a patentee is not estopped from disputing the validity of the patent as against his assignee, except where it is proved that the assignee bought on the faith of the statements in the patentee's petition to the Crown (*s*). To allow a licensee to dispute the title of his licensor would be inconsistent with the law, as it would be equally inconsistent with the ordinary reason and good sense of mankind (*t*).

(*k*) *Per* PATTESON, J., in *Doe* v. *Francis*, 2 M. & Rob. 57.
(*l*) *Batten Poolt* v. *Kennedy*, [1907] 1 Ch. 256.
(*m*) *Gosling* v. *Birnie*, 7 Bing. 339.
(*n*) *Biddle* v. *Bond*, 6 B. & S. 225; *Rogers* v. *Lambert*, 24 Q. B. D. 573.
(*o*) *Doe* v. *Baytop*, 3 A. & E. 188.
(*p*) *Clark* v. *Adie*, 2 App. Cas. 423.
(*q*) *Couchman* v. *Greener*, 1 R. P. C. 197.
(*r*) *Muirhead* v. *Commercial Cable Co.*, 11 R. P. C. 317.
(*s*) *Cropper* v. *Smith*, 26 Ch. D. 700.
(*t*) *Per* WESTBURY, L.C. in *Crossley* v. *Dixon*, 10 H. L. Cas. at p. 304.

(4) And, generally, any agent entrusted with the possession or management of property is estopped from denying the title of the principal (*u*).

(5) The acceptor of a bill of exchange is, by s. 54 of the Bills of Exchange Act, 1882 (*x*), precluded from denying to a holder in due course—

"(a) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; (b) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement; (c) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement."

So, too, if the bill be drawn by procuration, he cannot deny the authority of the agent to draw the bill in the name of the principal (*y*); but he can deny his authority to indorse (*z*).

By s. 55 the drawer of a bill is precluded from denying to a holder in due course—

"the existence of the payee and his then capacity to indorse";

and the indorser of a bill is precluded from denying to a holder in due course—

"the genuineness and regularity in all respects of the drawer's signature and all previous indorsements";

and also is precluded from denying to an indorsee—

"that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto."

A statement that the signature to a bill is genuine made to the plaintiff after the bill had been indorsed to him will not estop the declarant from setting up that the bill is a forgery (*a*), for the statement does not cause

(*u*) *Dixon* v. *Hamond*, 2 B. & Ald. 310; *Evans* v. *Nichol*, 3 Man. & G. 614; *Roberts* v. *Ogilby*, 9 Price, 269.
(*x*) 45 & 46 Vict. c. 61.
(*y*) *Sanderson* v. *Collman*, 4 Man. & G. 209.
(*z*) *Robinson* v. *Yarrow*, 7 Taunt. 455.
(*a*) *Brook* v. *Hook*, L. R. 6 Ex. 89.

the plaintiff to alter his position at all (*b*); and the payment of a bill upon which a man's acceptance has been forged does not make him liable to pay a second similarly forged acceptance, even without notice of repudiation (*c*). It has also been held that the acceptor of a bill of exchange is under no duty to take precautions against the fraudulent alteration of a bill after acceptance, and therefore is not estopped from relying on any such fraudulent alteration (*d*). But if a customer of a bank by the neglect of due caution causes his bankers to pay a forged order, he cannot set up the invalidity of a document upon which he has induced them to act as genuine (*e*).

(6) Mere acquiescence may sometimes create an estoppel. Where a party, having an interest in property, stands by and permits another to deal with such property, as if he were the absolute owner, and as if no such interest in himself existed, he will not be permitted to assert such interest against those with whom the apparent owner has dealt. This doctrine was discussed at length, in the case of *Ramsden* v. *Dyson* (*f*) in the House of Lords, when the following valuable canons were laid down by the law lords:—

"(i.) If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of equity will not afterwards allow the real owner to assert his title to the land. (ii.) But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real

(*b*) *Kelly* v. *Solari*, 9 M. & W. 54; *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49.

(*c*) *Morris* v. *Bethell*, L. R. 5 C. P. 47.

(*d*) *Scholfield* v. *Earl of Londesborough*, [1896] A. C. 514; followed in *Colonial Bank of Australasia* v. *Marshall*, [1906] A. C. 559.

(*e*) See *Young* v. *Grote*, 4 Bing. 253, and the judgment of Lord MACNAGHTEN in *Scholfield* v. *Earl of Londesborough*, *supra*. Other recent cases on estoppel concerning bills and cheques are *Lewes Sanitary Steam Laundry Co.* v. *Barclay*, 95 L. T. 444; *Lloyd's Bank* v. *Cooke*, [1907] 1 K. B. 794; *Smith* v. *Prosser*, [1907] 2 K. B. 735; *Glenie* v. *Tucker*, [1908] 1 K. B. 263; *Kepitigalla Rubber Estates* v. *National Bank of India*, 78 L. J. K. B. 964.

(*f*) L. R. 1 H. L. 129.

owner from afterwards claiming the land, with the benefit of all the expenditure upon it. (iii.) So if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined."

And Lord KINGSDOWN, affirming the principles of the case of *Gregory* v. *Mighell* (*g*), laid down the following rule:—

"If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation."

It seems now to be considered that, in order for the party standing by to be bound, he must have been aware of his rights (*h*), though this was not always the case (*i*). So, where a wife allows her husband to spend the income of her separate estate, he is not accountable to her afterwards for it (*k*); nor can she recover any portion thereof after his death. When an insurer of a ship has accepted notice of abandonment, with full knowledge of the facts of the loss, he is estopped from afterwards denying a total loss or relying on a breach of warranty (*l*).

Again, whenever a person obtains possession of land, claiming under a will or deed, he cannot afterwards set up another title to the land against the will or deed, though the will or deed did not operate to pass the land in question, and any person who gains possession through a person interested in the land under the will or deed is equally estopped (*m*).

(*g*) 18 Ves. 328.
(*h*) *Per* FRY, J. in *Wilmott* v. *Barber*, 15 Ch. D. 105.
(*i*) *Teasdale* v. *Teasdale*, Select Cas. *temp.* King, 59.
(*k*) *Smith* v. *Lord Camelford*, 2 Ves. 716.
(*l*) *Provincial Insurance Co.* v. *Leduc*, 22 W. R. 939.
(*m*) *Per* LOPES, L.J., in *Dalton* v. *Fitzgerald*, [1897] 2 Ch. 86; but see *In re Anderson*, [1905] 2 Ch. 70.

When a person, by holding himself out as a shareholder, induces a company to register him as such, he cannot deny that he is a shareholder in an action on such shares (*n*). Where a company, under circumstances which made it doubtful whether an agreement was binding on its shareholders, transferred its business to a new company, one of the terms of the agreement being that the shareholders in the old company should receive shares in the new company, and share certificates were sent to all the shareholders in the old company, it was held that a shareholder who had acknowledged the receipt of and retained the certificates was a shareholder in the new company; but that one who had taken no notice of the communication was not a shareholder (*o*). In the same case Lord HATHERLEY said :—

"No authority can be found for holding that a person, by simply doing nothing, may be rendered liable. The mere fact of standing by and being told there is something done which you have not authorised, cannot fix you with the heavy liabilities which shares in a joint stock company would create."

A company, by issuing a share certificate representing a person to be a holder of certain shares, is estopped, as against another person who *bonâ fide* acts upon the faith of the representation, from denying the truth of the share certificate (*p*), including the statement, if any, that the shares are fully paid up (*q*). The estoppel does not give a title to the shares or make the person in whose favour it arises a shareholder, but prevents the company from setting up that he is a shareholder in an action for damages for not registering him as a shareholder (*r*).

(*n*) *Sheffield Rail. Co.* v. *Woodcock*, 7 M. & W. 574.

(*o*) *Challis's Case*, L. R. 6 Ch. 266; cf. *Bank of Hindustan* v. *Alison*, L. R. 6 C. P. 222.

(*p*) *In re Bahia, etc. Rail. Co.*, L. R. 3 Q. B. 584. Approved by the House of Lords in *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396; and see *Dixon* v. *Kennaway*, [1900] 1 Ch. 833.

(*q*) *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004; *Bloomenthal* v. *Ford*, [1897] A. C. 156.

(*r*) *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396.

No estoppel arises where the person acting on the certificate knows the true state of the facts (*s*). But estoppel arises where, if the person to whom the statement is made had thought about it, he would have seen it was not true (*t*). In one case a purchaser of shares from a person, who had become the registered holder by means of a forged transfer, was held to be entitled to compensation from the company in the event of his being compelled to re-transfer to their proper owner; since, by holding out the seller as the registered owner, they were estopped from denying him to be so after the purchaser had acted upon such representation (*u*). Again, where a person, after receiving a certificate of the registration of some shares, repaid to the vendor the amount of a previous call, on the faith of the certificate, the company were held estopped by the certificate, and liable for the value of the shares (*x*). In 1884 a company was held estopped by a certificate issued by their secretary, although he had wrongfully affixed their seal and had forged a director's signature (*y*). But, recently, where the secretary had fraudulently affixed the seal to a certificate and forged the signatures of two directors, the House of Lords held that there had been no such negligence by the company as to fix them with responsibility for his acts, and they were not bound by the certificate (*z*). It is only the person in whose favour the estoppel exists that can render the company liable on it (*a*). A "certification" issued by a company estops them from denying the facts certified (*b*); but it

(*s*) *In re London Celluloid Co.*, 39 Ch. D. 190.
(*t*) *Per* Lord HERSCHELL in *Bloomenthal* v. *Ford*, [1897] A. C. 156.
(*u*) *In re Bahia, etc. Rail. Co.*, L. R. 3 Q. B. 584.
(*x*) *Hart* v. *Frontino Mining Co.*, L. R. 5 Ex. 111.
(*y*) *Shaw* v. *Port Philip Colonial Gold Mining Co.*, 13 Q. B. D. 103 (doubted by House of Lords in next case below).
(*z*) *Ruben and Another* v. *Great Fingall Consolidated*, [1906] A. C. 439.
(*a*) *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. D. 188.
(*b*) *Bishop* v. *Balkis Consolidated Co.*, 25 Q. B. D. 512.

was held by the House of Lords that, where the secretary of a company having authority to certify on behalf of the company certified a transfer of shares without having received the certificates, the company were not estopped by the certification (*c*). It should be noticed that a "certification" is not under the seal of the company whereas a share certificate is, and the estoppel arising from a wrongful use of a company's seal is not governed by precisely the same considerations as an estoppel from the fraudulent acts of a company's agent.

Where commissioners were empowered by a local Act to issue mortgage securities, it was held that they could not, as against a *bonâ fide* holder for value, set up an illegality in the issue of a security, but were estopped from denying its validity (*d*). A company cannot rely on an informality in the issue of their debentures as an answer to a petition for winding up (*e*). Where a company registered an assignment of debentures, it was held that they could not equitably set off against the transferee any claim against the transferor (*f*). This doctrine was extended to a case where there was no registration; for, a company having received notice of an assignment for value of one of their debentures, and acknowledged the receipt by stamping the duplicate notice, it was held that such stamping estopped them from setting up against the transferee any equities attaching between themselves and the transferor (*g*). A useful statement of the law on the subject of the right of a company to question securities irregularly issued, as developed up to

(*c*) *George Whitechurch, Limited* v. *Cavanagh*, [1902] A. C. 117.

(*d*) *Webb* v. *Herne Bay Commissioners*, L. R. 5 Q. B. 642.

(*e*) *In re Exmouth Dock Co.*, L. R. 17 Eq. 181.

(*f*) *Higgs* v. *Northern Assam Tea Co.*, L. R. 4 Ex. 387; followed by Lord ROMILLY in *In re Northern Assam Tea Co.*, L. R. 10 Eq. at p. 463; cf. *In re General Estates Co.*, L. R. 3 Ch. 758.

(*g*) *Brunton's Case*, L. R. 19 Eq. 302.

1883, is found in the judgment of KAY, J., in *In re Romford Canal Co.* (*h*). He said:—

"Where a company have power to issue securities an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia rite acta*. If such security be legally transferable, such an irregularity and *à fortiori* any equity against the original holder cannot be asserted by the company against a *bonâ fide* transferee for value without notice. Nor can such an equity be set up against an equitable transferee, whether the security was transferable at law or not, if, by the original conduct of the company in issuing the security or by their subsequent dealing with the transferee, he has a superior equity. There remains the present case in which I must treat the parties as equitable transferees only of securities which the company, having power to issue such, represent on the face of them to be legally transferable, and where the company would be able to plead at law against the original holder or the first transferee that the debentures were invalid because issued by an insufficient meeting of shareholders. I think the decision of *Higgs* v. *Northern Assam Tea Company* (*i*) warrants me in saying that, if the original conduct of the company in issuing these debentures was such that the public were justified in treating it as a representation that they were legally transferable, there would be an equity on the part of any person who had agreed for value to take a transfer of these debentures to restrain the company from pleading their invalidity, although that might be a defence at law to an action by the transferor."

But it must be noticed that, although a company may be estopped from questioning the validity of certain of the debentures issued by it, the holders of the other debentures are not so estopped (*k*). Where a person possessed of a security, purporting on the face of it to be transferable by delivery, leaves such security in the hands of another, who makes it over to a *bonâ fide* holder for value, the owner of the security cannot set up as against the *bonâ fide* holder that it was not so transferable (*l*). Where a person executed transfers of shares and left them in the hands of his brokers, who raised money on them, it was held that he was

(*h*) 24 Ch. D. at pp. 92, 93.
(*i*) L. R. 4 Ex. 387.
(*k*) *Mowatt* v. *Castle Steel, etc. Co.*, 34 Ch. D. 58.
(*l*) *Goodwin* v. *Robarts*, 1 App. Cas. 476; *Rumball* v. *Metropolitan Bank*, 2 Q. B. D. 194.

estopped from making any claim in respect thereof as against the lenders (*m*).

It may here be noticed that, in addition to the liability which a person who is in fact a partner in a firm is under for the debts of the firm, a liability for the debts of a firm may arise by estoppel. This liability is thus defined by the Partnership Act, 1890 (*n*), s. 14, which is as follows:—

"(1) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

(2) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrators estate or effects liable for any partnership debts contracted after his death."

Therefore, if a person retires from a partnership, but omits to give proper notice of dissolution, he may be liable for debts incurred in the subsequent carrying on of the business by a new firm; but he cannot be sued jointly with the new firm, and if the new firm be sued for such a debt, the retiring partner cannot afterwards be sued (*o*). This is only a branch of the doctrine of estoppel by conduct:—

If a man allows his name to be held out to the public as being the person responsible for the transaction in question he may be liable in consequence of this holding out, or in consequence of his conduct, although he may not have originally authorised the act, because he has not taken steps which he should take to stop the unauthorised use of his name" (*p*).

It is usually said, on the authority of Lord Coke, that where estoppels conflict they neutralise one another.

(*m*) *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120.
(*n*) 53 & 54 Vict. c. 39.
(*o*) *Scarf* v. *Jardine*, 7 App. Cas. 345.
(*p*) *Per* BYRNE, J., in *Walker* v. *Ashton*, [1902] 2 Ch. at p. 294.

"Estoppel against estoppel sets the matter at large." But, as pointed out by PARKER, J., in *Poulton* v. *Adjustable, etc. Co.* (*q*), it is difficult to imagine any case in which such an event would happen. If, however, by any chance two estoppels were found to conflict, there is very little doubt that the rule laid down by Lord Coke would apply.

Henceforward in this volume we shall assume that every fact sought to be made evidence in a particular action is a relevant fact, and that it has been proved by methods which the law recognises as legitimate. There still remains the question, Does the evidence tendered make the fact evident, or does it fall short of proof? The weight which should be attached to each piece of evidence will be discussed in the next Book under the head of "Cogency."

(*q*) [1908] 2 Ch. at p. 432.

## CANADIAN NOTES.

### ESTOPPELS.

It was held in *Scripture* v. *Curtiss*, 11 U. C. C. 345, on an issue with respect to a defence to a mortgage that it was tainted with usury, that a decree in the Court of Chancery in a suit between the same parties and upon the same question was conclusive.

Plaintiff's son was killed by accident alleged to have resulted from negligent operation of an elevator in the defendant's building. Plaintiff brought action for damages, claiming personally and as administrator of the deceased, and the jury awarded him sixteen hundred dollars for loss of deceased's services since death. On the trial, evidence was offered of the proceedings in and judgment dismissing the former action brought by plaintiff as administrator, suing for the benefit and on behalf of himself as father and the mother of deceased, under an Act corresponding to Lord Campbell's Act, in respect to the same negligence.

It was held that this evidence had been improperly rejected. In the first case, under Lord Campbell's Act, the loss of service to the father constituted the foundation of the action, and this also constituted the foundation of the present action, if an action lay for such a cause. If, in the first action, the plaintiff had recovered, instead of losing the verdict, and the jury had awarded the portion coming to the father under Lord Campbell's Act, he would have had in his pocket what he was now seeking to recover from the defendant. Now, it could

make no difference whether the plaintiff won or lost in the first action: "He is, in both cases, the party in interest. In the former he was party and privy, and here he is a party and his damages in the former would comprehend the damages recoverable in the second action." *Per* GRAHAM, J., *Hawley* v. *Wright*, 27 N. S. R. 77.

Plaintiff sued a railway company for the loss of a trunk which he alleged contained several papers, among them the lease of a farm from his father to himself. Defendants resisted the claim as fraudulent, denying that they had ever received the trunk. They then offered to prove, as tending further to show the dishonesty of the claim, that the farm had been the subject of a suit in Chancery, in which it was decreed that the plaintiff's father held the land only as agent for another, and should convey to him, and that plaintiff was aware of this fact, having been a witness in the suit. It was held that the evidence had been rightly received and that it was sufficient to prove the decree without the other proceedings in the suit. *Thomas* v. *Great Western Rail. Co.*, 14 U. C. Q. B. 389.

In an action for money had and received, although the pleadings did not raise any question as to the right of the plaintiff to recover being suspended by reason of the money having been taken under circumstances which would make the taking a felony, the question appears to have been raised at the trial, and the plaintiff put in evidence the indictment upon which the defendant had been convicted of embezzlement, but acquitted on a charge of larceny. It was held that this evidence was admissible to show the fact that the matter had been disposed of before the proper criminal tribunal, though not evidence of the fact that the defendant had taken or appropriated the plaintiff's money to his own use. *McDonald* v. *Ketcham*, 7 U. C. C. P. 484.

A certified copy of the certificate of the Court of Appeal of the result of an appeal in an action is not evidence of the judgment therein in another action between different parties. So runs the head-note, but the point really decided goes farther and was to the effect that the judgment itself was not admissible in the action between different parties. ROBERTSON, J., speaking for the Court, said: "I would, however, allow proper evidence of that judgment to be given, if I thought such evidence could be received in this action." *Blackley* v. *Kenney*, 19 O. R. 169.

A deed of a referee in equity, though purporting to have been made under a decree of the Court, is not admissible in evidence without proof of the decree. *Loggie* v. *Montgomery*, 3rd Trueman, N. B. Eq.

# BOOK III.

# COGENCY.

## CHAPTER I.

### WEIGHT OF EVIDENCE.

THE term "legal evidence" includes all means of ascertaining the truth which our law sanctions and our Courts adopt. While treating of Relevancy, we have defined the matters which a litigant will be permitted to lay before the tribunal in any legal proceeding. When dealing with Proof, we have discussed the methods by which such matters can be legitimately established. We will now assume that a certain number of relevant facts have been proved by proper evidence.

Proof is the result of evidence, but it is not always easy to say how much evidence or what kind of evidence will amount to proof. Much worthless evidence, no doubt, is given in our Courts—if only for this reason, that no one can tell that it is worthless before it is heard. The judge has no power to exclude any evidence which is legally admissible merely because he does not think it will be of much use.

The admissibility of evidence is one thing: its value, when admitted, another. This distinction is

clearly pointed out by JESSEL, M.R., in a case (*a*) where it was sought to exclude a declaration made against interest, on the ground that in one way it told in favour of the interest of the declarant. He said:—

"The question of admissibility is not a question of value. The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for making it, and that though apparently against his interest, yet really it was for it; but that is a matter for subsequent consideration when you estimate the value of the testimony."

It is the duty of the jury, or of the judge sitting alone, to take into consideration every piece of evidence which has been admitted and proved in Court, and to give it such weight as they or he may think it deserves.

Absolute certainty is unattainable in any of the affairs of daily life. The exigencies of public and private business limit the inquiries held in our law courts, both as to the time which they occupy and as to the extent of the matter investigated. The fallibility of human testimony and the passions and prejudices of mankind are other circumstances which sometimes prevent the tribunal from arriving at a decision with absolute precision. In the ordinary affairs of life we are all only too apt to accept what we are told by apparently respectable persons; hence juries, as a rule, accept the evidence of any witness who is neither shaken under cross-examination nor contradicted by evidence equally reliable.

We have already referred to the well-known rule that the law requires the "best evidence" to

(*a*) *Taylor* v. *Witham*, 3 Ch. D. 605.

be given; we have noted also the limitations necessarily imposed upon the application of that maxim. But this rule, in modern times at all events, applies rather to the admissibility than to the cogency of evidence. The word "best" is employed in a narrow and technical sense. The law often permits a relevant fact to be proved in more ways than one; it by no means follows that all these ways are equally cogent. They are, it is true, equally admissible, but when admitted very different values may properly be attached to them. The fact that a litigant employs one species of admissible evidence, and does not employ others which are usual and readily available, naturally provokes the inquiry, Why has he resorted to a more remote and less convincing method of proof? and suggests the answer that the more usual method is purposely avoided because it would not tell in his favour.

Thus, if it is alleged that a material document was written by A. and A. denies this, evidence of a man who has seen him write only once, or even of an expert who has never seen him write at all, is as admissible as that of A. himself or of his near relatives, friends, partners, or employees (*b*). But it cannot be contended for a moment that all these different kinds of evidence will be of equal value in determining the question. So, too, as we have seen (*c*), evidence of reputation, entries in a family Bible, etc., can be given in evidence, for what they are worth, to prove a marriage. But if the marriage is alleged to have taken place since the Registration of Marriages Act came into force, no one

(*b*) See *ante*, pp. 46, 47.
(*c*) See *ante*, p. 353.

would attach much value to such evidence if the ordinary marriage certificate be not produced, or its absence satisfactorily explained.

In the administration of justice, as in ordinary life, we often have to deal with competitive probabilities. The tribunal must not look for more than what is called a "moral certainty"; it should not act on a mere possibility. But a large field lies between these two extremes. The whole object of evidence is to create a conviction in the mind of a reasonable and practical man; and such conviction must be based upon the facts proved by express evidence, and on the inferences which naturally and probably arise from them. Belief should always be the reasonable result of facts; a theory should always be the true explanation of actual experience. Hence, whenever it is sought to establish a theory by circumstantial evidence, all the facts proved must be consistent with the theory.

The party upon whom in any action the burden of proof rests must bring forward some evidence to sustain that burden. He must bring forward sufficient evidence to create a strong probability that the facts which he alleges in his pleadings actually occurred. Such evidence is called *primâ facie* evidence; and if given may be accepted by the tribunal as sufficient, unless the opposite party adduces evidence to the contrary. In other words, *primâ facie* evidence shifts the burden of proof. It is a question in each case what weight is to be attached to the evidence, whether it be contradicted or not, for it is seldom conclusive. As a rule,

however, very little affirmative evidence will be held sufficient where the facts lie almost entirely within the knowledge of the other side (*d*). There is a difference, too, as we have seen, in the degree of proof required in civil and in criminal cases; for civil cases may be decided on a preponderance of probability, but in criminal prosecutions the guilt of the prisoner must be established beyond "reasonable doubt" (*e*).

We proceed to deal with the cogency of the different classes of evidence, discussing first the relative weight to be attached to direct and circumstantial evidence; then the same question as applicable to oral, documentary, and real evidence; and finally the relative value of primary and secondary evidence.

### *Direct and Circumstantial Evidence.*

The question often arises, which is the more cogent—direct, or circumstantial evidence? When the evidence tendered directly establishes the fact in issue, it is called direct. Thus the evidence of a bystander who saw the occurrence is direct oral evidence of the events which happened. A deed is direct documentary evidence of the interests of which it disposes; and a hedge and ditch are direct real evidence of the boundary between two fields. But when the fact in issue, or some part of it, is presented by means of some minor evidentiary facts which, though not themselves constituting any part of the fact in issue, throw light upon it, and from which some inference may be drawn as to the existence or non-existence of the fact in issue, the evidence is said to be

(*d*) See, for instance, *General Assurance, etc. Corporation* v. *Robertson*, [1909] A. C. 404; *Hollis* v. *Young*, [1909] 1 K. B. 629. For a stronger statement by BAYLEY, J., see *R.* v. *Turner*, 5 M. & S., at p. 211.

(*e*) *R.* v. *White*, 4 F. & F. 383.

circumstantial. It must not be too remote from the issue: the line is drawn "when the importance of the fact to be proved is wholly disproportionate to the extent of the inquiry." And the minor evidentiary facts which together constitute the circumstantial evidence must each in its turn be established by separate direct proof.

The direct evidence of a bystander who saw with his own eyes what was done is *primâ facie* the more reliable, unless there is any reason for doubting either his veracity or his powers of observation. Yet a jury is often loth to convict a prisoner on the uncorroborated evidence of one man. In criminal cases juries undoubtedly prefer to have the fact proved by direct evidence; but if the circumstantial evidence dovetails well together, and raises a violent presumption of the prisoner's guilt, then it will be as cogent as direct evidence.

The advocates of direct evidence say that in this the liability to err is little. The tribunal has only to consider whether the witnesses are telling the truth; whereas in circumstantial evidence it has to arrive at truth through two preliminary considerations: are the witnesses telling the truth; and if so, can the fact to be proved be rightly inferred from the circumstances proved? The advocates of circumstantial evidence say: witnesses can lie, but circumstances cannot. Therefore this evidence is better than direct evidence. "The coincidences of truth are innumerable," as Paley has it. But really the value of these two kinds of evidence depends upon the facts of each case. Sometimes circumstances lie in a more dangerous fashion than men, for truth *is* stranger than fiction, and the coincidences of error, the fortuitous concourse of events, *may sometimes* give an air of truth to an absolutely false charge against a person. Examples of this may be found in the history of all countries. Still, it is easier to read circumstances—the mute evidence of inanimate nature—aright than to probe the infinite variety and

complexity of human motives and emotions which may distort the truth.

In *R.* v. *Burdett* (*f*), ABBOTT, C.J., said:—

"A presumption of any fact is properly an inference of that fact from other facts that are known; it is an act of reasoning: and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a Court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given: the man who is charged with theft is rarely seen to break the house or take the goods; and in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction; if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily."

Lord STOWELL, in a case where adultery was alleged, said:—(*g*)

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

(*f*) 4 B. & Ald. at p. 161.
(*g*) *Loveden* v. *Loveden*, 2 Hagg. Cons. at p. 2.

rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations; neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and Courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties and remote and artificial reasonings upon such subjects. Upon such subjects the rational and the legal interpretation must be the same."

### *Oral, Documentary, and Real Evidence.*

The testimony of witnesses is the most usual method of proof. Unless the facts are agreed or admitted, so that the case depends entirely upon a point of law, it is, in practice, impossible for a plaintiff to conduct a case without calling witnesses, for both documentary and real evidence require some oral evidence to show their relation to the matters in issue.

Oral testimony, however, is limited by the lifetime of the witness; documentary and real evidence, on the other hand, in the ordinary course of nature will probably last until the need for producing them has ceased. To show that a witness is dead is a conclusive reason for not calling him; but to show that a document or thing no longer exists leads to comment, for it may have been destroyed for the express purpose of preventing it from being put in evidence. The person who should have produced it must account satisfactorily for its non-production.

The evidence of witnesses, however, raise so many difficult and important questions that the whole of the following chapter is devoted to the discussion of its cogency.

We will, however, deal here with the question, When both documentary and oral evidence are before the Court, which is entitled to more weight?

A judge as a rule regards a document as of igher authority. A jury likes to see the witnesses. But both

would agree that documentary evidence is of great use in checking and explaining oral. It is extremely valuable when the oral evidence is conflicting. The correspondence that passed between the parties before the quarrel began is of especial importance. Again, documentary evidence is useful to refresh the memory of a witness. Documents not otherwise admissible may be used for this purpose. But they must be documents which were written or dictated by that witness shortly after the event which they record, or which if written by someone else, were read and approved shortly after the event (*h*).

Real evidence is addressed directly to the senses of the tribunal, and is therefore more satisfactory and reliable than verbal descriptions of an object given by witnesses. But the great danger of this kind of evidence, especially when put before a jury, is that the tribunal will jump to a conclusion before any evidence has been given to establish the connection between the object produced and the issue to be tried. The production of a bloody weapon or the exhibition of a grievous wound may so excite the passion or the sympathy of a jury as to cause them to lose sight of the necessity of establishing a clear connection between such matters and the crime in question. They may jump to an erroneous conclusion as readily as the patriarch Jacob did, when, at the sight of Joseph's coat of many colours, he exclaimed, "It is my son's coat; an evil beast hath devoured him. Joseph is without doubt rent in pieces." Many other instances might be given of hasty and wrong conclusions produced by objects which thus strongly excite the passions. But, when real evidence is dealt with strictly, and kept within its proper sphere, it may be fairly said to be the most reliable that can be had.

In some cases production of physical objects may be actually required by the Court. For instance, in cases

(*h*) See *ante*, p. 169.

of larceny, the Court usually insists upon the stolen property being produced, if it has been found. But generally production is not insisted on, or legally required, although in many cases non-production would provoke comment or suspicion (*i*).

### *Primary and Secondary Evidence.*

We have defined secondary evidence as that which by its very nature shows that better evidence is or once was in existence; it follows that it must have less probative force than that better evidence the existence of which it connotes. Let us deal first with hearsay—that is, with secondary oral evidence. Here all the ordinary sanctions of truth (*k*) are missing.

The real author of the statement reported is not present in Court, is not on oath, and is not subject to cross-examination; and it is a fundamental principle of our law that evidence has no claim to credibility unless it be given on oath, or what is equivalent to an oath, and unless the party to be affected by it has an opportunity of cross-examining the witness. Hence, hearsay or second-hand evidence has always been regarded as inferior to original, as a guide to truth. When a witness states something, which he himself has either seen or heard, his statement contains clearly the requisite elements of presumptive truth; but when he states something which he has heard from another person, his statement is obviously less reliable and satisfactory. A multitude of probable contingencies diminish its value. The witness may have misunderstood or imperfectly remembered, or even may be wilfully misrepresenting the words of the third person; or the latter may have spoken hastily, inaccurately, or even falsely. He may

(*i*) *R.* v. *Francis*, L. R. 2 C. C. R. 128; *R.* v. *Hunt*, 3 B. & Ald. 566; *Armory* v. *Delamirie*, Strange, 505.

(*k*) See *post*, p. 497.

have been "a person whom no one who knew him would believe for a moment" (*l*).

Again, secondary documentary evidence has much less probative force than the corresponding primary evidence; that is why it is not received until such excuse as the law deems satisfactory has been given for the non-production of the primary evidence. When such excuse is forthcoming all kinds of secondary evidence are, as we have seen, equally admissible to prove the contents of a missing document (*m*): though they are far from being equally cogent. It is not to be supposed that oral evidence of a document, although in some cases equally admissible with an attested or examined copy, is therefore entitled to the same credibility; and it will be for a jury to place their own estimate on the value of the witness's memory. This, no doubt, is the reason why the Court is usually far more reluctant to admit secondary oral evidence than it is to admit secondary documentary evidence.

Take the eight cases, in which, as we have seen (*n*), secondary oral evidence is admissible. In all of these it is almost certain that there is no scope for falsehood. For instance, it is most improbable that a man when making a statement in the ordinary course of his duty, or against his interest, will tell a lie. In other cases, no doubt, *e.g.*, where evidence of reputation is admitted to prove general right, the sanction for the truthfulness of the evidence is distinctly weaker. But in these cases such evidence is necessary; a general right can scarcely ever be established without it. Such evidence, moreover, must have come into existence *ante litem motam*. And even when admitting such evidence the Court frequently warns the jury against giving it much credit (*o*). The safeguards for the admissibility of

(*l*) See the judgment of CAVE, J. in *Scott* v. *Sampson*, 8 Q. B. D. pp. 506, 507.
(*m*) See *ante*, p. 360.
(*n*) See *ante*, p. 306.
(*o*) *Per* ROMILLY, M.R. in *Crouch* v. *Hooper*, 16 Beav. 182; and see *Taylor* v. *Witham*, 3 Ch. D. 605.

secondary documentary evidence are not so strict. In fact, the latest tendency is, for the convenience of parties and by their consent, to admit any secondary documentary evidence without strict proof of the loss or destruction of the original.

Secondary evidence, then, of the contents of a document is admitted by our Courts more readily than secondary evidence of an oral statement. This is because a document cannot change and cannot be cross-examined; hence an accurate copy of a document is almost as valuable as the original. But a witness can always say more, and can often be made to say less, than is written down in any statement of his evidence. Cross-examination will often effect important variations or disclose weak points in his evidence. It is therefore unfair to the opponent that the witness should not be cross-examined in the hearing of the jury, which has to decide the issue. But though as a rule secondary evidence is *ex hypothesi* of less value than primary, nevertheless there are circumstances in which it is at least equally cogent. Thus a marriage is usually proved by a certified copy of the register, together with some evidence of identification of the parties. The copy is obviously *derived* from the register, and the register owes its existence to the rector or registrar. But if called as witnesses the rector or registrar would probably decline to pledge his memory to identification of a quite ordinary marriage of many years previously. He would at once appeal to the register, and be guided by what he found there. In this case, then, the register is as valuable as the registrar. But, further, it is undesirable on grounds of public policy for registers to be sent travelling up and down the country. Hence, as we have seen (*p*), by statute a certified copy of an entry in a register, if sealed with the seal of the Registrar-General's office, has rightly been made sufficient evidence

(*p*) See *ante*, p. 265.

of the birth, death, or marriage to which the entry relates.

We proceed now to deal with the means adopted by our law to secure, so far as possible, that the evidence laid before the Courts should be clear and reliable.

## CHAPTER II.

### HOW TO TEST THE VERACITY OF A WITNESS.

THE State does all it can to secure that the evidence given by every witness in our Courts shall be true. It seeks to impress upon him that it is his interest, as well as his duty, to tell the truth, and that it is against his interest to tell a lie.

The mind of a witness is influenced in this direction by six considerations, which may be called the sanctions of truth.

First, the arrangements of our Courts are such that a witness, when giving evidence, is placed in a box by himself, away from papers and friends.

Secondly, from that conspicuous position he can see all his friends and enemies—the very people whose esteem he wishes to keep or gain, and whose ridicule or contempt he wishes to avoid, and he knows that if he is detected in a lie he will incur social infamy.

Thirdly, he is solemnly sworn to tell the truth. If he breaks his oath, he will be committing a most serious sin.

Fourthly, he will not be allowed to tell the story in the way in which he relates events in his every-day life. Every fact, every incident, every inference may be challenged in cross-examination, and he knows that once in the box he cannot escape

cross-examination, if the opposite party desires it. The only way in which he can be sure of coming out unscathed is to tell the truth clearly and simply.

Fifthly, he knows that if he is detected in lying, he may not only forfeit esteem and incur contempt, but may also be prosecuted and severely punished.

And lastly, he will find it easier to tell the truth than to invent a lie. It is not so difficult to relate what happened, as it is to tell a lie which is sufficiently plausible and circumstantiated to impose upon the Court. Even the most expert liar has to watch his words very carefully; for, if the truth slips out even in the least important detail, it may be sufficient to throw doubt on the whole story. It often happens that, in a moment of inadvertence, a witness admits the very fact which he has been trying to conceal. Most witnesses, moreover, wish to tell the truth, or, at least, not to tell deliberate falsehoods.

Hence witnesses usually speak the truth, and therefore juries instinctively confide in them until it is shown that they are unworthy of credence. Nevertheless, it often happens that the evidence given by a witness is misleading. Such cases may be classed under three heads:—

The witness may not wish to tell the truth. He may commit deliberate perjury, not as to the whole of the facts, but as to the facts which are crucial to the issue.

Again, though not wishing to commit perjury, he may be very unwilling to assist the other side. The fact that he is a relation of the person calling him,

or his employer, or employed by him, or that he has a spite to gratify, a theory to ride to death, a pecuniary interest in the result, or merely that he is actuated by *esprit de corps*, may lead him to suppress part of the truth, or pretend ignorance as to matters with which he is acquainted, or wilfully exaggerate or minimise the facts to which he is deposing, even where he would shrink from deliberately inventing a lie.

And lastly, the witness may be ready and willing to tell the truth, but unable to do so—he may be physically or mentally incapable of appreciating the true bearing of the questions asked him or the answers given by him, and that either because such is his normal constitution or because he finds himself in a position which he has never occupied before. His vocabulary may be limited, and may consist largely of local terms, having little or no meaning to the general public, and these he may be unable to explain or translate. Again, he may not attend to the questions asked him, so that, although competent to answer properly, he gives a wrong answer. Inaccuracies arise far oftener from such defects than from any other reason. Many witnesses have been thought to be committing perjury when, as a matter of fact, they were unable to speak the truth in consequence of mental or physical conditions.

It is not enough that a witness should have no motive or interest to mislead. He will not be a good witness unless he had the opportunity to observe, the power of observing accurately, and of discriminating between facts and inferences from facts. He must also have a good memory, and,

lastly, the ability to state clearly and accurately the facts which he does remember.

We will now deal in more detail with the causes which may render the evidence of witnesses unworthy of credence.

First we will deal with the man who comes into the witness box resolved, if necessary, to commit deliberate perjury. Happily this kind of witness is not so often seen in our law courts as many persons suppose. Most witnesses wish to speak the truth, or, at all events they shrink from conscious falsehood. But there are cases in which the judge or jury cannot escape from the conclusion that the witnesses on one side or the other are purposely misrepresenting the facts within their knowledge. Now in the first place a distinction is to be observed between a false assertion and a false denial. It is comparatively rare for a witness to invent something which never happened; but he is generally willing to deny what witnesses on the other side have already asserted, and it frequently happens that a man who has denied that an event ever occurred with apparent frankness and honesty will so hesitate in giving his own version, that it will be obvious to everyone in Court that he is constructing an untrue story. It must be remembered, however, that pretended ignorance and wilful exaggeration amount to perjury just as much as untrue assertion.

It does not follow because a man gives evidence badly that he is lying; nor will the fact that a man has a bad character—even that he has been convicted of a crime—necessarily preclude him from being relied upon as a witness of truth.

But far more frequently, the facts are perverted by what we will call the partisan witness, a man whose interest or motive may not be enough to cause him to tell a downright lie, but yet may so colour his evidence

as to make it misleading. He is not prepared to go the length of committing flat perjury, but he is determined to say as little as he can to help the other side. Often, unless he is skilled in giving evidence, his testimony does more harm to his own side than to his opponents; for in his desire to score points he can easily be led on under cross-examination to make statements which no one believes and which discredit his own evidence, and that of the other witnesses on the same side.

Sometimes a man makes a partisan witness because he has a pet aversion or is wedded to a theory. In that case, a skilful cross-examiner will lead him gently to expound his theory or to air his aversion. This may destroy the value of his evidence as to the particular matter in issue. Again, *esprit de corps* is often a powerful factor. In all these cases the tribunal must endeavour to discover (i.) the facts and reasons upon which the witness's opinion is based, and (ii.) the motives which render him a partisan.

There is special difficulty in dealing with the evidence of expert witnesses. Such evidence must always be received with caution; they are too often partisans—that is, they are reluctant to speak quite the whole truth, if the whole truth will tell against the party who has paid them to give evidence. At the same time such witnesses are in a position of advantage; for they have had that special training and special experience which the judge and jury are without, and the absence of which renders necessary the presence of such witnesses.

The Court must try to elicit the grounds for the opinion expressed, the experiments or other facts on which the opinion is based, and the authorities on which the witness relies. Experts, moreover, frequently have a favourite theory in which they believe, and consequently tend to apply whenever they can, even if it is not generally accepted as true, or has very little bearing on the point in dispute. Expert witnesses are far too prone

to take upon themselves the duty of *deciding* the questions in issue in the action, instead of confining themselves to stating fairly and clearly their real opinion on the matter. Their duty is merely to assist the Court by calling its attention to, and by explaining, matters the true significance of which would not be clear to persons who have received no scientific training, or have had no special experience in such matters (*a*).

In many cases, the clear evidence of non-experts who depose to the fact is more cogent than the evidence of experts, who merely form conjectures. Thus, where an attesting witness swore clearly and distinctly that the deed was executed in his presence by R. and his wife, both of whom he knew, this evidence was held not to be counterbalanced by the evidence of experts, who expressed an opinion that the signature purporting to be that of R. was not in the character of his handwriting (*b*).

Next, we must deal with the witness who honestly desires to tell the truth, but who misleads the Court by giving stupid, incomplete, or inaccurate evidence. In the vast majority of cases, this is due to surrounding circumstances, to his mental or physical characteristics, to nervousness and timidity, confusion of mind, or mere inattention to the question.

A good witness requires the following intellectual faculties:—

(i.) *Perception.*—The power of observing what he has the opportunity of observing.

(ii.) *Judgment.*—The power of discriminating between facts and inferences.

(iii.) A good *memory.*

(iv.) Power to *express* clearly and accurately what he does remember.

(*a*) See *Hennessy* v. *Keating*, 25 R. P. C. 125; *Birmingham S. A. Co.* v. *Webb*, 24 R. P. C. 27.

(*b*) *Newton* v. *Ricketts*, 9 H. L. Cas. 262.

(i.) A witness must of course have had the chance to observe, but he may not have observed anything helpful to the Court. This may occur for many reasons. He may have been preoccupied, and so paid no attention to what was passing in his presence; he may have had no interest in the matter, and no motive for paying attention to it, or though he may have been present at one time he was absent when the important event happened. He may have been too old, blind, deaf, or suffering from want of intelligence. For these reasons the positive evidence of one witness who can say, "I was present and saw it," is stronger than that of a number of persons who were present and did not see.

Romilly, M.R., says in *Sharples* v. *Adams* (*c*):—

"As a rule people observe best that which is important to themselves, or strikes them as unusual or odd. Certain events produce of necessity a more lasting impression than others, and allowance must be made for this fact. Women as a class are more observant than men, especially in matters where details of dress are involved."

On the other hand, the value of a witness's evidence may be impaired if he pledges himself to precise details of time, measure, distance, etc., without having any means of forming a precise judgment on such matters.

(ii.) Want of *judgment* must make a man a bad witness. We often meet with witnesses who draw hasty conclusions, or think in a slipshod way; while others are imbued with false opinions, hobbies, theories, or foregone conclusions, which create a false impression in their minds, and render their evidence flighty and inaccurate.

Many a person when giving evidence appears unable to discriminate in his mind between those things which he really saw or heard at the time, and those which he has since concluded that he must have seen or heard, though in fact he did not. He has talked the matter over with the other witnesses; he has, as they say, put two and two together. He infers from that which he is told

(*c*) 11 W. R. 456.

happened subsequently that something else must have happened when he was present, and states the latter as though it had occurred within his own observation. Such departures from the field of actual fact are often indicated by looseness of expression, and the use of such phrases as, "of course he did" so-and-so, or "he must have done it."

(iii.) A good memory is also essential to a good witness; but the tribunal has often to deal with marvellous eccentricities of memory which do not necessarily imply a bad memory, or want of memory on essential points. Much depends upon the "vivacity" of the impression made at the time. Old people, too, remember more easily events of a distant date than those of more recent occurrence. Too accurate a memory may be suspicious, especially where it is wonderfully minute and accurate on unimportant details, and wonderfully inaccurate on things that no one could easily forget. But great care should be taken not to suspect such evidence unjustly; some men have a wonderful memory for trifles.

Lapse of memory may amount to "mere oblivion," where the witness's mind is apparently an entire blank on the matter. But more often false recollection may have superseded the truth. Some portions of the true picture have been effaced and false fancies taken their place. But it is seldom that the whole picture is wiped out. Some portion of the original impression generally remains, and by skilfully working from that the whole picture may often be restored.

(iv.) Lastly, a man is not a good witness unless he is able to tell his story clearly and well, a faculty which is often lacking in the most veracious witness, who consequently either misleads the Court or meets with undeserved discredit. In every-day life we often meet persons who, with the best intentions in the world, seem to find it physically impossible to narrate an event or even to convey a message correctly. They lack either power of

apprehension or power of expression, and these defects are aggravated when they have to give evidence publicly in a crowded Court. Many witnesses, too, have a limited vocabulary, and use the same word in many different senses. Others cannot refrain from employing local and technical terms which detract from the clearness of their evidence.

So far we have dealt with the mental condition and physical characteristics of a single witness, treating his evidence as though it stood alone. But in nearly every case the Court has to decide between the conflicting evidence of apparently truthful witnesses. In such a case, as we have seen, one or other set of witnesses may be lying, or may be biassed; or, while willing and anxious to tell the truth, may be unable to do so. To decide between these witnesses and to determine which to believe, three tests of truth may be applied.

We must consider (i.) The demeanour of the witness in the box. A witness of truth usually gives prompt, frank answers to all questions whether they tell for or against his side. Even if an untruthful witness shows no signs of weakness in his examination-in-chief, under skilful cross-examination he will usually disclose his latent bias or motive. If he suddenly becomes deaf or dull when awkward questions are asked; if he shuffles or fences with the question, or answers it "by the card," then his evidence will be discredited. Nevertheless it must be remembered that demeanour is not conclusive; a truthful witness may create a bad impression while an untruthful one may appear to be frank and honest.

(ii.) The evidence given by the witness. It should be clear, direct, detailed, and given with care and reflection; not learned by heart, and not suggested beyond reasonable limits. The details given should be equally copious whether the witness knows they can be checked by the other side or not. If all these requirements are fulfilled, the evidence is probably true.

(iii.) The evidence must be consistent with the other materials before the Court. It must be compared and contrasted with the documents in the case, with the conduct of the witness after the events which he describes, with the evidence given by other witnesses on the same or on the other side, and with all the surrounding circumstances of the case. The tribunal should also consider whether the witness is interested or independent, and how and at what stage of the proceeding the evidence was procured or produced.

(i.) The demeanour of the witness. In estimating the probable veracity of a witness the jury should consider his intellectual capabilities, his moral character, his rank and position in society, and what possible motive he might or could have to colour or soften the truth. This can only be done by closely watching his demeanour in the witness-box (*d*).

From the way in which he gives evidence one can often discover whether the witness is a liar, is a partisan or has a bias, or whether he is a truthful witness

(*d*) It is one good result of the provision contained in the Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), s. 16, which requires the presence of a shorthand writer at the trial of every indictment, that the judge is now relieved from the labour of taking a complete note of the evidence, and so can observe the demeanour of the witness, and also of the prisoner, as the trial proceeds.

struggling to tell an honest tale in spite of physical or mental disabilities, and of his unusual surroundings. If he is over-forward and over-zealous in giving answers in favour of one side, but reluctant to make any admissions that would go against that side; if his memory is clear and precise on all points that tell in favour of one party, but hazy and obscure when the truth would benefit the other party, then we may safely conclude that he is a liar or a partisan.

As his evidence proceeds it will often become apparent why he is a partisan. He will show malice against one party, friendship for the other; or it may appear that he is wedded to a theory or actuated by some pet aversion. He must have some motive for telling only half the truth, and this will probably be elicited in cross-examination.

The jury should also notice whether the evidence has been "coached up." Has it been rehearsed? There is no harm in it being premeditated, but it should not be learned by heart. Young children are sometimes taught to repeat a certain story by rote, and then it will often be found that they are using expressions which they cannot explain, such as "the prosecutor" or "the 20th inst." It is often desirable to ask a witness, whether an infant or an adult, to repeat some material portion of his evidence; if he repeats it in precisely the same language, he has probably learnt it by heart; for otherwise it would be natural for him to change a phrase here or there. No blame attaches to a witness if, before the trial, he tells his friends what he proposes to say in the box: it would be strange if he did not. But it is wrong for him to allow anyone to induce him to say more than he really does recollect. The transition from his own uninspired narrative to the matter supplied by a third person may often be detected by a change in the witness's voice or manner, by a certain hesitancy, or by an apologetic demeanour.

If a witness gives prompt, frank answers to all questions whichever way they tell, he is probably speaking the truth. But if he is sometimes precipitate in answering questions which tell in favour of one side, and at other times affects not to hear or not to understand questions, or, if a foreigner, suddenly forgets his English; if he be now eager, now affecting indifference, now evasive, now exaggerating, then he is probably lying.

(ii.) After the witness has left the box, much may be learnt from the evidence itself. Is it definite and complete, or does it mysteriously stop short without any apparent reason? Is it hazy as to all details where detailed evidence might reasonably have been anticipated? Are details given on some points but not on others which the witness has equal opportunity of observing? Are details given which apparently he could have had no opportunity himself of observing, and, therefore, must have learnt from others whose assistance he does not acknowledge? Is his memory suspiciously vague or suspiciously accurate? for in some cases too good a memory may be suspicious. Nevertheless, to use the language of Bentham, the story told should be "circumstantiated," that is, all the surrounding circumstances should be narrated as well as the main fact.

A witness who will give details on points which must be within the knowledge of the other side is usually to be believed. Witnesses of truth are always equally ready and equally copious upon all points that have come within their knowledge.

Lastly, is the witness's story credible? The mere fact that it is inherently improbable is not decisive of its untruth, for, as we know, "truth is often stranger than fiction." The jury are placed in the box as men of business and of common sense; and it is their duty to apply to the evidence given before them the experience that they have gained in the affairs of common life.

(iii.) The truth of the evidence given must also be tested by comparing it with the surrounding circumstances, and all other materials which are before the Court.

The evidence of each witness must be compared with his own letters and all other documents in the case. Those which came into existence before the dispute arose are especially valuable for this purpose, though the party sometimes changes his ground during the progress of the action. A witness's own letters often afford valuable material for his cross-examination. If in the box he contradicts any statement to the truth of which he has sworn in an affidavit, the jury will probably believe neither his present tale nor the affidavit.

Next, if the events which the witness has described really occurred, his subsequent conduct must be consistent with them (*e*). If it is not, the jury will doubt his story. Circumstances may often tell against a man, and then it is most material to inquire, "Did he act as an honest man would have acted in like circumstances? Or has he taken steps to avert suspicion from himself?" In criminal cases it is often material to inquire into the subsequent conduct of the prosecutrix as well as the prisoner. This is especially true in charges of rape. As Lord Hale said: —

"The party ravished may give evidence on oath, and is in law a competent witness; but the credibility of the testimony, and how far she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that occur in her testimony. For instance, if the witness be of good fame, if she presently discovered the offence, made pursuit after the offender, showed circumstances and signs of the injury . . . if the place wherein the fact was done was remote from people, inhabitants, or passengers, if the offender fled for it; these and the like are concurring evidence to give greater probability to her testimony when proved by others as well as herself. But on the other hand, if she concealed the injury for any considerable time after she had opportunity to complain, if the place where the fact was supposed to be committed were near to inhabitants, or common recourse, or passage of passengers, and she made no outcry when the fact was

(*e*) See *In re Barr's Trusts*, 4 K. & J. 256.

supposed to be done, when and where it was probable she might be heard by others; these and the like circumstances carry a strong presumption that her testimony is false or feigned" (*f*).

Again if a witness, especially an expert, offers his services to one side and then gives evidence in favour of the other party, his statements should be regarded with suspicion.

Thirdly, it is material to inquire whether the witness is dependent on or connected with the party in whose favour he testifies. Is he a near relation or intimate friend? Is he a servant, employee, or tenant of either party? Has he anything to gain or lose by the result of the litigation? One wholly independent witness may often be more reliable than several who are not independent.

Then, the evidence of each witness must be compared with that given by other witnesses called on the same side. It is not to be expected that they should all agree in every particular. A certain amount of discrepancy as to minor details will not destroy the value of their evidence. And, for this reason, details immaterial to the issue may acquire accidental significance if the witnesses differ as to them. Indeed, a concurrence in minute details will arouse a suspicion that their story has been concocted. But the witnesses called on the same side ought to agree on all material points which they had an equal opportunity of observing. If there is any ground for suspecting that the witnesses have joined in inventing a tale, they should be required to leave the court, and come in singly to give their evidence. Otherwise anyone who has heard the cross-examination of a previous witness will be able to fill up any gaps in that evidence, to swear clearly on any point as to which the former witness was doubtful, and to invent a fresh tale to make everything consistent. In some cases a plaintiff has been driven to put the defendant in the box. This is

(*f*) Hale, Pleas of the Crown, I., 633.

very dangerous tactics, for by calling the defendant as his witness, the plaintiff is thus disabled from impeaching his credit (*g*). In a recent case (*h*) where this had been done, and the defendant had contradicted the evidence of the plaintiff's other witnesses on a vital point, Hamilton, J., laid down the rule that, where two equally credible witnesses called by one side contradict each other, it is not competent for the party calling them to seek to discredit one and accredit the other.

Where a number of reliable witnesses agree upon all points material to the case it is extremely difficult to shake their evidence.

Fifthly, the evidence on one side must be contrasted with the evidence given by the witnesses on the other side. The tribunal must weigh the evidence, not count the witnesses on each side. One honest witness on one side may outweigh a host of unreliable witnesses on the other. It is to be expected that the story told by the plaintiff's witnesses will differ in many respects from the version put forward by the defendant's witnesses. But it is most material to observe on what matters they agree. If a fact alleged by one side be admitted by the other, the jury may rely upon this as absolute truth, and may draw from it inferences of fact which may guide them through a maze of conflicting evidence on other points.

As Lord Wensleydale said, in an Indian case before the Privy Council :—

"There is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts, according to the ordinary course of human affairs and the usual habits of life" (*i*).

(*g*) *Scott* v. *Sampson*, 8 Q. B. D. at p. 498. This was an action of libel, in which the defendant had pleaded justification; he called the plaintiff as his witness, and the result was a verdict against the defendant for £1,500.

(*h*) *Summer* v. *Brown*, 25 T. L. R. 745.

(*i*) *Mir Asadulah* v. *Bibi Imaman*, 5 Cal. W. R. P. C. 26.

Again, in estimating the value of a particular piece of evidence it is often important to ascertain by what method that piece of evidence was procured, and at what stage of the proceedings it is first forthcoming.

Evidence is often given in the Divorce Court by "private detectives" who have been paid to watch one of the parties. Their evidence must be received with caution, and so must evidence of an admission obtained by one who was sent to procure it (*j*). The fact that a document is not produced from a proper custody will impair its value, especially if there is ground for supposing that it has been obtained surreptitiously or by dishonest means. So, the fact that a piece of evidence is only forthcoming at the last moment, and that a document produced at the trial is not included in an affidavit of documents, are matters which, if unexplained, may lead the jury to disregard them. Courts of justice look with the utmost suspicion on the conduct of parties, who intentionally keep secret matters at a time when they might be explained, and divulge them when lapse of years may have made contradiction or explanation impossible (*k*).

Lastly, it will always diminish the value of a witness's evidence, if he could easily have been corroborated on a vital point and such corroborative evidence is not produced. It is not necessary, as we shall see in the next Chapter, that all available corroboration should in every case be produced. If thirty persons heard a slander uttered, it is neither necessary nor expedient to call more than two or three of them. But if no one heard the slander but the plaintiff and a disinterested stranger and the plaintiff does not call that stranger, the jury will be apt to believe the defendant's denial of the

(*j*) As to answers to questions put to a suspected person by a police officer or other person in authority, see *R.* v. *Knight*, 20 Cox, 711; 69 J. P. 108; *R.* v. *Best*, [1909] 1 K. B. 692, and see *ante*, p. 115.

(*k*) Cf. *Campbell* v. *Campbell*, L. R. 1 H. L. Sc. 182.

utterance. In the famous Rugeley murder case, where the prosecution alleged that Palmer had caused the death of Cook by administering to him minute doses of strychnine, and it was proved that Palmer had purchased strychnine, Palmer's defence was that he had given the strychnine so purchased to his groom and bidden him to administer it to his horse in order to make his coat sleek, but Palmer, although calling other witnesses in his defence, did not call the groom. This fact was strongly urged upon the jury by Sir Alexander Cockburn in his reply, and had no doubt a large share in inducing the jury to find a verdict of Guilty.

In this Chapter we have briefly discussed the influences which induce witnesses to tell the truth or lead them to tell a lie, and indicated the tests by which a judge or jury can decide between the conflicting testimony of opposing witnesses after observing their demeanour in the witness box, especially when under cross-examination. At the same time it must be remembered that the evidence given in our Courts is seldom, if ever, conclusive. This is not to be expected even under the wisest forensic rules. But although it may fall short of positive proof, it creates a degree of probability so strong that the most conscientious tribunal can act upon it with safety.

# CHAPTER III.

## CORROBORATION.

When dealing in the last Chapter with the importance of surrounding circumstances as tests of truth, we called attention to the fact that it will always greatly impair the value of a witness's evidence that it might easily have been corroborated and is not. This remark applies as a matter of expediency to all witness actions, but there are certain cases in which the Legislature has required as a matter of law that credence should not be given to the unsupported testimony of one witness, and there are other cases in which the practice of the Court is for a judge sitting alone not to act, or, if assisted by a jury, to advise them not to act, upon the evidence of a single witness unless it is corroborated in some material particular.

The cases in which corroboration is positively required by law must always be carefully distinguished from those in which corroboration is merely desirable as to the testimony already given. They are nine in number (*a*):—

(i.) Breach of promise.

(ii.) Treason.

(iii.) Perjury.

(*a*) Corroboration was also required by two ancient statutes (1 Eliz. c. 1; 9 Will. III. c. 35) relating to blasphemy. They are still unrepealed, but are omitted here, as no prosecution ever takes place under them. As to the removal of a pauper, see 39 & 40 Vict. c. 61, s. 34.

(iv.) Personation at elections.

(v.) Bastardy.

(vi.) Offences against women and girls under the Criminal Law Amendment Act, 1885, ss. 2, 3, and 4.

(vii.) Offences under the Motor Car Act, 1903, s. 9 (1).

(viii.) Offences under the Prevention of Cruelty to Children Act, 1904, s. 15, sub-s. (1).

(ix.) Offences under the Children Act, 1908, s. 30.

And in two cases, also, though corroboration is not required by law, the Court usually advises the jury not to act upon the evidence of a single witness unless corroborated, and will itself adopt this course. One is where the only evidence on a criminal charge is that of an accomplice; and the other is where a claim is made to property forming part of the estate of a deceased person. In such cases, however, the rule is only a rule of prudence, and if the tribunal when properly directed chooses to act upon such evidence its decision cannot be upset.

1. There is only one civil action in which corroboration is expressly required by statute (*b*), namely, in an action for breach of promise of marriage. This action has been singled out, no doubt, for the reason that there is no other kind of action which can be so easily brought and against which it is so difficult to defend oneself; its selection can also be accounted for on historical grounds. The statutory provision which now governs the matter is contained in the Law of Evidence Act, 1869 (*b*), which

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

for the first time renders the parties to such an action competent witnesses, and then continues as follows:—

"That no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise."

The statute applies to all actions brought in England, even if the promise has been made abroad according to the law of a country which may require more or less evidence than the English law does (*c*).

The corroborative evidence must be in support of the promise, and it will not be sufficient to corroborate the testimony of the plaintiff on other points, if it is uncorroborated in respect of the alleged promise; but the evidence need not be such as would alone establish the promise if it supports it (*d*). The corroborative evidence must not be that of the plaintiff (*e*). It has been held, that the evidence may relate to matters anterior to the date of the alleged promise (*f*). The letters of the defendant may afford the necessary corroboration. And so may the defendant's conduct, if described by witnesses other than the plaintiff. The fact of the defendant in the action not answering letters written by the plaintiff, in which she stated he had promised to marry her, is not such evidence (*g*) unless there is some clear reason to expect that he should (*h*). But the fact of the defendant not answering when charged orally by the plaintiff with having promised to marry her is corroborative evidence (*i*).

2. On charges of high treason (unless the accused is being tried for actual killing or attempting to kill the

(*c*) *Hansen* v. *Dixon*, 96 L. T. 32.
(*d*) *Bessela* v. *Stern*, 2 C. P. D. 265.
(*e*) *Owen* v. *Moberley*, 64 J. P. 88.
(*f*) *Wilcox* v. *Godfrey*, 26 L. T. 328, 481.
(*g*) *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534.
(*h*) *Spooner* v. *Godfrey*, Times newspaper, October 16th, 1908.
(*i*) *Bessela* v. *Stern*, *supra*.

Sovereign (*k*)), or misprision of treason, no person can be convicted except upon the oaths and testimony of two lawful witnesses, either both to the same overt act of treason, or one to one act, and the other to another act of the same treason, unless the accused willingly and without violence in open Court confesses the same. If two or more distinct treasons of different kinds are alleged in one indictment, one witness, who is produced to prove one of these treasons and another witness produced to prove another of them are not two witnesses to the same treason (*l*). It is not necessary to call two witnesses to prove a fact which is merely collateral, *e.g.*, the nationality of the prisoner (*m*), and if one overt act be charged, which is made up of several circumstances, it will be enough if the joint testimony of two or more witnesses establishes the act as a whole (*n*). The rule does not apply to charges of treason felony (*o*).

3. Again, in prosecutions for perjury, although the administration of the oath, the competency of the Court and every other issue in the proceeding may be established by the evidence of a single witness, the issue as to whether the defendant's statement was true or false cannot be proved by the evidence of one witness (*p*); otherwise it would be a case merely of one man's oath against another's (*q*). But it is not always necessary to call two witnesses; the evidence of one witness will be sufficient if he be corroborated in some material particular.

Such corroboration may consist of a verbal or written admission made by the defendant contradicting his own evidence. Thus, a letter written by the defendant either before or after he is alleged to have committed perjury

(*k*) 39 & 40 Geo. III. c. 93; 5 & 6 Vict. c. 51, s. 1.
(*l*) 7 Will. III. c. 3, ss. 2, 4.
(*m*) *R.* v. *Vaughan*, 13 How. St. Tr. 485.
(*n*) *R.* v. *McCafferty*, 10 Cox, 603.
(*o*) 11 Vict. c. 12.
(*p*) *R.* v. *Yates*, Car. & M. 132.
(*q*) *R.* v. *Muscot*, 10 Mod. 192.

may be sufficient corroboration of a single witness, who has sworn to the falsity of the defendant's statement (*r*). But where the only evidence tendered of the falsity of the perjury alleged in the indictment was that on another occasion the defendant had sworn the exact opposite, Gurney, B., held that, as there was nothing before him to show which of these contradictory statements was true and which was false, the defendant must be acquitted (*s*).

4. Personation. A person charged with personation at any parliamentary or municipal election cannot be committed for trial, unless at least two witnesses give evidence that he has knowingly personated and voted in the name of another (*t*).

5. Bastardy. An affiliation order on a putative father, under 35 & 36 Vict. c. 65, cannot be made unless the evidence of the mother is corroborated by other evidence in *some material particular*. Evidence of acts of familiarity between the mother and the defendant, although before the time when the child would have been begotten, are corroborative evidence within the meaning of the statute, although, of course, the weight to be attached thereto is a matter for the Court (*u*). That there was opportunity will not be enough, unless it was of such a nature as to provoke suspicion (*x*).

6. By the Criminal Law Amendment Act, 1885 (*y*), a person accused of the crimes created by s. 2 and 3 of the Act, cannot be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

(*r*) *R.* v. *Hook*, 27 L. J. M. C. 222; *R.* v. *Hare*, 13 Cox, 174; *R.* v. *Mayhew*, 6 C. & P. 315.

(*s*) *R.* v. *Wheatland*, 8 C. & P. 238.

(*t*) 6 & 7 Vict. c. 18, s. 88; 35 & 36 Vict. c. 33, s. 24. Apparently the same number of witnesses will be necessary at the trial.

(*u*) *Cole* v. *Manning*, 2 Q. B. D. 611.

(*x*) *Dawson* v. *M'Kenzie*, [1908] S. C. 648; and see *Harvey* v. *Anning*, 87 L. T. 687; *Reffell* v. *Morton*, 70 J. P. 347.

(*y*) 48 & 49 Vict. c. 69.

And if, on a charge under s. 4 of the same Act, the unsworn testimony of the prosecutrix or of any other witness who is a child of tender years be accepted, the accused cannot be convicted unless such unsworn testimony be corroborated by some other material evidence which implicates him.

7. By s. 9 (1) of the Motor Car Act, 1903 (*z*) :—

" . . . If any person acts in contravention of this provision (*a*) he shall be liable, on summary conviction, in respect of the first offence to a fine not exceeding ten pounds, and in respect of the second offence to a fine not exceeding twenty pounds, and in respect of any subsequent offence to a fine not exceeding fifty pounds, but a person shall not be convicted under this provision for exceeding the limit of speed of twenty miles merely on the opinion of one witness as to the rate of speed."

8. The Prevention of Cruelty to Children Act, 1904, s. 15 (1) (*b*) provides that in any proceeding against any person for an offence under the Act, the evidence of any child of tender years may be taken though not given upon oath, but provides that, in such a case, the accused—

"shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused."

9. A provision in precisely similar language is contained in s. 30 of the Children Act, 1908 (*c*). It relates to all offences under that Act and also those mentioned in the First Schedule to that Act.

Next come the two classes of proceedings, in which the rule is neither one of law nor one of mere expediency, where the Court will not as a rule act upon the evidence of a single witness unless it is corroborated, and, if sitting with a jury, will warn the jury not to accept

(*z*) 3 Edw. VII. c. 36.
(*a*) *I.e.*, travelling at a speed exceeding twenty miles per hour in certain places.
(*b*) 4 Edw. VII. c. 15.
(*c*) 8 Edw. VII. c. 67.

such evidence in the absence of other evidence which corroborates it.

The first class is where the prosecution relies upon the evidence of an accomplice. Such evidence must always be received with suspicion; for the witness is seldom actuated by the simple desire to tell the truth. He may be swearing falsely in the hope of escaping punishment himself, or in order to convict a former friend with whom he has now quarrelled. Accordingly, it is the universal practice for the judge to direct the jury not to convict upon the evidence of an accomplice, unless it is corroborated in some material particular by other evidence which is not so tainted (*d*).

An accomplice is a person who has consciously assisted in the commission of the crime in question. Thus the thief, who is called to give evidence against another on the charge of receiving, is an accomplice (*e*). The judge must be satisfied that the witness was in fact an accomplice. It has been held that a police spy, or even an *agent-provocatif*, is not an accomplice (*f*). The mere fact that the thief has asked a woman to pawn a stolen watch for him does not make her an accomplice (*g*).

The corroboration must be such that it should satisfy the jury that the prisoner is the person who committed the offence with which he is charged (*h*); and it must be evidence which is admissible against him. Thus, if several persons are charged together and the evidence of an accomplice is only corroborated as to some of them, the others ought to be acquitted (*i*). So, too, the mere fact that the prisoner made no answer when formally

(*d*) *R.* v. *Tate*, [1908] 2 K. B. 680; *R.* v. *Everest*, 73 J. P. 269; *R.* v. *Noakes*, 5 C. & P. 326.
(*e*) *R.* v. *Patram*, 2 East, P. C. 782; *R.* v. *Robinson*, 4 F. & F. 43; *R.* v. *Pratt*, *ibid.*, 315.
(*f*) *R.* v. *Mullins*, 3 Cox, 526; *R.* v. *Bickley*, 73 J. P. 239.
(*g*) *R.* v. *Kirkham*, 73 J. P. 406.
(*h*) *R.* v. *Foster*, 8 C. & P. 107.
(*i*) *R.* v. *Stubbs*, Dears. 555,

charged (*k*), or when a statement written by another person also accused of the crime is read out (*l*), is no corroboration of the story of the accomplice.

The jury, however, is entitled, if it thinks fit, to disregard the caution of the judge and to find the prisoner guilty in the absence of such corroboration (*m*). As Lord ELLENBOROUGH said in *R.* v. *Jones* (*n*):—

"No one can seriously doubt that a conviction is strictly legal, though it proceed upon the evidence of an accomplice only. Judges, in their discretion, will advise a jury not to believe an accomplice, unless he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts to which he deposes."

Where, however, the point has been taken on behalf of the accused, and the judge omits to warn the jury, the Court of Criminal Appeal will in general quash the conviction (*o*).

Where two or more persons are jointly charged with the commission of a crime, a statement made by one of them behind the back of the others, or even in the presence of the others when they are before the magistrate, is not evidence either for or against them (*p*). The Criminal Evidence Act, 1898, made a person charged with an offence a competent witness for the defence, whether charged solely or jointly with any other person. Hence, if two persons are jointly charged and one of them elects to give evidence and his evidence inculpates the other, it is evidence against that other, who therefore has an unrestricted right to cross-examine him (*q*). If the evidence which he gives exculpates the other,

(*k*) *R.* v. *Tate*, [1908] 2 K. B. 680.
(*l*) *R.* v. *Pearson*, 72 J. P. 449; *R.* v. *Dibble*, 72 J. P. 498.
(*m*) *R.* v. *Stubbs*, Dears. 555; *R.* v. *Attwood*, 1 Leach, 464; *In re Meunier*, [1894] 2 Q. B. 415.
(*n*) 2 Camp. at p. 133.
(*o*) *R.* v. *Tate*, *supra*; *R.* v. *Beauchamp*, 73 J. P. 223; but see *R.* v. *Kirkham*, *supra*.
(*p*) *R.* v. *Payne*, L. R. 1 C. C. R. 349.
(*q*) *R.* v. *Hadwen*, [1902] 1 K. B. 882.

it is evidence for him (*r*). Where several persons are indicted, the prosecutor may, by leave of the Court, take a verdict of acquittal as to one or more, and call them as witnesses against the remaining prisoners (*s*). It appears also that an accomplice, who is himself charged on a separate indictment, is a competent witness for a prisoner (*t*); and a prisoner, who has pleaded guilty, may be called for or against his co-fellow prisoners (*u*). So, where the evidence against one of several prisoners is slight, the judge may direct an acquittal in order to enable the others to call him as a witness; and it seems that this may be done without taking a verdict against the prisoner who is so called (*x*); though it would, as a general rule, be judicious, where the accomplice is indicted with the prisoner, to dispose of the charge against him by acquitting or convicting the accomplice before he is called as a witness, so that the temptation to strain the truth should be as slight as possible (*y*).

Again, the Court is very reluctant to admit the validity of a claim against the estate of a deceased person, whether it be a claim to specific property or to a debt due from him, on the uncorroborated evidence of the claimant himself. Indeed, in some cases, the judges have stated that there is a rule of law that such claims must be corroborated (*z*); but it is clear that the rule is only one of prudence. The evidence must, of course, be examined with care, and even with suspicion, but if the Court is convinced by it that the claim is good, full effect must be given to it (*a*). The judge in directing the jury should warn them not to accept such evidence

(*r*) *R.* v. *McDonell*, 73 J. P. 490.
(*s*) *R.* v. *Owen*, 9 C. & P. 83.
(*t*) 2 Hale, P. C. 280.
(*u*) *R.* v. *George*, Car. & M. 111; *R.* v. *Hincks*, 1 Den. 84.
(*x*) *Windsor* v. *R.*, 7 B. & S. 360.
(*y*) See *R.* v. *Payne*, L. R. 1 C. C. R. at p. 354.
(*z*) See *In re Finch*, 23 Ch. D. 267; *Vavasseur* v. *Vavasseur*, 25 T. L. R. 250.
(*a*) *Rawlinson* v. *Scholes*, 79 L. T. 350; *In re Garnett*, 31 Ch. D. 1; *In re Hodgson*, 31 Ch. D. 177; *In re Griffin*, 79 L. T. 442.

unless they are convinced, but if after a proper direction the jury do act upon it, their verdict will not be disturbed on this ground (*b*). In one case, a release to a trustee was set aside after his death upon the evidence of the plaintiff which was only confirmed by the tenor of the release itself (*c*). A *donatio mortis causâ* has also been established by such evidence, where the claimant, however, was not cross-examined (*d*).

In all other cases, corroboration is not required by law or necessarily insisted upon by the Court. Nevertheless the absence of corroboration which should be forthcoming is always a matter of comment, and may cause the tribunal to decide a case against the person who failed to produce such evidence.

Thus, on the trial of a petition for divorce, corroboration is always expected by the Court. For example, if only one witness is called for the petitioner, especially if the witness is a woman of bad character, or if the only evidence is an uncorroborated confession, it is almost certain that the Court would not grant a decree (*e*). So, too, no solicitor could hope to establish a verbal retainer without corroborative evidence, if the retainer is denied by the alleged client (*f*). Again, if a person be charged with attempting to procure abortion, the jury should be warned to hesitate to convict on the uncorroborated evidence of the woman upon whom the operation was alleged to have been performed (*g*). And in all criminal charges of a sexual offence, it is always unsafe for the jury to convict when there is only oath against oath—the word of the prosecutrix against that of the prisoner.

(*b*) See *In re Finch*, 23 Ch. D. p. 271.
(*c*) *In re Garnett*, *supra*.
(*d*) *Farman* v. *Smith*, 58 L. T. 12; and see *In re Wes'on*, [1902] 1 Ch. 680.
(*e*) *Ginger* v. *Ginger*, L. R. 1 P. & D. 37; *Curtis* v. *Curtis*, 21 T. L. R. 676; *Getty* v. *Getty*, [1907] P. 334; *Judd* v. *Judd*, [1907] P. 241.
(*f*) *Bird* v. *Harris*, 29 W. R. 45.
(*g*) *R.* v. *Cramp*, 14 Cox, 390; 5 Q. B. D. 307; *R.* v. *Bickley*, 73 J. P. 239.

## CANADIAN NOTES.

### CORROBORATION IN CRIMINAL CASES.

Sect. 684 *e* of the Criminal Code, 55 & 56 Vict. 29 D., which enacts that a person accused of the offences therein indicated is not to be convicted upon the evidence of one witness, unless such evidence is corroborated in some material particular, does not make it necessarily incumbent on the Crown to adduce the testimony of another witness to the acts charged. It is enough if there be testimony to facts from which the tribunal trying the case, weighing them in connection with the testimony of the one witness, may reasonably conclude that the accused did the act with which he is charged. *R.* v. *Burr*, 13 O. L. R. 485.

The section of the Criminal Code, 684 *e*, requiring corroboration in certain special cases, refers to the corroboration required on the trial of a prisoner, but has no application to the preliminary investigation held with a view to commitment for trial. *In re Lazier*, 30 O. R. 419.

In the case of *R.* v. *Tower*, 20 N. B. 168, it was held that there was no positive rule of law that testimony of an accomplice must receive direct corroboration, and that the nature and extent of the corroboration required depend a great deal upon the character of the crime charged. Therefore, in the case of a ship being scuttled by boring holes in the air streak, the judge having directed the jury that it was not necessary

that the accomplice should be corroborated as to the very act of boring the holes in the vessel, and that if the other evidence and circumstances of the case satisfied them that he was telling the truth in the account which he gave of the scuttling of the vessel that would be sufficient, it was held to be a proper direction.

In *R.* v. *Beckwith*, 8 U. C. C. P. 274, a conviction of a prisoner for horse stealing upon the uncorroborated evidence of an accomplice was held to be legal, although the judge did not caution the jury as to the weight to be attached to the evidence. See *infra*, as to the evidence of accomplices in civil cases arising out of criminal acts.

Where, on a charge of forgery, in addition to evidence of one witness that the forged documents were written by the accused, it was also proved by the same witness that certain names in a book written by the same hand as the forged document were in the handwriting of the accused, this was held to be no such corroboration as required by the Act. *R.* v. *McBride*, 26 O. R. 639.

*Evidence of Accomplice given in Civil Case.*

The plaintiffs claimed that a sum of money had been stolen from them by defendant, and brought an action to recover the money, or the land in which it had been invested. The evidence in proof of the charge was that of accomplices, and, in corroboration, the evidence of detectives, who stated that the defendant admitted the charge.

The trial judge charged the jury that if it was a criminal trial he should be compelled to tell them that, though they might convict on the evidence of accomplices, it was never safe to do so, and there should be some corroborative evidence to turn the scale against the

presumption of innocence. He further said that this was not a criminal case, but yet he could not say the rule ought not to be applied, perhaps not precisely in the same way, but they were to exercise their common sense as to how far they would credit or discredit the evidence of accomplices. He also stated that when he said that corroborative evidence was necessary when accusations were sworn to by accomplices, he desired them to understand that the more particular point of corroboration should be the identity of the person accused, and unless the corroborative evidence identified the defendant with the stealing on the occasion and under the circumstances detailed in the evidence, it would not be corroborative. His identity should be contained in the evidence of corroboration.

*Held* (GALT, J., dissenting) that the effect of the charge and the impression it was calculated to leave on the minds of the jury, fairly considered, was that the evidence of accomplices in crime, which crime gave rise to the civil action, ought not to be credited or relied on unless corroborated, and was misdirection, and there was also misdirection in charging that the corroboration must be as to the identity of the party charged with the criminal act. *United States Express Co.* v. *Donohoe*, 14 O. R. 333.

*Corroboration against Estate of Deceased.*

"The material evidence in corroboration required by the Evidence Act, R. S. O., ch. 61, in an action by or against the heirs, executors, administrators or assigns of a deceased person, may be direct, or may consist of inferences or probabilities, arising from other facts and circumstances tending to support the truth of the witness's statement. In an action by an administratrix to recover moneys alleged to have been received on behalf of the deceased, the defendant's statement that the

moneys in question were paid in due course to the deceased is sufficiently corroborated by showing that the deceased, a close, careful, intelligent man, who lived for over a year after the transactions in question, and during that time saw and conversed with many persons, continued to entrust her with his business and made no complaint of the non-receipt of the money." *Green* v. *McLeod*, 23 O. A. R. 676.

To enable an opposite or interested party to recover in an action against the estate of a deceased person it is sufficient if his evidence is corroborated, *i.e.*, strengthened, by evidence which appreciably helps the judiciai mind to believe one or more of the material statements or facts deposed. It is not necessary that the case should be wholly proved by independent testimony. The production by the plaintiff, an architect, claiming payment for his services in drawing plans and making estimates for the erection of a house, of a memorandum in the deceased's handwriting, showing the room and the accommodation required and the suggested cost, and of a sketch of the property, was held (BURTON, J.A., dissenting) sufficient corroboration of the plaintiff's evidence. *Radford* v. *Macdonald*, 18 O. A. R. 167.

Although the statute says that the opposite or interested party shall not obtain a verdict upon his own evidence, it seems it does not follow that an opposite party may not obtain a verdict upon the evidence of an interested party uncorroborated. Thus in a case before STREET, J., the claimant was one Anderson, who brought an action against John Curry, executor of the estate of James Curry. The evidence of John Curry and another Curry was adduced in support of the claim. "If the decision is in favour of the claimant, it will be the case of an opposite party obtaining a decision against the estate of James Curry, upon the evidence of another

party to the action, who was interested but who does not obtain the decision. The party who is interested is not the party who obtains the decision." *In re Curry* v. *Curry*, 32 O. R. 150.

In *Parker* v. *Parker*, 32 U. C. C. P. 113, ARMOUR, J., delivering the judgment of the Common Pleas Division, after reviewing a number of cases on the subject of corroboration, in the case of claims against the estate of a deceased person, including, among others, the leading case of *Sugden* v. *Lord St. Leonards*, L. R. 1 P. D. 154, said: "I think that the decision in *Bessela* v. *Stern*, L. R. 2 C. P. D. 265, indicates the true construction to be put upon the provision in our Act, and that if the learned Chief Justice, in *Orr* v. *Orr*, 21 Grant, 397, meant to say that the interested party must be corroborated as to every issue raised in the cause by some other evidence material to that issue, I think he was putting too narrow a construction upon the provision under discussion. I think that under this provision, if there is any evidence adduced corroborating the evidence of the interested party in support of his claim or defence in any material particular, it must be submitted to the jury as sufficient corroboration in point of law, the weight to be attached to it in point of fact being a matter for their consideration."

In an action by the plaintiff, a widow, it was shown that about twenty-five years before action she went to live with her son-in-law, and resided with him up to the time of his wife's death. She alleged that after this the son-in-law agreed to pay her wages if she would continue to live with him and take care of his family, which she did until his death. In an action for wages, a witness stated that the defendant's testator had told witness, about two years before his death, that plaintiff should be handsomely paid for her services, and there was evidence of another son-in-law that two or three years before his

death said testator had told witness that he would pay the plaintiff well. By his will the testator directed the income of his property to be payable to plaintiff during her lifetime, but there was no evidence of the value of the bequest. It was held that there was no sufficient corroboration of the evidence of plaintiff. *Tucker* v. *McMahon et al.*, 11 O. R. 718.

In an action against the estate of a deceased landlord, by the tenant, for a balance due to him in respect to alleged advances and for goods supplied, the books of the tenant in which the transactions were set out and the cheques made by the defendant in favour of the landlord and endorsed by him, were held to be sufficient corroboration of his evidence, although the cheques did not show on their face whether they had been given on account of rent or of advances. *In re Jelly, Union Trust Co.* v. *Gamon*, 6 O. L. R. 481.

In an action claiming the amount of a deposit receipt as *donatio mortis causâ*, it was contended that the only corroboration to satisfy the statute of Nova Scotia as to evidence in a claim against the estate of a deceased person must be by an additional witness. It was held that this was not necessary, but that such evidence might be corroborated by circumstances or fair inferences from facts proved. *McDonald* v. *McDonald*, 33 S. C. R. 145.

In *Cooke* v. *Grant*, 32 U. C. C. P. 511, it was held that when each item in an account against the estate of a deceased person is an independent transaction and constitutes a separate independent cause of action, to satisfy the statute requiring corroboration some essential corroboration of the interested party's evidence must be adduced as to each item.

Where an action was brought by the executors of a mortgagee against two joint mortgagors, who deposed to

a certain payment, it was held that the two together constituted an interested party, and could not be regarded as corroborating each other. It was necessary that their evidence as to the payments should be corroborated by independent evidence. *Taylor* v. *Regis*, 26 O. R. 483.

A party who had sold goods to the defendant's testator but had assigned the moneys due to him by the testator, and who was called as a witness in the action against the executor, was held not to be an opposite or interested party to the suit within the meaning of the Evidence Act of Ontario, R. S. O. c. 62, s. 10, so as to require corroboration. *Watson* v. *Severn et al.*, 6 O. A. R. 559.

*Other Cases requiring Corroboration.*

In the case of a sale by an insolvent person to a relative, attended by suspicious circumstances, the reality and *bona fides* of the transaction should not be rested on the uncorroborated testimony of the parties to the impeached transaction. This was held in the case of *The Merchants Bank of Canada* v. *Clarke*, 18 Grant's Ch. 594, and the decision was cited with approval in *Morton* v. *Nihan et al.*, 5 O. A. R. 20, in which the judgment of PROUDFOOT, V.-C., given with great hesitation, was reversed on the ground that the evidence of the parties to the transaction was uncorroborated by other testimony either oral or written.

The Imperial Statute, 32 & 33 Vict. c. 62, s. 2, requiring plaintiff's evidence in an action for breach of promise to be corroborated by some other material evidence in support of such promise, is in force in Manitoba, not being either expressly or by implication repealed by the Manitoba Evidence Act, 57 Vict. c. 11, now c. 57 of the Revised Statutes of Manitoba. *Cockerill* v. *Harrison*, 14 Man. 366.

In *Waters* v. *Bellamy*, 5 Man. 246, it was held that the corroboration necessary in an action for breach of promise need not go the length of by itself proving the promise. It will be sufficient if it supports the plaintiff's evidence in respect to the promise, so as to make it appear reasonably probable that her testimony that the promise was given is true. Circumstances which are as consistent with the non-existence of the promise as they are with the fact of a promise having been given, can scarcely be taken to afford the material corroboration that the statute requires. The statute in question here was the Imperial Act, 32 & 33 Vict. c. 68, s. 2, that no plaintiff in any such action, as breach of promise among others, shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise.

In an action for breach of promise, facts as to the defendant having kept company with the plaintiff for a long period, visiting her at her house, taking her out drives, and being received in the family as a lover, and making presents of jewellery, etc., were all held to be corroborative evidence such as required by R. S. O. c. 61, s. 6; and in answer to a contention that all such facts were as consistent with the position of a kept mistress as with that for which plaintiff contended, it was said that the presumption was in favour of the moral as against the immoral relationship, and the fact that defendant set up an immoral relationship as a defence did not render the evidence less material in support of the promise. *Yarwood* v. *Hart*, 16 O. R. 23.

One William David Burn alleged that in 1872 David Burn, deceased, had transferred to him as a gift one hundred shares of a certain stock, and as corroborative evidence thereof, proved the transfer of the stock to him and a re-transfer afterwards on January 30th, 1873, which re-transfer, he said, was to prevent the surplus of

the savings bank appearing to be less, and he also produced the printed statement of the savings bank of December 31st, 1872, showing this stock. It was held that this was not such corroborative evidence of a gift as satisfied the statute R. S. O. c. 62, s. 10. *Burn* v. *Burn*, 8 O. R. 237.

# CHAPTER IV.

## EXAMINATION OF WITNESSES.

Long forensic experience has evolved a body of rules of practice which undoubtedly tend to elicit the truth, and thus materially assist the tribunal in ascertaining the weight which should be attached to the evidence of any witness.

In the first place, there is a precaution which either party may take, if he thinks fit, before any witness enters the box, or, indeed, before the case is opened to the jury. Whenever there is any dispute as to the facts, he may apply to the judge to order all the witnesses who are awaiting examination to leave the court; and this he may do whether he has any reason to suspect collusion between his opponent's witnesses or not. Such an order, although it is apparently not absolutely a matter of right, is never refused to the applicant (*a*). The order does not usually extend to a witness who is also a party, nor to a solicitor in the action, nor to scientific witnesses. If a witness remains in court after such an order, it seems that he may be attached; but his evidence will be received although subject to strong observation (*b*). Witnesses are only excluded while evidence is being given *viva voce*, and

(*a*) *Southey* v. *Nash*, 7 C. & P. 632; *R.* v. *Murphy*, 8 C. & P. 307.
(*b*) *Chandler* v. *Horne*, 2 M. & Rob. 423.

not while affidavits are being read (*c*). And any witness who has given his evidence must stay in court, and not rejoin the other witnesses who are still outside the court waiting to give evidence.

In the next place, when a witness is placed in the witness box, he must take an oath or make a solemn affirmation that he will tell the truth, the whole truth, and nothing but the truth. This is what Bentham calls the religious sanction of truth. The method of administering the oath or affirmation is now regulated by the Oaths Act, 1909 (*d*). As soon as the witness has taken the oath or affirmed, he will be examined by the counsel for the party who called him as a witness; this is termed examination-in-chief. Next, he will probably be cross-examined by the other party. Lastly, he may be re-examined by the party who called him. Certain rules have been established for the conduct of these examinations, and it is the purpose of this Chapter to state and explain them.

## I. EXAMINATION-IN-CHIEF.

(i.) The first rule which regulates examination-in-chief is this:—Counsel can ask a witness whom he has called himself such questions only as are strictly relevant to the issue. Anything that goes to prove a material fact or which will affect the amount of damages recoverable is relevant; everything else will be rigorously excluded. And relevant facts must be proved in the legitimate way; a fact may

(*c*) *Penniman* v. *Hill*, 24 W. R. 245.
(*d*) 9 Edw. VII. c. 39; Appendix; and see *ante*, pp. 216—219.

be most material, still that is no reason for admitting hearsay evidence in proof of it.

Again, counsel must confine his questions to matters of fact; he must not put to a witness points of law, or ask him what he inferred from the facts which he saw or heard. The personal opinion of the witness on any matter is, as a rule (*e*), inadmissible except in the case of skilled or scientific witnesses, who are allowed to state their opinions whenever special training or special experience is necessary to enable the tribunal to form a competent judgment on any matter in issue.

It is the duty of counsel to bring out clearly and in proper chronological order every relevant fact in support of his client's case to which the witness can depose. This task is more difficult than may at first sight appear. The timid witness must be encouraged; the talkative witness repressed; the witness who is too strong a partisan must be kept in check. And yet counsel must not suggest to the witness what he is to say. An honest witness, however, should be left to tell his tale in his own way with as little interruption from counsel as possible.

In criminal cases, the duty of counsel for the prosecution is wider. It is the practice, and probably the duty, of a prosecuting counsel to ask a witness questions favourable to the prisoner; for he must lay all the material evidence before the Court, whether it tells in favour of the prisoner or not, and not unduly press for a conviction.

If counsel when examining a witness in chief either seeks to prove an irrelevant fact or to prove a relevant fact by some improper means, counsel on the other side

(*e*) See *ante*, p. 37.

will at once rise and object. Such objections are frequently taken either to questions put by counsel or to something which the witness is endeavouring to say. An objection as to the admissibility of any evidence must be taken as soon as it is tendered; no objection can be raised after the evidence has been once received.

(ii.) The second rule is of equal importance, and conduces largely to prevent loose and inaccurate, as well as untrue, statements being made in court. It is this: counsel when examining-in-chief must not ask leading questions. It may be assumed that a witness is generally favourable to the cause of the party who calls him, and therefore may be inclined to overstate the circumstances which conduce to establish the case of that party; hence this rule.

A leading question is one which suggests to the witness the answer which it is desired he should give. The counsel who has called a witness will not be allowed to frame his questions in such a manner that the witness, by answering merely "Yes" or "No," will give the evidence which that counsel wishes to elicit (*f*). He must not put into the witness's mouth the words which he hopes the witness will utter; nor in any other way suggest to him the answer which it is desired he should give. Counsel must leave the witness to tell his own unvarnished tale.

The rule that leading questions must not be asked on an examination-in-chief is not inflexible.

In the first place, a question is not objectionable as leading when it is only introductory to what is material, or relates to matters as to which there is no dispute. In most cases it is necessary to prove a certain number of uncontested facts, in order that judge and jury may understand

(*f*) *Nicholls* v. *Dowding*, 1 Stark. 81; Cockle, 195.

the position of the parties and the circumstances surrounding the case. As to these matters, leading questions are often put with the permission of counsel on the other side, and such questions should then be put in the shortest and most direct manner. But when the real issue is approached, the witness must be asked such questions merely as, "What did you see?" "What did you hear?" "What happened next?" This rule prevents, at least in some measure, the possibility of any collusion between a prosecutor, or a party, and his witness.

Leading questions may also be put to contradict evidence already given by a witness on the other side; *e.g.*, if the plaintiff has sworn that the defendant said, "The goods need not all be equal to sample," the defendant can, and should, be asked, "Did you ever say to the plaintiff that the goods need not all be equal to sample, or any words to that effect?" And there are other occasions on which leading questions may be put by permission of the presiding judge, who has a general discretion over the conduct of all *viva voce* examination. For instance, when a question from its nature cannot be put except in a leading form, the judge may allow it to be put. Where a witness has manifestly or apparently forgotten a circumstance, and all indirect attempts to recall it to his mind have failed, the circumstances may be put to him in a leading form, and he may be asked whether he remembers it. Thus, where a witness stated that he could not remember the names of certain persons, but that he should remember and be able to identify them if they were read to him, Lord ELLENBOROUGH allowed this to be done (*g*). In former days, when an offence had been proved, counsel for the prosecution was allowed to point at the prisoner and ask a witness whether that was the man whom the witness saw commit the offence. But in the present day it is considered the

(*g*) *Acerro* v. *Petroni*, 1 Stark. 100.

proper method for counsel merely to ask, Do you see the person in court? and leave the witness to identify the prisoner (*h*).

(iii.) As a general rule a party has no right to discredit his own witness, or to call any evidence to contradict him (*i*), for he has voluntarily placed the witness before the Court as worthy of belief. But it sometimes happens that a witness proves unexpectedly adverse to the party who calls him, and then this rule and the preceding one are relaxed, and counsel who called him may be permitted by the judge to attack the character and dispute the veracity of the witnesses—in fact, to cross-examine him. The foundation of the rule against leading questions is that the witness is favourable to the party who calls him; and when this is not the case, the reason for insisting on the rule is gone.

The mere fact that a party is driven to call his opponent as his witness does not entitle him to treat that opponent as hostile and cross-examine him without the leave of the Court (*k*). But whenever the judge is satisfied that a witness is hostile to the party who called him, he will, upon application, declare him so to be; and this will entitle the counsel for that party to treat him as a witness called by the other side (*l*).

The law on the matter is regulated by the Criminal Procedure Act, 1865 (*m*), which applies to all Courts both civil and criminal.

(*h*) *R.* v. *Watson*, 32 How. St. Tr. 74; 2 Stark. 128; *R.* v. *Berenger*, 2 Stark. 129, n.

(*i*) Unless he was compelled by law to call that particular witness, *e.g.*, an attesting witness to a will.

(*k*) *Scott* v. *Sampson*, 8 Q. B. D. 491; *Price* v. *Manning*, 42 Ch. D. 372.

(*l*) *Price* v. *Manning*, *supra*.

(*m*) 28 Vict. c. 18.

Sect. 3 enacts that:—

"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

It is not enough that the evidence given by the witness is unfavourable to the party who called him; his manner and tone must show hostility to that party (*n*). The two statements need not be directly contradictory (*o*).

(iv.) A witness should always state what happened according to his own personal recollection, and not according to what he has since been told. But he is allowed to refresh his memory, when in the box, by looking at any entry or memorandum which he himself wrote or dictated very shortly after the event which it records, or even at an entry made by someone else, but which he saw and read and approved as correct very shortly after the event. It does not matter that the document is not evidence for either party, or even that it should be and is not stamped (*p*). The witness must have in Court the original entry, and not a fair copy of it. Counsel on the other side is entitled to look at any document by which the witness has refreshed his memory, and to cross-examine him on it; and he may, if he thinks fit, put it in evidence.

(*n*) *Greenough* v. *Eccles*, 5 C. B. (N.S.) 786; Cockle, 208.
(*o*) *Jackson* v. *Thomason*, 1 B. & S. 745.
(*p*) *Birchall* v. *Bullough*, [1896] 1 Q. B. 325. In this action, which was brought for money lent, an insufficiently stamped promissory note, purporting to be signed by the defendant and

## II. THE CROSS-EXAMINATION.

When a witness has been thus examined in chief, the opposite party, or his counsel, has the right to cross-examine him. He must put to each of his opponent's witnesses, in turn, so much of his own case as concerns that particular witness or in which that witness had any share. Thus, if the plaintiff has deposed to a conversation with the defendant, it is the duty of the counsel for the defendant to indicate by his cross-examination how much of the plaintiff's version of the conversation he accepts, and how much he disputes, and to suggest what the defendant's version will be. If he asks no question as to it, he will be taken to accept the plaintiff's account in its entirety.

But in all other matters it is often safer to ask too little than too much.

When the examination-in-chief has resulted in clear, conclusive, or unimpeachable evidence, it may be prudent for the adverse party not to cross-examine; for, in such a case, he may by so doing, instead of weakening the evidence, merely strengthen and confirm it. So, too, he will generally not cross-examine a witness, whose evidence he admits, or which cannot possibly injure his case. Reckless cross-examination, moreover, often lets in evidence which before was not admissible.

expressed to be given for money lent, was put into the defendant's hands by the plaintiff's counsel for the purpose of refreshing his memory and obtaining from him an admission of the loan. It was held that the plaintiff was entitled to use the note for that purpose, notwithstanding the provision of the Stamp Act, 1891, that an instrument not duly stamped "shall not be given in evidence or be available for any purpose whatever."

The objects of cross-examination are to impeach the accuracy, credibility, and general value of the evidence given in chief; to sift the facts already stated by the witness, to detect and expose discrepancies, or to elicit suppressed facts which will support the case of the cross-examining party. On cross-examination an adverse witness may be asked leading questions (*q*); for the reason for excluding such questions in examination-in-chief does not exist; the witness is generally adverse to the cross-examiner. Accordingly, either party may put point blank questions to his opponent's witnesses with the object of discrediting their evidence or of supporting his own case.

If, however, the witness is in fact favourable to the party cross-examining him, it will often weaken the effect of his evidence if he is asked leading questions in cross-examination; and in such a case the Court will sometimes refuse to allow a cross-examiner to lead his opponent's witness. Thus, on Hardy's trial, a witness for the prosecution, on evincing a favourable disposition towards the prisoner, was asked a leading question by the counsel for the defence, but BULLER, J., refused to allow the question to be put, saying:—

"You may lead a witness upon a cross-examination to bring him directly to the point as to the answer; but you cannot go the length of putting into the witness's mouth the very words which he is to echo back again" (*r*).

But, in a later case, ALDERSON, B., stated that the right to lead on cross-examination exists whether the witness be favourable or not (*s*).

Great latitude is permitted in cross-examination, and

(*q*) *Per* EYRE, L.C.J., in *R.* v. *Hardy*, 24 How. St. Tr. at p. 755.
(*r*) 24 How. St. Tr. at p. 659.
(*s*) *Parkin* v. *Moon*, 7 C. & P. 408; Cockle, 198.

a cross-examiner will not be stopped by the Court unless the question is manifestly irrelevant and calculated neither to weaken the examination-in-chief nor to impeach the credit of the witness. Questions, clearly irrelevant in examination-in-chief, may be relevant and of the highest importance when asked in cross-examination. In cross-examination, then, a witness (*t*) may be asked any question, however irrelevant to the matter in issue, the answer to which may tend to affect his credit; but he will not always be obliged to answer such question, and if he does answer it, he cannot as a rule be contradicted. He may be asked questions which affect his veracity, such as, whether he has been convicted of a crime; whether he is a relation, or intimate friend, or under any special obligation, to the party who calls him; whether he is not identified or connected with him in interest; whether he has not been on terms of enmity with the adverse party; whether his memory is not defective generally, or as to the particular transaction; and whether he has been bribed, or paid to give evidence.

By the R. S. C. 1883, Order XXXVI., r. 38—

"The judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be inquired into in the cause or matter."

Even in cross-examination, irrelevant questions will be disallowed, if they neither contradict or qualify the result of the examination-in-chief, nor impeach the credit of the witness. Thus, a cross-examiner may not as a rule ask questions of the witness as to his transactions with a third person. Hence, in an action for a nuisance, the defendant's witness cannot be asked in cross-examination whether compensation for a similar nuisance has not been paid by the defendant to a third person in

(*t*) A prisoner giving evidence is, of course, not to be asked questions forbidden by the Criminal Evidence Act, 1898. See *ante*, pp. 204 *et seq.*

the same position as the plaintiff (*u*). So, as evidence of the mode in which the defendant has contracted with third parties is no evidence of the mode in which he contracted with the plaintiff in the transaction in question, the latter cannot ask a witness in cross-examination upon what terms the defendant contracted with such third parties (*x*). Again, a witness cannot be asked whether a third person had admitted that he and not the party charged was the person liable, for such evidence would be hearsay (*y*); but he may be asked whether such third person is the person to whom credit was given, or who was dealt with as the party primarily liable, and it seems that he may be asked such questions as the foregoing, in order to test his memory or credibility (*x*). If, however, any transaction with a third party is admissible in chief, it will also be admissible in cross-examination. In an action for a libel published in a newspaper, the fact that the plaintiff has sued for or obtained, or agreed to accept, from other persons compensation for libels to the same effect as that now in question is, by statute, admissible both in chief and in cross-examination (*z*).

Where a question asked in cross-examination appears to be irrelevant, it will not be excluded if the cross-examiner undertakes to show that it is really material (*a*).

If a witness, after being sworn, is not examined in chief, the counsel of the other party has a right to cross-examine, unless the witness has been called under a mistake, *e.g.*, under the mistaken idea that he knew something of the transaction he was called to prove when in fact he knew nothing (*b*).

(*u*) *Tennant* v. *Hamilton*, 7 Cl. & F. 122.
(*x*) *Hollingham* v. *Head*, 4 C. B. (N.S.) 388; Cockle, 63 (*per* BYLES, J.).
(*y*) *Watts* v. *Lyons*, 6 M. & G. 1047.
(*z*) Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 6.
(*a*) *Haigh* v. *Belcher*, 7 C. & P. 389.
(*b*) *Wood* v. *Mackinson*, 2 M. & Rob. 273; Cockle, 197.

A witness who has been called by neither party may be called and examined by the judge, and then he is the witness of the judge and not of either of the parties. Then, as Lord ESHER, M.R., said:—

"The counsel of neither party has a right to cross-examine him without the permission of the judge. The judge must exercise his discretion whether he will allow the witness to be cross-examined. If what the witness has said in answer to the questions put to him by the judge is adverse to either of the parties, the judge would no doubt allow, and he ought to allow, that party's counsel to cross-examine the witness upon his answers. A general fishing cross-examination ought not to be permitted" (*c*).

Whenever a party is compelled by law to call a particular witness, *e.g.*, the attesting witness to a will, he is not the witness of either party, but of the Court; the party calling such a witness may cross-examine him (*d*). And where in an Admiralty action for collision, a compulsory pilot, not called by either party, was allowed to give evidence on his own behalf, the Court allowed cross-examination by both sides (*e*).

When a prisoner calls a witness who incriminates another prisoner, the latter has a right to cross-examine; but it seems there is no such right when the evidence is not criminatory (*f*). So, when a prisoner elects to give evidence on his own behalf under the Criminal Evidence Act, 1898, and in so doing incriminates a fellow prisoner, the latter has a right to cross-examine him (*g*).

Counsel when cross-examining may, as we have seen, impeach the character of a witness; for this purpose he may ask him whether he has committed any crime, or been guilty of immoral conduct; but, if he denies it, the fact cannot be proved by the cross-examiner unless it be material to the issue (*h*). In other cases the

(*c*) *Coulson* v. *Disborough*, [1894] 2 Q. B. 316.
(*d*) *Jones* v. *Jones*, 24 T. L. R. 839.
(*e*) *The Cardiff*, [1909] P. 183.
(*f*) *R.* v. *Burditt*, 6 Cox, 458, followed in *R.* v. *Hadwen*, [1902] 1 K. B. at p. 886.
(*g*) *R.* v. *Hadwen*, *supra*; cf. *R.* v. *McDonell*, 73 J. P. 490.
(*h*) *Harris* v. *Tippett*, 2 Camp. 637; Cockle, 203.

answer of the witness is conclusive; and no evidence can be called to contradict it (*i*). But there are exceptions to this rule. By the Criminal Procedure Act, 1865 (*k*), s. 6 (which applies in all Courts, civil as well as criminal), it is enacted that—

"A witness may be questioned as to whether he has been convicted of any felony or misdemeanour, 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; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same."

This is so, even though conviction is altogether irrelevant to the matter in issue (*l*).

Again, if a witness is asked whether he ever made a former statement, as to matters in issue, different from the evidence which he has just given in chief, and he denies it, evidence may be given to show that he did make such a statement; but before doing so it is necessary to lay a foundation for such evidence in the cross-examination of the witness by first putting to him all the circumstances under which he is supposed to have made that statement, in order that he may remember the occasion and explain the discrepancy (*m*). As ALDERSON, B., said:—

"A witness may be asked any question which, if answered, would qualify or contradict some previous part of that witness's testimony, given on the trial of the issue, and, if that question is put to him and answered, the opposite party may then contradict him. . . . You may ask him any question material to the issue,

(*i*) *Feret* v. *Hill*, 15 C. B. 207.
(*k*) 28 Vict. c. 18.
(*l*) *Ward* v. *Sinfield*, 49 L. J. C. P. at p. 697.
(*m*) *Crowley* v. *Page*, 7 C. & P. 791.

and if he denies it you may prove that fact, as you are at liberty to prove any fact material to the issue" (*n*).

This rule was subsequently embodied in the Criminal Procedure Act, 1865 (*o*), which enacts that—

"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" (*p*).

"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" (*q*).

A witness who has already given evidence may be recalled for the purpose of proving an "inconsistent statement" made by a subsequent witness (*r*).

There is authority for asserting the existence of a third exception to the rule that the answer of a witness to a question which merely impeaches his credit cannot be contradicted. The decisions were inconsistent; the modern doctrine appears to be that, although such evidence may be given to impeach his general veracity, evidence cannot be given of any particular acts of falsehood or dishonesty, because a witness cannot be expected to be prepared to rebut particular charges or to justify the whole course and details of his private life. A witness, therefore, who is called to impeach the veracity of another witness, can only be asked whether

(*n*) *Attorney-General* v. *Hitchcock*, 1 Ex. at p. 102; Cockle, 207.
(*o*) 28 Vict. c. 18.
(*p*) Sect. 4.
(*q*) Sect. 5; and see *Darby* v. *Ouseley*, 1 H. & N. 1.
(*r*) *Sykes* v. *Haig*, 44 L. T. 57.

he would believe the other witness on his oath (*s*). When a witness is thus impeached, the party calling him may re-establish his character by calling witnesses to his general character for veracity (*t*).

Again, as we have seen (*u*), questions may be put to a witness to show that he is actuated by revenge or some other corrupt motive in giving his evidence; and there is some authority for holding that, if he denies it, his statement may be contradicted by other witnesses (*x*). Thus a witness may be asked if he has accepted a bribe, and, if he denies it, other evidence may be called to prove that he did (*y*); but if he is asked whether he has said that he has been offered a bribe, and he denies it, evidence to contradict him is inadmissible (*z*).

The general rule as to impeaching the veracity of one's opponent's witnesses was thus stated by Lord HERSCHELL in the case of *Browne* v. *Dunn* (*a*):—

"I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made of excessive cross-examination of witnesses, and it has been complained of as undue; but it

(*s*) *R.* v. *Bispham*, 4 C. & P. 392; *R.* v. *Brown*, L. R. 1 C. C. R. 70; Cockle, 210.

(*t*) *Annesley* v. *Lord Anglesea*, 17 How. St. Tr. 1430.

(*u*) See *ante*, p. 533.

(*x*) *Thomas* v. *David*, 7 C. & P. 350; Cockle, 209.

(*y*) See *R.* v. *Langhorn*, 7 How. St. Tr. 446.

(*z*) *Attorney-General* v. *Hitchcock*, 1 Ex. 91; cf. *R.* v. *Yewins*, 2 Camp. 638.

(*a*) 6 The Reports, 67.

seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth; I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course, I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest that it is not necessary to waste time in putting questions to him upon it. All I am saying is, that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted."

## III. THE RE-EXAMINATION.

When the cross-examination of the witness is concluded, the party who called him has the right to re-examine him on all matters arising out of the cross-examination for the purpose of reconciling any discrepancies that may exist between the evidence on the examination-in-chief and that which has been given in cross-examination; or for the purpose of removing or diminishing any suspicion that the cross-examination may have cast on the evidence-in-chief; or to enable the witness to state the whole truth as to matters which have only been partially dealt with in cross-examination. If there has been no cross-examination there can be no re-examination. No leading questions are allowed in re-examination. And it is, as a rule, unnecessary, and therefore wrong, to repeat any question already put in chief. Only such questions may be asked as are connected with, and arise out of, the cross-examination (*b*); and no questions can

(*b*) The judge, however, may in his discretion allow such a question to be put. See *per* CAVE, J., in *Scott* v. *Sampson*, 8 Q. B. D. at p. 506.

be asked in re-examination to introduce new evidence which might have been given in chief (*c*). Thus, in *The Queen's Case* (*c*), Lord TENTERDEN, in delivering the judgment of the Court, said:—

"I think that counsel has a right upon re-examination to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but I think he has no right to go further, and to introduce matter new in itself, and not wanted for the purpose of explaining either the expressions or the motives of the witness."

Therefore a witness, who has been cross-examined as to a conversation with a party, cannot be re-examined as to parts of the conversation not connected with the portion to which the cross-examination referred (*d*). If such questions are asked and answered, the witness may be again cross-examined, but such further cross-examination will be confined to the matter so improperly introduced. Where a party has inadvertently omitted to put a question in chief, a judge will usually put it, if requested to do so by counsel, and then will also put questions suggested by the opposing counsel. The re-examination closes the examination of a witness by counsel, but the judge has also a discretionary power to recall a witness at any time for the purpose of putting a question to him.

The judge has a right to interpose at any stage of the proceedings to ask a witness in the box any question which he thinks necessary; but he usually reserves such questions until both counsel have concluded their examination of the witness. Counsel has no right to re-examine upon the Court.

In order that a witness may give his evidence fully, freely and without fear of any consequences, it has always been the law that no action lies against a witness

(*c*) *The Queen's Case*, 2 B. & B. at p. 297.
(*d*) *Prince* v. *Samo*, 7 A. & E. 627; Cockle, 200.

for what he says or does in giving evidence before a Court of justice. Such evidence is absolutely privileged (*e*); and so are his proofs given to the party or his solicitor before the trial (*f*).

What a man says before he enters, or after he has left, the witness box is not privileged; and if a man when in the witness box takes advantage of his position to utter something having no reference to the cause or matter of inquiry, in order to assail the character of another, as if he were asked, "Were you at York on a certain day?" and he were to answer, "Yes, and A. B. picked my pocket there," it certainly might well be said in such a case that the statement was altogether *dehors* the character of witness, and not within the privilege (*g*).

A similar immunity is enjoyed by a witness before a military Court of inquiry, held under the King's Regulations (*h*), and of a witness examined before a Select Committee of the House of Commons (*i*). Now, by the Witnesses (Public Inquiries) Protection Act, 1892 (*k*), s. 2:—

> "Every person who commits any of the following acts, that is to say, who threatens, or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure, any person for having given evidence upon any inquiry, or on account of the evidence which he has given upon any such inquiry, shall, unless such evidence was given in bad faith, be guilty of a misdemeanour, and be liable upon conviction thereof to a maximum penalty of one hundred pounds, or to a maximum imprisonment of three months";

and by sect. 1:—

> "In this Act the word 'inquiry' shall mean any inquiry held under the authority of any Royal Commission, or by any Committee of either House of Parliament, or pursuant to any statutory authority, whether the evidence at such inquiry is or is not given on oath, but shall not include any inquiry by any Court of justice."

(*e*) *Seaman* v. *Netherclift*, 2 C. P. D. 53.
(*f*) *Watson* v. *Jones*, [1905] A. C. 480.
(*g*) *Per* COCKBURN, C.J., in *Seaman* v. *Netherclift*, *supra*.
(*h*) *Dawkins* v. *Lord Rokeby*, L. R. 7 H. L. 744.
(*i*) *Goffin* v. *Donnelly*, 6 Q. B. D. 307.
(*k*) 55 & 56 Vict. c. 64.

## CANADIAN NOTES.

### EXCLUSION OF WITNESSES FROM COURT.

One of several defendants was called as a witness in their and his own behalf. It appeared that he had been in court during part of the examination of another defendant in the cause. Notice had been given on a previous day of the assizes that parties to the record wishing to give evidence must not remain in court during the examination of the other witnesses. The judge therefore rejected his evidence, and it was held that he had authority to do so.

*Per* DRAPER, J.: "It appears to have been considered as a matter resting in the discretion of the judge, whether he would suffer a witness to be examined who remained in court and heard the cause proceeding after an order to withdraw." The learned judge, after referring to later cases, such as *Chandler* v. *Horn* and *Cook* v. *Nevercoke*, pointed out the distinction between disinterested witnesses and parties to the record, and held, as already stated, that the trial judge had discretion to reject the evidence. *Winter* v. *Mixer et al.*, 10 U. C. Q. B. 110.*

A witness remained in court although an order had been made for the excluding of all the witnesses. The trial judge refused to receive the evidence of the witness, but a new trial was ordered, because of the exclusion of the evidence, there having been no scheme apparent to keep the witness in court. *Per* PROUDFOOT, J.: "I think

* See, however, the two following cases.

the practice is that the evidence of such a witness should be received, but with great care." *Black* v. *Besse*, 12 O. R. 522.

In *Mahoney* v. *McDonnell et al.*, 9 O. R. 137, at the beginning of the trial all witnesses were ordered out of court except the parties to the action. Judgment having been given, dismissing the action as against the defendant P., his co-defendant M. entered upon his case and called P. as a witness. P. had remained in court and heard the whole of the evidence as used by the plaintiff, and his evidence was rejected on this ground.

It was held that the evidence was improperly rejected, and a new trial was ordered.

*Cross-Examination.*

In an action of ejectment, the defendant's counsel has no right on cross-examination of a witness to put a paper not in evidence in his hands, telling him that the paper was written by the witness's father, C. W., under whom the defendant claimed, and to ask the witness whether C. W. did not state, in the presence of W., through whom the plaintiff claimed, that W. had given him possession of the land with the understanding that he was to receive an undisputed title to it from W. *Wetmore* v. *Bell*, 30 N. B. 83.

It was held in *R.* v. *Tower*, 20 N. B. 168, on the trial of the master of a vessel indicted for scuttling her, adhering to the old rule of the common law, that the contents of a written instrument, if it be in existence, can be proved only by the instrument itself, and counsel would not be allowed to read from a paper not in evidence and found a question upon the paper so read; that this cannot be done, even on cross-examination for the purpose of testing the credibility of the witness. It was also held, in the same case, that the statute of

Canada, allowing a witness to be cross-examined as to previous statements made by him in writing, or reduced into writing, would not apply to protests made by the prisoner, or to policies of insurance issued to the witness, or to receipts which it did not appear the witness had either written, signed, or even seen until they were shown to him in the witness-box.

In an action against the town of Moncton for injury caused by non-repair of the sidewalk, constructed by the town, the mayor gave evidence for the defendant of the care with which the officials looked after the streets. It was held that he might be asked on cross-examination if he knew on what street a person had fallen and was injured and for which an action was brought, such question arising out of the direct examination. ALLEN, C.J., *dubitante*, 29 N. B. 372.

On the trial of an action on a promissory note, brought by the plaintiffs, a banking corporation, to which defendants pleaded usury, consisting in the plaintiffs making the note payable at a distance from the place of discount, and thereby securing a larger rate of interest in the shape of commission than they were legally entitled to, the plaintiffs' agent was asked by the counsel in cross-examination whether during the time he was in Peterborough, the place where the note was discounted, he had directed or caused any other note to be made payable at any other place than Peterborough. It was held that this question was admissible. *Per* A. WILSON, J.: "It may have been put for the purpose of testing his memory; it was a general question. The answer to it either way would not have settled anything in respect of the note, but it may have been rightly asked to enable the judge or the jury to form an opinion as to the value of the witness's testimony. The answer to it, 'I do not recollect,' was taken as conclusive, and no attempt was made to

impeach him or to follow it up further." *Bank of Montreal* v. *Scott et al.*, 17 U. C. C. P. 358.

In an action by plaintiff against the defendant for negligence, counsel for defendant called witnesses as to the reputation of the plaintiff, who swore that they would not believe the plaintiff on oath. On cross-examination, plaintiff's counsel asked the witness what the individual neighbours of the plaintiff thought of his character, and, in further cross-examination, witness having said that he knew the individual opinion of the plaintiff's neighbours as to his character, counsel proposed to ask, "Whose opinion do you know?" The question was ruled out. *Held*, that this was an improper ruling. *Messenger* v. *Town of Bridgetown*, 33 N. S. R. 291.

Where a witness had given his version of a conversation, in which it was alleged that for a certain consideration he had agreed to waive the cesser clause, the question, "Then so far as you were concerned, you did not agree to waive that?" was held to have been properly rejected, inasmuch as it was for the jury to say, upon the evidence already given, whether or not the defendant had waived the cesser clause. *Lovett et al.* v. *Snowball*, 33 N. B. 263.

In an action of assumpsit for breach of promise of marriage the defendant was held entitled to cross-examine the plaintiff's own witnesses respecting the general bad character of the plaintiff. *MacGregor* v. *MacArthur*, 5 U. C. C. P. 493.

*Previous Inconsistent Statements.*

It was held in *R.* v. *Mailloux*, 16 N. B. 493, that, while a witness may be asked on cross-examination if he had not previously made a statement at variance with his evidence on the trial, in order to do this, the witness's

attention must be called to the particular statement by which it is proposed to contradict him, and he cannot be asked generally to relate a conversation with another person, to enable the cross-examining counsel to discover whether any of his statements varied from his evidence on the trial.

At a coroner's inquest evidence is properly receivable that a witness at another time made a statement inconsistent with that given at the inquest, under R. S. of Canada (1886), c. 174, s. 234. *R.* v. *Sanderson*, 15 O. R. 106.

Defendant was convicted of an assault. At the trial the defendant gave evidence on his own behalf, and his counsel proposed to ask certain questions, with a view of showing that one of the witnesses for the Crown, when examined before the committing magistrate, had made statements at variance with her testimony given on the trial of the indictment. The depositions taken before the magistrate were admitted to have been lost.

It was held that the evidence had been improperly rejected. *Per* HENRY, J.: "The law provides for cross-examining a witness as to previous statements made by him in writing, or reduced to writing, and for contradicting him, if necessary, by such writing. As to a statement made orally by such a witness, and reduced to writing as in the present case, his statement, if the writing can be produced, must be proved by the writing, but, failing the writing, the provision of the law can be carried out by proving the statement in the way which would be the obvious and the legal method if the reduction to writing had never taken place, namely, by the evidence of a witness or witnesses who heard the statement as it was originally made."

The evidence excluded was as to the alleged statement of one of the witnesses for the prosecution, at the

preliminary examination, as to what was said by the accused at the time of the alleged assault, and as to which alleged statement the witness had been cross-examined. "As to this, it seems to me enough to say that these alleged statements of the witness had reference to the alleged statements of the accused, constituting part of the *res gestæ*; that is to say, a part of the transaction which was the subject of the trial. That being so, we may not concern ourselves with an inquiry as to the measure of its importance."

RITCHIE, J., held that under the Criminal Code the witness could be cross-examined as to statements made by her at the preliminary examination without producing the deposition, and it seemed to him clear that the deposition was not to be taken as the sole evidence of the statement made at the preliminary inquiry. Furthermore, as it was not apparently intended to contradict the witness by the writing, the case was not within the section of the Code 700 (now s. 10 of the Canada Evidence Act, c. 145). The case came under s. 701 of the Code (now s. 11 of the said Act), and the witness having been cross-examined as to her statement before the magistrate, and having denied it, evidence could be given that she had made the statement sought to be proved. *R.* v. *Troop*, 30 N. S. R. 339.

A point was taken that the whole of the evidence of a certain witness should have been struck out as entirely discredited, because of her having been ruled to be a hostile witness, and a witness had been admitted for the purpose of proving that she had previously made a statement inconsistent with part of her testimony. This contention was overruled. The dictum of Lord CAMPBELL, in 1 F. & F. 254, is referred to in the decision to the effect that in order to be entitled to be admitted, the alleged inconsistent statement must be introduced for the purpose of discrediting the witness altogether, and

not for the purpose of getting rid of part of his testimony. The dictum is regarded as unsatisfactory. *Gates* v. *Lohnes et al.*, 31 N. S. R. 221.

In an action by an administrator upon a fire policy one of the issues was whether the occupation of the insured house had been abandoned. The administrator stated in his evidence that the house had not been abandoned and that he had occupied it. It was held that statements of the administrator, before assuming that character, tending to contradict his evidence, were properly received. *Cormier* v. *Ottawa Agricultural Insurance Co.*, 20 N. B. 526.

In *R.* v. *Chasson*, 16 N. B. 546, it was held that depositions made and signed by a party at an inquest might be received in evidence to contradict him, whether the inquest was illegally taken or not, as being statements of the witness made on a previous occasion.

The defendants called the plaintiff as a witness, and after asking him some questions, produced a deposition made by him, before a magistrate, which was at variance with his answers. He admitted the contradiction, but said his present evidence was correct, and gave as an explanation that he was much confused at the time, being without papers which he wished to refer to, and that all he said was not in the deposition. It was held that this explanation was a collateral matter and the defendant could not therefore call the magistrate to disprove it. *Beemer* v. *Carr et al.*, 23 U. C. Q. B. 557.

In an action on a fire policy, the plaintiff was called as a witness, and said, "I did not tell Evatt," the defendant's agent, "I had not been burned out before. I was not asked by him." Evatt was called, and it was proposed to ask him questions to contradict the plaintiff on this point. It was held that such evidence was properly rejected as raising a collateral issue.

*McCullogh* v. *Gore District Mutual Insurance Co.*, 34 U. C. Q. B. 384, *affirming decision*, 32 U. C. Q. B. 610.

*Previous Conviction of Witness.*

A prisoner who on his trial for an indictable offence is examined as a witness on his own behalf may be cross-examined as to previous convictions. It is pointed out by ARMOUR, C.J.O., that, in the Imperial Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36, there is a provision that a person charged and called as a witness in pursuance of that Act shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless under the circumstances in the said Act set forth. In the absence of any such provision in the Canada Evidence Act or any other provision limiting in any way the cross-examination of the person charged with the offence who becomes a witness in his own behalf, he held that the defendant could be asked as to the previous conviction. OSLER, J., also pointed out that it had long been the law, as now found in the Criminal Code, that a witness might be questioned as to whether he had been convicted of any offence, and if, upon being so questioned, he either denied the fact, or refused to answer, the opposite party might prove such conviction by a certificate of the proper officer. *R.* v. *D'Aoust*, 3 O. L. R. 653.

*Re-Examination.*

In an action of ejectment, where the defendant set up title by possession, claiming through a third party, on cross-examination of the defendant, plaintiff's counsel put in his hand a deed from W. to defendant and others and asked him whether he knew of the deed having been

made, and whether as a member of an Orange lodge he had accepted it. It was held that the defendant's counsel had no right on re-examination to ask the defendant what took place between W. and him with regard to the purchase of the land described in the deed.

# CHAPTER V.

## CONSTRUCTION OF DOCUMENTS.

When a material document has been properly proved and put in evidence, it is the province of the judge to construe it, though it is for the jury, if there be one, to find any facts which may be necessary to enable him so to do. But in endeavouring to arrive at the true meaning of any document the judge will always be guided by certain well-known canons of construction.

1. The first and fundamental rule is that everyone must be taken to mean what he has written. The judge will always, in the first place, endeavour to arrive at his meaning by studying the document which he has written or signed. It is only if that study fails, that the judge will seek for an interpretation outside the four corners of the document.

2. In construing what has been written, the judge will give to ordinary English words their ordinary English meaning. A witness cannot be called and asked what he understands by a plain ordinary English sentence.

3. The judge will give to technical legal words their technical legal meaning.

4. It may be, however, that the document contains words which are neither ordinary English nor technical legal terms. Parol evidence is admissible to explain the special meaning of such

words, if they have any. For instance, the document may be written in a foreign language which needs interpretation.

5. Parol evidence is also admissible to show that in any given document a word which at first sight seems ordinary English is used in some peculiar sense in a particular trade or locality. If such evidence be given, it will be for the jury to find whether such word is in fact used with a technical or local meaning, and, if so, what that technical or local meaning is; and the judge, in construing the document, will give that word that meaning.

6. Again, there are words which have both a strict and proper meaning, and also a loose and popular meaning, *e.g.*, "children" (which may or may not include illegitimate children), and "brothers and sisters" (which may or may not include half-brothers and sisters) (*a*). The judge will give to such words their strict and proper meaning, unless it be clear that the writer used the words in their loose popular meaning.

7. Where the words, as they stand, are quite clear and intelligible, but it turns out that they can apply equally well to two or more persons, or two or more things, this is a "latent ambiguity," and parol evidence is admissible to show which was really meant. This is not contradicting the document, because each answers the written words equally well. A "patent ambiguity," on the other

(*a*) *In re Cozens*, [1903] 1 Ch. 138; but see *In re Dowson*, [1909] W. N. 245, where Joyce, J., held that the words "my own brothers and sisters" did not include brothers and sisters of the half-blood.

hand, is one which appears on the face of the document and renders it unintelligible, *e.g.*, a legacy of £100 to ——. No parol evidence is admissible to supply the missing name.

8. Having thus settled the meaning of each word, the judge will proceed to construe the document as a whole, not divorcing isolated passages from their context, but giving due weight to every part. He will avoid, if possible, a construction which will render any portion of the document nugatory or meaningless.

9. Sometimes, however, one clause in a document has a superior efficacy to another, and in case of conflict overrides it. Of two inconsistent clauses in a deed, the first shall prevail; in a will, the latter.

We proceed to discuss each of these rules separately.

1. The primary canon needs no explanation; it is merely a rule of common sense. The parties have expressed their intentions in writing, and the Court will take it for granted that they know and approve of what is written and are willing to be bound by it. The fact that they have put their wishes down on paper shows that they meant that paper to be the main, if not the only, guide to their intentions; and, in construing it, the judge should not permit his mind to be distracted from the study of the written words by listening to the parol evidence of irresponsible strangers who suggest interpretations of their own invention. Nor will the parties themselves be allowed subsequently to suggest that they did not mean what they have said.

2. Common sense also dictates the second rule. It is obviously right that anyone who is construing a document in English should give to ordinary English words

their ordinary English meaning. A witness cannot be called and asked what he understands by a plain sentence in English (*b*). Words which have a clear and fixed meaning cannot in the absence of special circumstances be shown by extrinsic evidence to have been used by the parties to mean something different. Even the fact that the parties in their subsequent business transactions have put a different construction on the language is immaterial (*c*), though, as we shall see hereafter, evidence may be admissible to show that in a particular trade, or in a particular part of the country, an ordinary English word conveys a technical or local meaning.

In the case of *North Eastern Rail. Co.* v. *Hastings* (*d*), Lord HALSBURY stated the law thus:—

"No principle has ever been more universally or rigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself."

In the same case Lord BRAMPTON said (*e*), with reference to the deed on which the action was brought:—

"It seems to me to be clear and free from ambiguity, and incapable of any other construction than that assigned to it by the respondent. Certainly there is nothing to be found in the rest of the agreement to suggest any other interpretation. But it is said that it must have been differently understood by the parties themselves, and that the omission by the plaintiff and his predecessor for upwards of forty years to claim the rents now sought to be recovered is cogent evidence that such was the case. I grant that if the clause were capable of two constructions, one of which would support, the other of which would defeat the claim, the omission would afford irresistible proof that the latter was the interpretation intended by the parties. No such ambiguity, however, exists, and it seems therefore to me that, in the absence of any proof to the contrary, it must be assumed that the parties knew and understood the language they were using, and that in executing the agreement containing that clause they were truly expressing their intentions, and are bound by the writing they have signed. Why the agreement was so framed—what were the

(*b*) *Dowling* v. *Pontypool, etc. Rail. Co.*, L. R. 18 Eq. 714; and see *In re Lewis, Prothero* v. *Lewis*, [1910] W. N. 6.

(*c*) *London County Council* v. *South Metropolitan Gas Co.*, [1904] 1 Ch. 76.

(*d*) [1900] A. C. 260, at p. 263.

(*e*) [1900] A. C., at p. 270.

considerations which induced it—and why the claim was so long allowed to sleep are mere matters of speculation; but one has no right to act upon speculation to set aside a deed or agreement which is on the face of it clear and definite."

This rule is well illustrated by the decisions given in actions of slander, which though not precisely in point—for we are here dealing with documents—are yet closely analogous to our subject. Thus, in *Daines and another* v. *Hartley* (*f*), a witness was called at the trial who deposed that in a conversation with the defendant he mentioned that his firm held some bills of the plaintiffs, and that the defendant replied, "You must look out sharp that they are met by them." The counsel for the plaintiffs then proposed to ask him: "What did you understand by that?" But the question was objected to, and disallowed by the judge (POLLOCK, C.B.). The jury found a verdict for the defendant, and the Court of Exchequer refused to grant a new trial. So, in actions of slander where it is important to prove an innuendo and that the obvious and natural meaning of a word was not the one which the speaker intended to convey to the witness, the witness cannot be asked what he understood by the language; for the answer to such a question would be in the nature of an inference and a mere personal opinion; but questions may be put to him which tend to elicit all the surrounding facts and circumstances which led him to understand the words in a slanderous sense, and he may be asked whether there was irony in the speaker's tone at the time, and generally whether there was anything to prevent him from understanding the words in their ordinary sense (*g*).

3. The judge will give to technical legal words their technical legal meaning (*h*). For example, a grant of freeholds to A. in fee simple will be construed as a grant of

(*f*) 3 Ex. 200; and see *Barnett* v. *Allen*, 3 H. & N. 376; and *Gallagher* v. *Murton*, 4 T. L. R. 304.
(*g*) *Boydell* v. *Jones*, 4 M. & W. 446.
(*h*) *Leach* v. *Jay*, 9 Ch. D. 42.

the entire freehold. So, too, the phrase "chattels real" has a definite meaning in law, and a bequest of "all my chattels real and personal" will not pass the testator's freeholds or copyholds, but a bequest of "all my effects both real and personal" will, because the word "effects" has in law no technical meaning (*i*). So a person who is expressly designated to be a "residuary legatee" cannot, in the absence of special circumstances, take as "residuary devisee" (*j*). Unless the document itself shows that another meaning was intended, words of weight, measure and number to which a particular meaning has been assigned by statute, must be given that meaning, and no extrinsic evidence will be admitted to show that the parties meant something different (*k*), So, also, the names of the quarter days in leases and other documents refer to the days on which they now fall, and not to those on which they fell under the "old style" (*l*). The words "City of London" have also a definite legal meaning (*m*), so that where a dentist in Bloomsbury Street, London, W.C., made his manager covenant never to practise as a dentist in either of he cities of London or Westminster, and the manager ejected him from the house in Bloomsbury Street and carried on the business there as his own, it was held that the covenant did not apply, as Bloomsbury is not strictly in either of those cities, although it was obviously the intention of the parties to include the whole metropolis, and certainly Bloomsbury. So the words "rent" and "term" are words of art, and consequently will receive their ordinary legal meaning unless the context makes another meaning necessary (*n*).

(*i*) *Smyth* v. *Smyth*, 8 Ch. D. 561; *Hall* v. *Hall*, [1892] 1 Ch. 361.
(*j*) *In re Gibbs*, [1907] 1 Ch. 465.
(*k*) *Smith* v. *Wilson*, 3 B. & Ad., at pp. 731—734.
(*l*) *Doe* v. *Lea*, 11 East, 312; *Doe* v. *Benson*, 4 B. & Ald. 588.
(*m*) *Mallan* v. *May*, 13 M. & W. 511.
(*n*) *Lord Llangattock* v. *Watney, Combe, Reid & Co., Ltd.*, [1910] 1 K. B. 236. Affirmed in H. L. 26 T. L. R. 418.

In ordinary legal documents the Court always construes the word "month" as meaning "lunar month," unless the context requires another meaning, but in commercial documents the word "month" always means "calendar month" (*o*).

Even silence may have a technical legal meaning. Thus, if an agent signs a document on behalf of a principal without adding words to show that he is signing merely as agent for his principal, he will be personally liable. And, if an agreement for the purchase of goods says nothing as to the time of payment for them, the Court will construe it as meaning that the goods are to be paid for on delivery (*p*).

4. If the document contains words which are neither ordinary English nor technical legal terms, parol evidence is admissible to explain them.

5. Parol evidence is also admissible to show that in any given document a word which at first sight seems ordinary English is used in some peculiar sense in a particular trade or locality.

It is convenient to treat of the considerations affecting both these classes of words together.

Where a written instrument is in a foreign language, or where it contains technical words of trade or custom, oral or other extrinsic evidence will be received to inform the Court of the sense of the instrument. Thus, in *Shore* v. *Wilson*, PARKE, B., said:—

> "I apprehend that there are two descriptions of evidence . . . which are clearly admissible for the purpose of enabling a Court to construe any written instrument, and to apply it practically. In the first place, there is no doubt that not only when the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms are used, or, indeed, any expressions which at the time when the

(*o*) *Jolly* v. *Young*, 1 Esp. 186; *Simpson* v. *Margitson*, 11 Q. B. 23.

(*p*) *Ford* v. *Yates*, 2 Man. & G. 549.

instrument was written had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes. . . . This description of evidence is admissible in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate" (*q*).

When a document is in a foreign language, the Court requires a translation by a competent translator; and if there are technical expressions in the document, expert evidence must be given to explain to the Court what meaning those words would convey to people in whose language the document is written (*r*). Before admitting evidence of the secondary meaning of a word, the Court must be satisfied from the instrument itself, or from the circumstances of the case, that the word ought to be construed not in its ordinary and primary signification, but according to its secondary meaning (*s*). Thus, extrinsic evidence was received to explain the meaning of the phrase, "Godly preachers of Christ's Holy Gospel," and to show that according to the usage of a sect to which the grantor belonged, the grant was intended for that sect (*t*). So, such evidence has been received to explain the meaning of the phrase "across a country" in a steeplechase transaction (*u*); that "close," by local usage, signified "a farm" (*v*); and that a contract to pay an actor so much a week was a contract to pay only during the theatrical season (*x*). So, also, it has been received to explain the local meaning of "good" or "fine" barley (*y*), to identify the property described in a contract of sale as "my

(*q*) 9 Cl. & F. 355.
(*r*) See *Chateney* v. *Brazilian Telegraph Co.*, [1891] 1 Q. B. 79; cf. *Di Sora* v. *Phillipps*, 10 H. L. Cas., at p. 633.
(*s*) See the judgment of FRY, J., in *Holt & Co.* v. *Collyer*, 16 Ch. D. 718.
(*t*) *Shore* v. *Wilson*, 9 Cl. & F. 355.
(*u*) *Evans* v. *Pratt*, 3 Man. & G. 759.
(*v*) *Richardson* v. *Watson*, 4 B. & Ad., at p. 799.
(*x*) *Grant* v. *Maddox*, 15 M. & W. 737.
(*y*) *Hutchinson* v. *Bowker*, 5 M. & W. 535.

house in town," or to define the quantity of wool sold as "your wool" (*z*); and, generally, in all cases where the signification of a particular phrase is unsettled and variable in its nature, and where it is liable to have different senses attached to it in different places.

Usage or custom is also admissible to explain and control, but not to contradict, a written instrument, such as a contract. It may be admissible to explain what is doubtful; it is never admissible to contradict what is plain (*a*). Thus, wherever the language of a written instrument is so clear that there can be no reasonable ground for construing it as subject to a custom, or where, although the language is ambiguous, the custom itself is uncertain, the writing must be construed strictly according to its literal terms (*b*).

On the general principle, it has been held allowable to show that, by the custom of the country, a provision in a lease as to ten thousand rabbits signified twelve hundred to the thousand (*c*); and that where nothing is said in the lease, the outgoing tenant is entitled to the away-going crop (*d*). In such cases it will be for the jury to find whether such word or phrase is in fact used with a technical or local meaning, and if so, what that technical or local meaning is, and the judge in construing the document will give that word or phrase that meaning. If the jury find it is in fact *not* used with a technical or local meaning, then it is for the judge to give it its proper legal signification and construe the document accordingly. Thus, where an auctioneer sued for a sum which he was to receive under a written contract, only if he sold "within two months," it was held, that, in the absence of admissible extrinsic evidence this

(*z*) *Macdonald* v. *Longbottom*, 29 L. J. Q. B. 256.
(*a*) *Per* Lord CAMPBELL in *Hall* v. *Janson*, 4 E. & B. 500; see *The Nifa*, [1892] P. 411.
(*b*) *In re Stroud*, 8 C. B. 502; *Hurst* v. *Usborne*, 18 C. B. 144.
(*c*) *Smith* v. *Wilson*, 3 B. & Ad. 728.
(*d*) *Wigglesworth* v. *Dallison*, 1 Doug. 201.

meant in point of law two lunar months, and that, unless the context, or the circumstances of the contract, showed that the parties meant two calendar months, the conduct of the parties to the written contract alone was not admissible to withdraw the construction of a word in it which had a settled primary meaning from the judge and transfer it to the jury (*e*). In general, where there are two alternative constructions, both of which are possible, evidence of usage will be received to determine which is the right one (*f*). Thus evidence was admitted to explain the ambiguous word "shares" in a memorandum of association (*g*). But in order to admit extrinsic evidence the phrase need not be ambiguous on the face of it (*h*).

Where a doubt is raised by evidence upon the meaning of a written contract, or where the contract contains words which have more than one meaning (*i*), to remove such doubts, extrinsic evidence is admissible of the usage or course of trade at the place where the contract is made, or where it is to be carried into effect. Thus, evidence is admissible to show that in the trade the word "bale" means a "bale" of a particular kind having a definite weight (*k*); that the words "wools" and "bankers" have a special meaning in the trade of the person who used them (*l*); to explain the meaning of "regular terms of loading" (*m*), "lay days," and other terms used in the shipping trade. So, where the question was whether goods were to be liable to freight according to their weight at the place of shipment, or according to their expanded weight at the place of consignment, the terms of the charter-party were construed

(*e*) *Simpson* v. *Margitson*, 11 Q. B. 23.
(*f*) *Blackett* v. *Royal Exchange Assurance Co.* 2 C. & J., at p. 249.
(*g*) *Mason* v. *Motor Traction Co.*, [1905] 1 Ch. 419.
(*h*) *Per* BLACKBURN, J., in *Myers* v. *Sarl*, 3 E. & E., at p. 319.
(*i*) *Buckle* v. *Knoop*, L. R. 2 Ex. 125, 333.
(*k*) *Gorrissen* v. *Perrin*, 2 C. B. (N. S.) 681.
(*l*) *Goblet* v. *Beechey*, 2 Russ. & My. 624.
(*m*) *Leidemann* v. *Schultz*, 14 C. B. 38.

by extrinsic evidence that the usage was to measure the goods according to their weight at the place of shipment (*n*); and where the question was as to the date of the arrival of the ship at the port named in the charter-party, evidence was admitted to show what spot in the port must be reached before, by the usage of the port, it was considered that the ship had arrived (*o*).

Again, it may be shown that by the usage of trade an inferior kind of palm oil answers to the description of "best palm oil" (*p*); or that by the custom of the building trade the words "weekly accounts" refer to regular day work only (*q*); or that credit "for six or eight weeks" does not necessarily give the whole eight weeks for payment of goods (*r*). Evidence of surrounding circumstances is admissible to show that a guarantee was intended to be a continuing one where this was not obvious from the language of the document taken by itself (*s*).

But the custom cannot prevail over the express words of the instrument (*t*), and therefore evidence of a custom, inconsistent with an arbitration clause in a bought note, was held inadmissible (*u*). Whenever the parties have come to an express contract, this will preclude any implied contract, in spite of any custom in the trade (*x*). It seems that no trade usage will be binding on a party unless he knew, or under the circumstances must be taken to have known, of its existence, and contracted with reference to it (*y*). The mere habit of affixing a special meaning to words in one class of contracts cannot

(*n*) *Bottomley* v. *Forbes*, 5 Bing. N. C. 121.
(*o*) *Norden* v. *Dempsey*, 1 C. P. D. 654.
(*p*) *Lucas* v. *Bristow*, E. B. & E. 907.
(*q*) *Myers* v. *Sarl*, 5 E. & E. 306.
(*r*) *Ashforth* v. *Redford*, L. R. 9 C. P. 20.
(*s*) *Heffield* v. *Meadows*, L. R. 4 C. P. 595.
(*t*) *Blackett* v. *Royal Exchange Assurance Co.*, 2 C. & J. 244; *Suse* v. *Pompe*, 8 C. B. (N. S.) 538.
(*u*) *Barrow* v. *Dyster*, 13 Q. B. D. 635.
(*x*) *Cutter* v. *Powell*, 2 Sm. L. C. 1.
(*y*) *Kirchner* v. *Venus*, 12 Moo. P. C. 361.

amount to a custom of trade, so as to control a written agreement (*z*).

But this rule only applies where the word in question is understood in the special sense by a large number of people who reside in the particular locality or are engaged in the particular trade; and it will not be allowable to show that a party used the term in a sense peculiar to himself and opposed to its local and conventional usage. Thus, where a testatrix was in the habit of treating certain shares as "double shares," evidence of this was not allowed to influence the construction of her will, Sir W. PAGE WOOD, V.-C., saying:—

> "I must take things to be as I find them, and I cannot allow particular expressions, said to have been used by this testatrix, to prevail where they are not the general language universally applicable to the particular subject-matter" (*a*).

6. Again, apart from any local or trade custom, there are words in ordinary English which have both a strict or more proper meaning, and also a loose and popular meaning. To such words the judge will give their strict meaning, unless it be clear that the writer used the word in its popular meaning. Extrinsic evidence is admissible to show that the writer did so use the word (*b*). Thus "lands" before the Wills Act meant freeholds only, not leaseholds, unless there were no freeholds; and "children" in a will always means legitimate children, unless, on the facts being ascertained and applied to the words of the will, some repugnancy or inconsistency would result from so interpreting it (*c*).

The strict sense of a word is its legal sense; and if it be intelligible in this sense, it cannot be varied or explained by evidence that it was used by the party in a

(*z*) *Abbott* v. *Bates*, 24 W. R. 101.
(*a*) *Millard* v. *Bailey*, L. R. 1 Eq., at p. 382; and see *per* BLACKBURN, J., in *Grant* v. *Grant*, L. R. 5 C. P., at p. 728.
(*b*) *Bank of New Zealand* v. *Simpson*, [1900] A. C. 182.
(*c*) *Per* Lord SELBORNE in *Dorin* v. *Dorin*, L. R. 7 H. L. 577.

popular sense, or in one peculiar to himself (*d*). Thus, if a man devises freeholds to his "children" and he has both legitimate and illegitimate children, only the former will take; extrinsic evidence cannot be received to show that he intended that his illegitimate children should also take. But, where there are no legitimate children to take, the illegitimate will. So, where there is a devise to "children," and the evidence shows only one legitimate child, and children who are illegitimate, the latter will take equally with the former (*e*). In such a case the extrinsic evidence of a collateral fact is strictly admissible to explain a written instrument which would otherwise have no meaning. Where a testator uses a word capable of many meanings, such as "issue" or "nephews and nieces" (*f*), it must be gathered from the will in what sense he has used it (*g*).

But although extrinsic evidence is admissible to explain a written document, it does not follow that declarations of intention by the parties will be received. In almost all such cases the extrinsic evidence will be confined to collateral and surrounding facts, which are so connected with the substantial issue that they reasonably afford *data* to aid the Court or jury in construing the language of the document (*h*). They must not be personal declarations of the party, but distinct incidents, which may be presumed to have been present to his mind at the time he wrote the words (*i*).

7. The law recognises, according to the authority of Lord BACON, two kinds of ambiguities in written instruments, viz., patent and latent.

A patent ambiguity is said to exist when the instrument, on its face, is unintelligible, as where a gift is

(*d*) See *per* BLACKBURN, J., in *Grant* v. *Grant*, L. R. 5 C. P., at p. 728.
(*e*) *Gill* v. *Shelley*, 2 Phill. 373.
(*f*) *In re Corsellis*, [1906] 2 Ch. 316.
(*g*) *Kenyon* v. *Birks*, [1900] 1 Ch. 417.
(*h*) *Smith* v. *Thompson*, 8 C. B. 44.
(*i*) This matter is dealt with later under "Wills," *post*, pp. 562, 563.

made by will, and a blank appears in the place of the name of the devisee or legatee. In such a case extrinsic evidence is wholly inadmissible to show who was intended to be the devisee or legatee; for, if it were admissible, it would be tantamount to permitting wills to be made verbally. Nevertheless if a christian name is stated in a will, followed by a blank for the surname, extrinsic evidence will be admitted to show whom the testator intended to designate (*k*). And generally, although a complete blank in a will cannot be filled up, a partial blank may be explained by extrinsic evidence (*l*). Such evidence has also been admitted to rebut the presumption against an executor taking the residue beneficially, where a specific legacy is left to him and where the frame of the will also strengthens this inference (*m*).

Although extrinsic evidence is not admissible to explain a patent ambiguity, nevertheless it is open to the Court to study the document as a whole, and to ascertain from the context, if possible, what was the word which the writer has omitted. Thus, in *Mourmand* v. *Le Clair* (*n*), the action was brought on a bill of sale to secure a loan of £70 and interest at 1*s.* in the pound per month, which stipulated that the principal and interest should be repaid by monthly instalments of "seven" on a certain date in each month. It was held, that as, having regard to the amount of the monthly interest, the bill of sale could only be paid off if the repayments were at the rate of £7 per month, the bill of sale was not rendered invalid by the omission of any unit of monetary denomination after the word "seven," and was not void as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882.

On the other hand, where a written instrument is

(*k*) *In the Goods of De Rosaz*, 2 P. D. 66.
(*l*) *In the Estate of Hubbuck*, [1905] P. 129.
(*m*) *Camp* v. *Coe*, 31 Ch. D. 400.
(*n*) [1903] 2 K. B. 216.

intelligible on the face of it, but a difficulty arises from extrinsic circumstances in understanding and carrying out its terms, the ambiguity is said to be latent, and extrinsic evidence will be admissible to explain and apply those circumstances, so as to reconcile them to the terms of the writing. The difficulty which has been raised by evidence of extrinsic circumstances may also be solved by such extrinsic evidence. Thus, where the words as they stand are quite clear and intelligible, but it is shown to the Court that they can apply equally well to two or more persons or two or more things, this is a latent ambiguity, and parol evidence will be admissible of all the surrounding circumstances. This is not contradicting the document, because each answers the written words equally well.

Such evidence is admissible only to explain, and not to vary the document. Thus, in *Goldshede* v. *Swan* (*o*), PARKE, B., said :—

> "You cannot vary the terms of a written instrument by parol evidence; that is a regular rule; but if you can construe an instrument by parol evidence, when that instrument is ambiguous, in such a manner as not to contradict, you are at liberty to do so."

To the same effect are the following remarks of Sir JAMES WIGRAM (*p*) :—

> "A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only if found to be of uncertain meaning when persons of competent skill and information are unable to do so. Words cannot be ambiguous because they are unintelligible to a man who cannot read, nor can they be ambiguous merely because the Court which is called upon to explain them may be ignorant of a particular fact, art, or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used."

In an action arising out of a contract to accept goods which were to arrive by a particular ship, it

(*o*) 1 Ex., at p. 158.
(*p*) On Extrinsic Evidence in Aid of the Interpretation of Wills, 2nd ed., p. 130.

appeared that there were two ships of the same name, and parol evidence was admitted to show which ship was meant (*q*). So it has been held, in spite of the provisions of the Statute of Frauds, that extrinsic evidence was admissible to prove who was the buyer and who the seller in a memorandum or note of the sale of goods (*r*), and what is the subject-matter of a written contract to sell twenty-four acres of land (*s*). Where the defendants had by a deed covenanted to pay the plaintiff a royalty on all articles manufactured or sold "under the powers hereby granted," but the deed did not on the face of it disclose what the powers were, it was held to create a latent ambiguity on the face of the deed, and extrinsic evidence was admitted to prove what was intended by the parties (*t*). So, parol evidence has been admitted to show whether an instrument was intended as a deed poll or as a will (*u*).

8. Having thus settled the meaning of each word, the judge will proceed to construe the document as a whole, not divorcing isolated passages from their context, but giving due weight to every part. He will, if possible, avoid a construction which will render any portion of the document nugatory or meaningless.

Although the dispute between the parties may be limited to the construction of a particular clause, nevertheless the same words may occur in other portions of the document, and it is obviously right to refer to these other portions, as they may throw light on the true meaning of the clause in dispute (*x*). So the operative part of a document may be prefaced by recitals, which will often furnish an excellent test for discovering the

(*q*) *Raffles* v. *Wichelhaus*, 2 H. & C. 906.
(*r*) *Newell* v. *Radford*, L. R. 3 C. P. 52.
(*s*) *Plant* v. *Bourne*, [1897] 2 Ch. 281.
(*t*) *Roden* v. *London Small Arms Co.*, 46 L. J. Q. B. 213.
(*u*) *In the Goods of Slinn*, 15 P. D. 156. See further as to patent and latent ambiguities in a will, *post*, pp. 562 *et seq.*
(*x*) *Blundell* v. *Gladstone*, 11 Sim. 486.

real intention of the parties and thus enable the Court to arrive at the true meaning of the operative part (*y*).

Parties, however, often fill up printed forms of wills or contracts (*e.g.*, charter-parties, bills of lading and policies of assurance). In construing these the Court naturally attaches more importance to the words which have been written in than to the printed words of the form (*z*); for the former are the words of the parties themselves. Nevertheless, it is still the duty of the Court, if possible, to construe the document as a whole, giving weight to both the printed and the written words. It is only where the written words are irreconcilable with the printed form that the written words will prevail (*a*).

Thus, in *Badeley* v. *Consolidated Bank* (*b*), in which case the Court had to construe a deed which was alleged to constitute a partnership, COTTON, L.J., said:—

"When the participation in profits arises from a clause in an agreement entered into between the parties, it is wrong to say that this is *primâ facie* evidence of a partnership, because you must look not only to that stipulation, but to all the other stipulations in the contract, and determine whether on the stipulations of the contract taken as a whole you can come to the conclusion that there is a partnership—that there is a joint business carried on on behalf of the two—or whether the transaction is one of loan between debtor and creditor, a loan secured by giving a certain interest in the profits."

NORTH, J., referring to this decision in *Davis* v. *Davis* (*c*), said:—

"It is true that that case was decided before the Act of 1890 (*d*) was passed, but the Act seems to me to give effect to what was there laid down. . . . Adopting then the rule of law which was laid down before the Act, and which seems to me to be precisely what is intended by sect. 2, sub-sect. 3, of the Act, the receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in it, and, if the matter stops there,

(*y*) *Walsh* v. *Trevanion*, 15 Q. B. 733.
(*z*) *Robinson* v. *French*, 4 East, 130, p. 136.
(*a*) *Gunn* v. *Tyrie*, 6 B. & S. 298; *Jessel* v. *Bath*, L. R. 2 Ex. 267.
(*b*) 38 Ch. D., at p. 250.
(*c*) [1894] 1 Ch., at pp. 398, 399.
(*d*) 53 & 54 Vict. c. 39.

it is evidence upon which the Court must act. But, if there are other circumstances to be considered, they ought to be considered fairly together; not holding that a partnership is proved by the receipt of a share of profits, unless it is rebutted by something else; but taking all the circumstances together, not attaching undue weight to any of them, but drawing an inference from the whole."

Thus, as we have seen, the word "close" may, by the custom of the country in which the testator resided, be extended to cover a whole "farm," but if it appear that in other parts of the will the word was employed in its technical legal meaning of an enclosure, it is only reasonable to conclude that it bears the latter meaning throughout the whole will, and no parol evidence to show the contrary will be admitted.

This rule is also illustrated by the decision that where a party gives a portion of a writing in evidence, the adverse party is entitled to have read all other passages which are connected with, or construe, control, modify, qualify, or explain, the passages which have been read; but not distinct passages, or passages which are irrelevant to, or not explanatory of, such first-mentioned passages (*e*).

It may be convenient to add here a few remarks on alterations and interlineations in a document. Extrinsic evidence is not only admissible, but necessary, to explain any alteration or interlineation that may appear in a written instrument. Such evidence does not vary the transaction, but only proves the condition of the document when it first came to have an effect in law (*f*). As a general rule the party tendering it in evidence must account for the alteration (*g*). If it appears to have been made contemporaneously with the instrument, or if it was made subsequently to its execution, with the privity of the parties, and there is no fraud upon, nor invasion of, the stamp laws, its validity may

(*e*) *Darby* v. *Ouseley*, 1 H. & N. 1.
(*f*) *Stewart* v. *Eddowes*, L. R. 9 C. P. 311.
(*g*) *Clifford* v. *Parker*, 2 Man. & G. 909.

be maintained, provided it is an immaterial alteration (*h*); but not if the alteration is material (*i*). What is immaterial depends to a great extent upon the nature of the particular instrument; but if the date (*k*), or amount, or time of payment of a bill of exchange be altered (*l*), or a joint responsibility is converted into a joint and several responsibility (*m*), the instrument will be void, unless the alteration was made by consent of the parties; and equally so, although made with consent, if the stamp laws are infringed (*n*). Where a bill has been altered with the privity of an indorser and his indorsee, but without the privity of the acceptor, the latter is discharged (*o*). The same rule holds when the alteration is accidental (*p*), or by a stranger without the privity of either party (*q*). Parol evidence may be called to show that a variation between a bought note and a sold note is immaterial (*r*).

In the case of wills, s. 21 of the Wills Act, 1837, provides that no obliteration, interlineation, or other alteration made after execution shall have any effect except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration is executed as provided by the section.

The foregoing rules govern the construction of all documents—of wills and Acts of Parliament as well as of deeds, contracts, and other commercial instruments. But special rules apply to certain

(*h*) *In re Howgate and Osborn's Contract*, [1902] 1 Ch. 451.
(*i*) *Suffell* v. *Bank of England*, 9 Q. B. D. 555.
(*k*) *Clifford* v. *Parker*, 2 Man. & G. 909.
(*l*) *Warrington* v. *Early*, 2 E. & B. 763.
(*m*) *Alderson* v. *Langdale*, 3 B. & Ad. 660.
(*n*) *Perring* v. *Hone*, 4 Bing. 28.
(*o*) *Master* v. *Miller*, 1 Sm. L. C. 796.
(*p*) *Burchfield* v. *Moore*, 3 E. & B. 683.
(*q*) *Davidson* v. *Cooper*, 13 M. & W., at p. 352; *Croockewit* v. *Fletcher*, 1 H. & N. 893.
(*r*) *Holmes* v. *Mitchell*, 7 C. B. (N. S.) 361.

particular classes of documents; and these we will proceed to discuss.

### *Wills and Deeds.*

In the case of wills certain special rules have been laid down by the Court of Chancery and by statute which settle the construction to be placed upon certain words and special phrases when they occur. Hence the same word or phrase may have one meaning in a will and another in a deed. Thus a devise "to A." *simpliciter* will pass to him the testator's whole property in the land (*s*); the same words in a deed will convey only a life estate. So certain words which in a will imply an estate tail will not be so construed if they occur in a deed.

But apart from these special provisions a will must be construed according to the same general principles as other documents. The judge will endeavour to arrive at the intention of the testator by studying the language of the will. If the meaning of that language is clear it must be followed, however improbable it may seem from extraneous matters that the testator intended so to dispose of his property. No parol evidence is admissible to override the words of the will if they be clear and unambiguous: or, in the words of JOYCE, J., in *In re Glassington* (*t*):

"Parol evidence is not to be resorted to except for the purpose of proving a fact which will make intelligible something in the will that, without the aid of extrinsic evidence, would not be intelligible."

(*s*) Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), s. 28; and see Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 10.
(*t*) [1906] 2 Ch., at p. 314.

If, however, any clause in a will is fairly capable of more than one meaning, then the judge will in the first place study the rest of the will, and by the light derived from this he may be able to determine which of the various meanings the testator really intended his words to bear. It may appear from the rest of the will that the testator had, so to speak, a language of his own, *e.g.*, that he used the word "niece" to include a great-niece or his wife's niece (*u*).

Should the context, however, throw no light upon the matter, then *ex necessitate rei* a certain amount of extrinsic evidence is admissible to enable the judge to discover the testator's intention.

If there be a patent ambiguity in the language of a will, the defect cannot be cured by parol evidence. But if the facts disclose a latent ambiguity, some parol evidence is admissible to remove the difficulty which parol evidence has raised. Thus, if there is no one who exactly answers to the description given in a will of an intended legatee, but there are two or more persons, any one of whom the testator may have intended so to benefit, parol evidence is admissible of all the "surrounding circumstances," in order to place the Court so far as possible in the position in which the testator stood when he dictated his will. In such a case evidence may be given of the relationship of each of the claimants to the testator and of the degree of their intimacy with him, but not of any parol declarations made by the testator in his life-

(*u*) See, for instance, *Stringer* v. *Gardiner*, 27 Beav. 35; and *In re Corsellis*, [1906] 2 Ch. 316.

time as to his intentions to benefit this or that person (*x*); nor can the instructions to his solicitor to prepare his will or any draft of it be produced and read (*y*); but if a statement made by the testator as to his various relatives is admissible on other grounds, it will not be excluded merely because it is contained in such instructions (*z*). If, however, the testator in the will alludes to any of his relatives or friends by a pet name or a nick-name, parol evidence is admissible to show the identity of the person whom the testator in his lifetime was in the habit of calling by that name (*a*).

But when there are two or more persons or things, and each of them exactly answers to the description in the will, then all manner of parol evidence is admissible (*b*), for the language of the will is complied with whichever person receives the legacy or whichever thing passes under the bequest. This is called a case of equivocation.

Nevertheless, the real question always is, What do the words of the will mean? Not, What do we suppose the testator intended? The Court assumes that the testator read his will and understood it. It will not, therefore, admit any extraneous evidence of his intention (except, as we have just said, in cases of equivocation). The intention expressed in the will is taken conclusively to be the intention of the testator.

(*x*) *Doe* v. *Hiscocks*, 5 M. & W. 363.
(*y*) *Stringer* v. *Gardiner*, 27 Beav. 35.
(*z*) *In re Ofner*, [1909] 1 Ch. 60.
(*a*) *Lee* v. *Pain*, 4 Hare, at p. 251.
(*b*) *Charter* v. *Charter*, L. R. 7 H. L. 364.

If on reading a will there is any doubt as to the meaning of the testator's language, evidence is always admissible of the circumstances surrounding the testator at the time of making his will (*c*), so as to put the Court "in the shoes of the testator." Thus the Court should be informed as to what property the testator owned at his death, its tenure or other nature, and, where material, the date at which the testator acquired (*d*).

A familiar illustration of this doctrine is cited from Lord BACON, where a man devises his manor of S. to J. F., and it turns out that he has two manors answering the description, *e.g.*, North S. and South S. In such cases it may be shown by extrinsic evidence which manor was intended to pass (*e*). In a case, where a testatrix by her will bequeathed £4,000 to C. "for the charitable purposes agreed upon between us," the Court of Appeal held that an affidavit by C. was admissible to show what the charitable purposes were, but not to show that only the income of the £4,000 during his life was to be devoted to the charitable purposes, as that would contradict the will (*f*). In another case, a testator had given to his wife all his property for life, and added: "I desire and empower her by her will, or in her lifetime, to dispose of my estate in accordance with my wishes verbally expressed by me to her." JOYCE, J., held that parol evidence was inadmissible to show what those wishes were, and that the clause quoted above was void for uncertainty (*g*). The distinction between these two cases is that the former was one relating to a power, and the general rule is that extrinsic evidence of a testator's intention is inadmissible to aid the construction

(*c*) *Rayner* v. *Rayner*, [1904] 1 Ch. 176; *In re Gent*, [1905] 1 Ch. 386.
(*d*) *In re Gibbs*, [1907] 1 Ch. 465.
(*e*) *Doe* v. *Needs*, 2 M. & W. 129; *Ricketts* v. *Turquand*, 1 H. L. Cas. 472.
(*f*) *Huxtable* v. *Crawford*, [1902] 2 Ch. 793.
(*g*) *Hetley* v. *Hetley*, [1902] 2 Ch. 866.

of his will (*h*); but where, on the construction of the words of the will, a presumption arises, extrinsic evidence is admissible to rebut such presumption (*i*).

When declarations of a testator are admissible, it is immaterial that they were made some time after the execution of the will (*k*), or before it (*l*), and they are admissible to prove the contents of a lost will (*m*). In *Quick* v. *Quick* (*n*), Lord PENZANCE held that the declarations of a testator made *after* the execution of a lost will, were not admissible to prove its contents This case was, however, overruled by the majority of the Court of Appeal in *Sugden* v. *St. Leonards*, which held that the declarations of a testator, written and oral, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents, MELLISH, L.J., dissenting as regards declarations made after execution. A similar question was under consideration in the House of Lords in *Woodward* v. *Goulstone* (*o*), but was not decided. The learned lords present took the very inconvenient course of saying that, under the circumstances of that case, the question did not arise for determination, but that they desired to leave the question open, should it thereafter come before the House for decision; and the Lord Chancellor in his judgment expressed considerable doubts as to the correctness of the decison of the majority of the judges of the Court of Appeal in *Sugden* v. *St. Leonards*. The result is, that the decision of the Court of Appeal stands, and is binding on inferior Courts, in spite of the cloud cast over it by the House of Lords.

(*h*) *Doe* v. *Hiscocks*, 5 M. & W. 363; cf. *Stanley* v. *Stanley*, 2 J. & H. 491; *Bishop* v. *Holt*, [1900] 2 Ch. 620.
(*i*) *Tussaud* v. *Tussaud*, 9 Ch. D. 363.
(*k*) *Doe* v. *Allen*, 12 A. & E. 455.
(*l*) *Langham* v. *Sandford*, 19 Ves. 649.
(*m*) *Sugden* v. *Lord St. Leonards*, 1 P. D. 154; *Gould* v. *Lakes*, 6 P. D. 1.
(*n*) 3 Sw. & Tr. 442.
(*o*) 11 App. Cas. 469.

But it has been held that this case does not alter the old rule that the fact of the execution of a will cannot be proved by the declarations of the testator (*p*).

Where a will has been torn up without the authority of the testator and subsequently pieced together, but certain fragments are missing, so that there are gaps in the document, the Court will not order the missing words to be inserted in the probate, but if secondary evidence is produced which satisfies the Court what the missing words were, it will allow a document setting them out to be annexed to the probate (*q*).

Verbal statements made by a testator, in and about the making of his will, when accompanying acts done by him in relation to that subject, have been held admissible in evidence (*r*). A letter written to a testator by a solicitor, whether by way of advice or statement, is inadmissible for the purpose of construction of the will (*s*).

A witness cannot be asked what a testator said about property, not distinctly devised, in order to show it was intended to pass with other property devised (*t*). Where the testator was in the habit of calling persons by nicknames or wrong names, and these names appear in his will, they can only be explained and construed by the aid of evidence to show the sense in which he used them, just as if his will was written in cipher or in a foreign language (*u*). Thus, a bequest to "Mrs. G." was upheld by evidence that the testator was in the habit of calling a Mrs. Gregg, "Mrs. G." (*x*). Here the evidence was of a fact, not of a declaration. So, parol evidence is admissible to fill a partial blank (*y*), or to show what

(*p*) *Atkinson* v. *Morris*, [1897] P. 40.
(*q*) *Gill* v. *Gill*, [1909] P. 157.
(*r*) *Johnson* v. *Lyford*, L. R. 1 P. & D. 546.
(*s*) *Per* JAMES, L.J., in *Wilson* v. *O'Leary*, L. R. 7 Ch., at p. 456.
(*t*) *Doe* v. *Hubbard*, 15 Q. B. 228.
(*u*) *Per* Lord ABINGER in *Doe* v. *Hiscocks*, 5 M. & W. 368.
(*x*) *Abbott* v. *Morice*, 3 Ves. 148; cf. *Lee* v *Pain*, 4 Hare, at p. 251.
(*y*) *In the Estate of Hubbuck*, [1905] P. 129; *Mourmand* v. *Le Clair*, [1903] 2 K. B. 216.

lands of the testator were reputed to lie in a parish, in order to construe a devise of lands in the parish (*z*); but where the testatrix, after a specific devise to "my niece, A. B." (who was in fact her husband's niece), left her residue to "all my nephews and nieces," JESSEL, M.R., refused to admit A. B. to participate in the residue (*a*). Where the testator appointed his "nephew, A. B." executor, and his own nephew and his wife's nephew both bore that name, extrinsic evidence was admitted to show that the latter was the person designated (*b*). But where a testator left a legacy to his "niece E. W.," and neither he nor his wife had any niece, but his wife had a legitimate grandniece, E. W., and an illegitimate grandniece, E. W., evidence to show that the testator intended the latter was rejected on the ground that, under the circumstances, there was no latent ambiguity as there would have been had both been legitimate (*c*). To identify the person or thing intended as the object or subject of the testator's bounty the Court may inquire into every material fact, and all extrinsic circumstances known to the testator as to his family and affairs; but extrinsic evidence of the testator's intention is admissible only in the event of there being more than one person or thing answering equally well to the description he has used (*d*). In cases such as those under consideration the testator's own declarations are probably inadmissible (*e*). Punctuation in a will must be disregarded (*f*).

A will may refer to another document in such a manner as to incorporate it; but for this purpose the other document must be clearly identified by the will

(*z*) *Anstee* v. *Nelms*, 1 H. & N. 225; *In re Glassington, Glassington* v. *Follett*, [1906] 2 Ch. 305.
(*a*) *Wells* v. *Wells*, L. R. 18 Eq. 504.
(*b*) *Grant* v. *Grant*, L. R. 5 C. P. 727.
(*c*) *Ingham* v. *Rayner*, [1894] 2 Ch. 85.
(*d*) *Charter* v. *Charter*, L. R. 7 H. L. 364.
(*e*) *Per* Sir F. H. JEUNE in *In the Goods of Chappell*, [1894] P. 98.
(*f*) *Per* Lord WESTBURY in *Gordon* v. *Gordon*, L. R. 5 H. L., at p. 276.

and must be in existence at the time the will is executed. If it is not clear from the words of the will whether the document to which it refers is then in existence or will come into existence at some future time, no parol evidence is admissible to incorporate any document (*g*). As Lord ELDON said in *Smart* v. *Prujean* (*h*):—

"The rule of law is that an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is, which is meant to be incorporated, in such a way that the Court can be under no mistake."

And Lord KINGSDOWN, in *Allen* v. *Maddock* (*i*) said:—

"A reference in a will may be in such terms as to exclude parol evidence, as where it is to papers not yet written or where the description is so vague as to be incapable of being applied to any instrument in particular."

It is impossible in this volume to give even the most meagre outline of the special rules which have from time to time been laid down in our Courts of Equity for the true interpretation of particular clauses in a will. The decisions on such points in our law reports are very numerous, and not always consistent. The reader is referred to the well-known works of Messrs. Vaughan Hawkins and Theobald. The rules as to the construction of wills and deeds differ in one important particular. If a deed contains two clauses which are so clearly inconsistent with each other that they cannot be reconciled, the former clause will prevail. In a will, however, the latter clause will prevail; it is supposed to represent the testator's latest intention.

We may also mention three other rules applicable to the construction of a deed; if the recitals are

(*g*) *University College of North Wales* v. *Taylor*, [1908] P. 140.
(*h*) 6 Ves., at p. 565.
(*i*) 11 Moo. P. C., at p. 454.

clear and the operative part is ambiguous, the recitals govern the construction (*k*); if the recitals are ambiguous and the operative part is clear, the operative part must prevail; if both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred (*l*).

Again, in a lease the *habendum* is the operative clause, and will decide the length of a term in preference to the *reddendum*, should these two clauses differ. For example, if the *habendum* of a lease says one hundred years and the *reddendum* says ninety-four years, the term will be held to be for one hundred years; and if there be any discrepancy between a lease and its counterpart, the lease will prevail over the counterpart.

A curious problem on this point came before the Common Pleas Division in the case of *Burchell* v. *Clark* (*m*). There the lease stated the length of the term in the *habendum* as ninety-six years, in the *reddendum* as ninety-nine years, while the counterpart had ninety-nine throughout; and it was held that the demise was for a term of ninety-nine years.

### *Grants and Contracts.*

The construction of documents is for the judge; though the jury will find any facts which may be necessary to enable the judge to construe the document. A copy of the document to be construed should be supplied to the Court, and the costs of such copy will be allowed

(*k*) See *ante*, pp. 557, 558.
(*l*) *Ex parte Dawes*, 17 Q. B. D., at p. 286.
(*m*) 2 C. P. D. 88; and see *Matthews* v. *Smallwood*, [1910] 1 K. B. 777.

on taxation (*n*). When a document purports to be the record of the final intention and agreement of the contracting parties, no parol evidence, as we have seen (*o*), is admissible to contradict or vary its terms. Parol evidence is only admissible:—

(a) *To show* that the alleged contract is no contract at all, owing either to—

(1) Incapacity of the parties.
(2) Illegality of the consideration.
(3) Non-compliance with a statute which requires some special form.
(4) The parties not being *ad idem*.
(5) The presence of fraud, mistake, or misrepresentation.
(6) The non-fulfilment of some condition precedent.
(7) The rescission of the contract.

It does not follow that because a document purports to contain the contract between the parties that it is a contract at all, or that it is in fact the only contract between them on the subject-matter in question.

Although parol evidence may not be given to vary, contradict, add to, or subtract from any contract contained in a document, it may be given to show that the document is no contract at all, or to prove collateral contracts between the same parties on the same subject-matter, which do vary, contradict, add to, or subtract from the contract contained in the document.

(b) *To explain*—

(1) Foreign or technical terms used in the documents and terms used in a sense peculiar to a locality, or to a particular trade; or
(2) Latent as distinct from patent ambiguities.

These distinctions have already been discussed (*p*).

(*n*) *Re Houston*, 89 L. T. 469.
(*o*) See *ante*, p. 181.
(*p*) See *ante*, pp. 548, 554.

Apart from these cases in which parol evidence may be adduced to extinguish contracts or to explain their language, the construction of contracts follows the general rules which have already been laid down for other documents, and especially the fundamental rule that the parties must be taken to have intended what they have written. The judge will always begin by studying the language of the document before him. It is only if such study fails that he will seek for an interpretation outside the four corners of the document.

In a recent case a question arose as to the interpretation to be put upon certain clauses in a mining lease, and it was held that in construing instruments which involve the severance of surface or of a higher seam and subjacent minerals, it is presumed that the owner of the surface or of the higher seam intends to reserve his common law right of support; the *onus* of showing that this was not the intention of the parties to the deed lies on the mineral owner, and this *onus* is not discharged by the insertion in the lease of full powers of working and carrying away all the minerals, expressed in general terms, or of wide provisions for compensation. But when the mineral owner proves not only that the upper seam will not be destroyed, but only injured to such an extent as will admit of compensation, and, further, that it is impossible to get the minerals at all without letting down the upper seam, all reasons for qualifying the general words of the powers of working are gone, and if the terms of the instrument make it clear that it was the intention of the parties that subjacent seams should be worked, it is a necessary implication that they intended that there should be a subsidence of superjacent strata (*q*).

(*q*) *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, [1909] 1 Ch. 37. Affirmed in H. L. (1910) 26 T. L. R. 415.

*Indictments.*

In former times, when nearly every felony was a capital offence, indictments were always construed *in favorem vitæ ;* and resort was had to many technicalities in order to save the life of a first offender. The degree of precision required in the statement of the crime was curiously minute; one prisoner, for instance, escaped punishment because the colour of the horse which he had stolen was misdescribed in the indictment; and another who had stolen a pair of boots was acquitted, because in the indictment the property had been described as a pair of shoes (*r*). It was laid down that an indictment ought to be construed against the prosecutor who preferred it. But in the present days of greater leniency this rule has been abandoned, and the Courts hold, as the late Lord RUSSELL grimly said, that "even in considering the question of the validity of an indictment, one must have some regard to the ordinary interpretation of language" (*s*). Indictments are no longer construed strictly in favour of accused persons; they must, like any ordinary document, be so interpreted *ut res magis valeat quam pereat.* Thus, if the language be capable of different meanings, it should be construed "in that sense in which the party framing the indictment must have used it if he intended his charge to be consistent with itself" (*t*); that is to say, in the sense most favourable to the prosecutor. In indictments, as in other instruments, surplus words may be rejected, according to the maxim *utile per inutile non vitiatur.* Should two entire clauses be contradictory, so that one of them must be rejected as surplusage, it is, as in deeds, the later one that must be so rejected (*u*), not, as in wills, the earlier.

(*r*) See Archbold, Criminal Pleading, 23rd ed., at p. 60. These cases, of course, were prior to the statute 14 & 15 Vict. c. 100.
(*s*) *R.* v. *Jameson*, [1896] 2 Q. B., at p. 429.
(*t*) *R.* v. *Stevens*, 5 East, at p. 257.
(*u*) *Wyatt* v. *Aland*, 1 Salk. 325.

*Statutes.*

It might have been expected that the interpretation of a statute would be an easier task than the interpretation of a mercantile contract, or of a deed or lease. But in practice this is found not to be the case. The pressure necessary to secure the passing of a Bill through Parliament often induces the Government to accept amendments which are not in entire harmony with either the object or the language of the statute. It has been found necessary, therefore, to lay down certain canons for the construction of statutes. The object of these is to ascertain the intention of the Legislature—not to control that intention, or to confine it within limits which the judges may deem reasonable or expedient. The leading rules may be briefly stated thus:—

(i.) A statute must be taken to mean what it says (*x*). The intention of the Legislature must be gathered from the language which it has employed in the Act, and not from any extraneous source, such as statements made during the debates in either House, or conjectures as to the policy of the promoters of the Bill.

Under our constitution the office of declaring the law is separated from that of making it. It is not the province of a judge to speculate upon what in his opinion may be most for the advantage of the community; it is his duty simply to construe what Parliament has said. "It is dangerous in the construction of a statute to

(*x*) See the judgment of Lord ESHER, M.R., in *Hornsey Local Board* v. *Monarch, etc. Society*, 24 Q. B. D., at p. 5; and *Unwin* v. *Hanson*, [1891] 2 Q. B. 115; *Algoma Central Rail. Co.* v. *R.*, [1903] A. C. 478.

proceed upon conjecture" (*y*). "We cannot speculate upon the intentions of the Legislature which are neither expressed in terms nor conveyed by implication; our duty is to interpret the words of a statute according to their plain and grammatical meaning, when, as in this case, they are not controlled by anything to be found in the context" (*z*). "It is never very safe ground in the construction of a statute to give weight to views of its policy which are themselves open to doubt and controversy" (*a*).

The Court will, however, use the preamble for the purpose of ascertaining the intention of the Legislature (*b*).

(ii.) If the words of the statute be plain and clear, it is not for the Court to raise any doubts as to what they mean. "We cannot assume a mistake in an Act of Parliament" (*c*). This is so, though "anomalous and inconvenient" results may follow (*d*).

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making

(*y*) *Per cur.* in *Barton* v. *Muir*, L. R. 6 P. C., at p. 144; and see *South Eastern Rail. Co.* v. *Railway Commissioners*, 50 L. J. Q. B., at p. 203.
(*z*) *Per cur.* in *Muller* v. *Baldwin*, L. R. 9 Q. B., at p. 461.
(*a*) *Per* Lord SELBORNE, L.C., in *Municipal Building Society* v. *Kent*, 9 App. Cas., at p. 273.
(*b*) *R.* v. *Costello*, [1910] 1 K. B. 28.
(*c*) *Per* GROVE, J., in *Richards* v. *McBride*, 8 Q. B. D., at p. 122.
(*d*) See *Clementson* v. *Mason*, L. R. 10 C. P. 209, 217.

the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer (*e*), is 'a key to open the minds of the makers of the Act and the mischief which they intended to redress'" (*f*).

(iii.) If the language of a statute is ambiguous or if one clause in it contradicts another, still the statute must be construed as a whole, and some meaning, if possible, given to every part of it. "When two constructions are open the Court may adopt the more reasonable of the two" (*g*). A construction which renders any clause or proviso nugatory or meaningless will be avoided (*h*). For this purpose, if it be absolutely necessary, a word or two may be rejected, but none may be added (*i*). And that construction will be the best, which gives to all the words their plain and ordinary meaning. "Even in cases where words are ambiguous and capable of two constructions, the rule is to adopt that which would give some effect to the words rather than that which would give none" (*j*).

(*e*) *Stowel* v. *Lord Zouch*, Plowd., at p. 369.

(*f*) *Per cur.* in *Sussex Peerage Case*, 11 Cl. & F., at p. 143; and see *Abley* v. *Dale*, 11 C. B., at p. 390; *Fielding* v. *Morley Corporation*, [1899] 1 Ch. 1. As to cross-headings in a statute, see *Union Steamship Co., etc.* v. *Melbourne, etc. Commissioners*, 9 App. Cas., at p. 369.

(*g*) *Per* Lord BLACKBURN in *Countess of Rothes* v. *Kirkcaldy, &c., Commissioners*, 7 App. Cas., at p. 702; and see the remarks of JESSEL, M.R., in *The Alina*, 5 Ex. D., at pp. 230, 231; and of Lord SELBORNE in *Caledonian Rail. Co.* v. *North British Rail. Co.*, 6 App. Cas., at p. 122.

(*h*) See the judgments of GROVE, J., in *Ruther* v. *Harris*, 1 Ex. D., at pp. 99, 100, and in *Williams* v. *Evans*, *ibid.*, at pp. 281, 282.

(*i*) *Laird* v. *Briggs*, 19 Ch. D. 22; *Symons* v. *Leaker*, 15 Q. B. D. 629; *Salmon* v. *Duncombe*, 11 App. Cas., at p. 635; *R.* v. *Vasey and Lally*, 93 L. T. 671.

(*j*) *Cargo ex "Argos,"* L. R. 5 P. C., at p. 153; and see the remarks of Lord COLERIDGE, C.J., in *R.* v. *Most*, 7 Q. B. D., at p. 251; and of Lord ESHER, M.R., in *Barlow* v. *Ross*, 24 Q. B. D., at pp. 388, 389.

Thus, by the Tyne Coal Dues Act, 1872 (*k*), the old coal dues were abolished, and the commissioners were empowered to levy dues, *inter alia*, of one penny per ton on "coals exported from the port." The question raised in the case of *Muller* v. *Baldwin* (*l*) was whether these words rendered coals taken out of the port of Newcastle by a foreign steamer for consumption during the voyage liable to this due of one penny per ton. Under the former Act the usage had been not to levy this due upon such bunker coal, but only upon coal which was exported for the purpose of being sold in foreign countries. It was held that, in the absence of anything in the Act to the contrary, the phrase "exported from the port" must be taken to be used in its ordinary meaning of "carried out of the port," and that, therefore, the due must be paid for every ton of coal "carried out of the port" on board the steamer.

So, by the County Courts Admiralty Jurisdiction Acts, 1868 and 1869 (*m*), jurisdiction in Admiralty matters was conferred on such county courts as might be appointed by the Lord Chancellor. The latter Act enacted that any Courts so appointed "shall have jurisdiction, and all powers and authorities relating thereto, to try and determine any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of any goods in any ship, provided the amount claimed does not exceed £300" (*n*). And it has been held (*o*) that this section gives such county courts jurisdiction in cases of claims arising out of charterparties or other agreements for the use or hire of ships; and this although

(a) The Court of Admiralty has no original jurisdiction in such cases;

(*k*) 35 & 36 Vict. c. xiii.
(*l*) L. R. 9 Q. B. 457.
(*m*) 31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51.
(*n*) 32 & 33 Vict. c. 51. s. 2.
(*o*) *Cargo ex* "*Argos*," L. R. 5 P. C. 134; and see *R.* v. *Judge of the City of London Court*, [1892] 1 Q. B. 273.

(b) the county courts had at that time no jurisdiction to try claims arising out of contracts which exceeded £50;

(c) the appeal from the decision of the Court so appointed would lie to the Court of Admiralty, which had no jurisdiction over contracts; and

(d) the Admiralty procedure *in rem* was thus for the first time rendered available in an ordinary mercantile action of contract.

(iv.) A statute must be construed as prospective, and not as retrospective, in its operation, unless it relates to procedure only, or unless a contrary intention be clearly expressed (*p*).

Thus, an Act (*q*), passed in August, 1881, to compel public-houses in Wales to close on Sunday, was to come into operation in a certain division of a county "on the day next appointed for the holding of the general annual licensing meeting for that division," and the general annual licensing meeting for that division was held on September 8th, 1881. The Court decided that the Act was not in operation on the following Sunday, on the ground that "the day next appointed" meant "the day which shall after the passing of the Act be next appointed" for the holding of such meeting, and not the next day on which such a meeting would be held if it had been appointed before the passing of the Act (*r*).

(v.) If general words in a statute follow particular terms, they will be construed as applying only to persons or things of the same class (*ejusdem generis*)

(*p*) *Gardner* v. *Lucas*, 3 App. Cas. 582; see the judgments at pp. 597, 601, 603. And see *Republic of Costa Rica* v. *Erlanger*, 3 Ch. D. 62; *Smithies* v. *National Association of Operative Plasterers*, [1909] 1 K. B. 310; *R.* v. *Smith*, [1910] 1 K. B. 17; cf. *Wooler* v. *N. E. Breweries*, [1910] 1 K. B. 24.

(*q*) Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61).

(*r*) *Richards* v. *McBride*, 8 Q. B. D. 119.

as those already mentioned. Thus a bicycle is not included in the words "coach, chariot, hearse, chaise, gig, car, chair, and every other carriage hung on springs" (*s*).

(vi.) If particular terms only be used and no general words follow, the statute will be construed as not applying to any other persons or things of the same class, but only to those already expressly mentioned. *Expressio unius est exclusio alterius.*

Thus the first great Poor Law Act, passed in 1601 (*t*), imposed rates on "lands, houses, tithes, *coal mines*, or saleable underwoods in the parish"; and it was held that no other mines could be rated. "As there may be a reason for the strict letter of the statute, and none appears for extending it beyond the letter, we have no ground or authority or pretence for giving it that extensive construction" (*u*).

(vii.) If one statute deals generally with a whole class of persons or things, and another statute, whether earlier or later in date, deals exclusively with a particular species of the persons or things included in that class, the special provision will restrict the general enactment and will control the particular species of persons or things.

Thus, as we have seen above (*v*), a general enactment that no County Court can try any action arising out of a

(*s*) *Simpson* v. *Teignmouth and Shaldon Bridge Co.*, [1903] 1 K. B. 405; *Smith* v. *Kynnersley*, *ibid.*, 788; *Plymouth, etc. Tramways Co.* v. *General Tolls Co., Ltd.*, 75 L. T. 467; (H. L.) 14 T. L. R. 531; and see *Cannan* v. *Earl of Abingdon*, [1900] 2 Q. B. 66; *Burton* v. *Nicholson*, [1909] 1 K. B. 397.

(*t*) 43 Eliz. c. 2.

(*u*) *Per* Lord MANSFIELD in *Lead Co.* v. *Richardson*, 3 Burr., at p. 1344; and see *R.* v. *Bell*, 7 T. R. at p. 600; *R.* v. *The Inhabitants of Woodland*, 2 East, at p. 164; *R.* v. *Cunningham*, 5 East, 478; *R.* v. *Halkett*, [1910] 1 K. B. 50.

(*v*) *Cargo ex* "*Argos*," L. R. 5 P. C. 134.

contract if the amount claimed exceeds £50 (*x*), must yield to a special provision that certain County Courts can try *any* claim arising out of an agreement for the use or hire of any ship, even if it exceed £50.

Again, by s. 3 of the Fatal Accidents Act, 1846 (*y*), an action for the benefit of the wife, husband, parent, or child of a person whose death has been caused by the wrongful act, neglect, or default of another must be commenced within twelve calendar months of the death of the deceased. By s. 1 of the Public Authorities Protection Act, 1893 (*z*), an action against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or in respect of any alleged neglect or default in the execution of any Act, must be commenced within six months next after the act, neglect, or default complained of, or, in case of continuing injury or damage, within six months next after the ceasing thereof. An action under the Fatal Accidents Act, 1846, was brought against the defendants, a statutory body formed to provide, maintain, and manage a hospital, to recover damages for the death of a patient in the hospital caused by the negligent act of a nurse in the defendants' employment; the writ was issued more than six months, but less than twelve months, after the death of the deceased. Held, that the action was brought too late, and was not maintainable (*a*).

(viii.) A statute which destroys, infringes or restricts any existing right will be construed strictly. Cases not infrequently occur in which it is necessary for the benefit of the community as a whole to take private property away from its

(*x*) The limit is now £100: County Courts Act, 1903 (3 Edw. VII. c. 42), s. 3.
(*y*) 9 & 10 Vict. c. 93.
(*z*) 56 & 57 Vict. c. 61.
(*a*) *Markey and Another* v. *Tolworth, etc. Hospital District Board*, [1900] 2 Q. B. 454.

owner. But such an invasion of private right is never sanctioned without due inquiry, and when it is sanctioned compensation should always be granted to the owner of the property taken. A clause to this effect is almost invariably inserted in the Act which legalises the infringement. And, even in the absence of any such clause, "it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it" (*b*).

(ix.) Again, any statute which derogates from the common law will be construed strictly. From very early times the judges, as we have seen, were loath to admit that the common law required amendment; and therefore refused to enforce any statute which altered the common law, unless its terms were so clear and explicit as to be imperative. The same strictness will be applied to the construction of any Act which creates a new criminal offence or imposes any fresh burden on the people. "Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public" (*d*).

In addition to these rules the practitioner has

(*b*) *Per* BRETT, M.R., in *Attorney-General* v. *Horner*, 14 Q. B. D. at p. 257; and see *R.* v. *Smith*, L. R. 1 C. C. R. 266, 271; *Barton* v. *Muir*, L. R. 6 P. C. 134; *Williams* v. *Evans*, 1 Ex. D. 277; *Lamb* v. *Brewster*, 4 Q. B. D. 607; *Cotton* v. *Vagan & Co.*, [1896] A. C. 457.

(*d*) *Per* TINDAL, C.J., in *Parker* v. *Great Western Rail. Co.*, 7 Scott, N. R. at p. 870; and see the remarks of Lord MACNAGHTEN in *Metropolitan Water Board* v. *New River Co.*, 20 T. L. R. at pp. 689, 690; cf. *Attorney-General* v. *West Gloucestershire Water Co.*, [1909] 2 Ch. 338, at p. 347.

also the Interpretation Act, 1889 (*e*), to assist him in construing a statute. The first Interpretation Act was brought in by Lord Brougham in 1850 (*f*); it was a painstaking effort in a new field, but it was far from complete, and was repealed by the present Act in 1889. This Act has done much to ensure reasonable conciseness in the wording of statutes, besides supplying many useful definitions, such as:—

"Words importing the masculine gender shall include females" (*g*).

"Words in the singular shall include the plural, and words in the plural shall include the singular."

"The expression 'person' shall, unless the contrary intention appears, include a body corporate" (*h*).

"The expression 'oath' and 'affidavit' shall, in the case of persons for the time being allowed by law to affirm or declare instead of swearing, include affirmation and declaration, and the expression 'swear' shall, in the like case, include affirm and declare (*i*)." But in spite of the first of the above provisions, it was held in *Chorlton* v. *Lings* (*k*) that the word "man" in the Representation of the People Act, 1867 (*l*), does not include a woman; as women are subject to a legal incapacity to vote at a Parliamentary election, which can only be removed by an express enactment.

(*e*) 52 & 53 Vict. c. 63.
(*f*) 13 & 14 Vict. c 21.
(*g*) 52 & 53 Vict. c. 63, s. 1, sub-s. 1.
(*h*) *Ibid.*, s. 2, sub-s. 1.
(*i*) *Ibid.*, s. 3.
(*k*) L. R. 4 C. P. 374.
(*l*) 30 & 31 Vict. c. 102, s. 3.

## CANADIAN NOTES.

### CONSTRUCTION OF DOCUMENTS.

A shipping bill requested defendants to send the goods one car load to N. Dyment Wyoming, and another to Henry James Mitchell. Evidence was given to explain the meaning of this to be that one car load was to go to Dyment at Wyoming and another to Henry James at Mitchell. *Held*, that this was properly received, being an explanation of the ambiguity in the shipping bill. Whether Mitchell was part of the name of the consignee or the name of the place where the consignee lived was clearly a matter that could be made plain by parol evidence. *Dyment* v. *N. & M. W. Rail. Co.*, 11 O. R. 343.

A deed of part of lot 5 in the first concession of Uxbridge described it as commencing at a point 46 chains 33⅓ links from the north-west angle of the lot. It was held that the deed must be read as meaning the true north-west angle, from which the admeasurement must be made, and not from a point which, when the deed was executed, was erroneously supposed to be such angle, and which for the purpose of construing the deed it was understood should be so taken, and that the evidence of such understanding was inadmissible. *Forsyth* v. *Boyle et al.*, 28 U. C. C. P. 26.

Defendant, by writing under seal, agreed to become responsible for a debt contracted by James Jones to the Waterous Engine Works Co. The writing did not state to whom he was to become responsible. It was held, reversing the judgment of KILLAM, J., that parol evidence

of the surrounding circumstances was admissible to explain the ambiguity, and that, looking at the writing, in relation to those circumstances, it was sufficiently shown that it was the plaintiff to whom the defendant was to become responsible. It was also held, consistently with this ruling, that the writing was sufficient under the Statute of Frauds. *Waterous Engine Works Co.* v. *Jones*, 7 Man. 73.

*Construction of Statutes.*

Where a private act of incorporation provided that in an action against a shareholder for calls a certificate under the seal of the company, and purporting to be signed by one of their officers, to the effect that the defendant was a shareholder, that such calls had been made, and that so much was due by him, should be received in all courts of law as *primâ facie* evidence to that effect, and the certificate was put in evidence certifying that the defendant was the holder of fifty shares and that certain calls had been made, and that he was indebted to the company in the sum named, being the amount of the call, it was held, nevertheless, in *Stadacona Insurance Co.* v. *Rainsford*, 21 N. B. 309, that the certificate was not evidence against the defendant in the absence of other evidence that the defendant was a shareholder in the company.

The judgment seems to proceed upon the ground that the statute must be construed strictly and that it was not binding upon any person not otherwise shown to have been a shareholder.

# BOOK IV.

## PROCEDURE.

THERE is very little provision made by our law for procuring or recording evidence before litigation has commenced. If a man's property has been damaged in his absence, it is often very difficult for him to discover who is liable to him for such damage. If a crime has been committed, much valuable time is often wasted by the police in following up misleading clues. As soon, however, as sufficient information has been obtained in either case to justify an action being commenced, or an information laid, against a definite person, there is abundant machinery by which evidence can be both procured and placed on record.

The phrase "procuring evidence" includes obtaining information from persons as well as the search for and seizure of such pieces of evidence as documents and things. It will be necessary also to distinguish between criminal and civil proceedings.

# CHAPTER I.

## PROCEDURE IN CRIMINAL CASES.

### *Witnesses.*

It is in theory of law the duty of every good citizen to assist the police and the prosecutor by giving them all relevant information, and calling their attention to any fact which may throw light on the identity of the criminal or the manner in which the crime was committed (*a*). To suppress such information in the case of treason or felony, is technically a crime, which is termed "misprision"; but prosecutions for misprision are extremely rare, if not obsolete. As a matter of fact, however, in serious criminal cases information is often readily afforded to the police. But there is no power, at this stage of the proceedings, of placing such information upon record in any shape which will render it admissible at a subsequent trial.

In cases of homicide, however, there are two exceptions to this statement. First, it is the duty of a coroner to summon a jury and hold an inquiry (which is called an inquest), whenever there is reasonable cause for suspecting that any person has died either a violent or unnatural death, of which

(*a*) As to the right of the police to interrogate persons whom they suspect of crime, see *ante*, p. 115.

the cause is unknown, or that any person's death is due to some other cause than ordinary disease. The jury must see the body, and to investigate the cause of death the coroner has the power to summon before himself and, by *subpœna*, to compel the attendance of any person whom he has reason to believe can throw light upon the matter into which he is inquiring, and he can also compel such witness by *subpœna duces tecum* to produce any documents in his possession which may be useful to the inquiry. If any witness, on being summoned, refuses to give evidence or to produce the required documents, the coroner can commit him for contempt of Court. He has also power to order a *post-mortem* examination of the body and the attendance of medical witnesses. Each witness is examined on oath, and his evidence taken down in writing in the form of a deposition, which can, in certain cases, be given in evidence at the subsequent trial, if—

(i.) it be signed by the coroner;

(ii.) it was taken down in the presence of the person subsequently charged with the crime;

(iii.) such person had an opportunity of cross-examining the witness (*b*).

Frequently, however, the person who is subsequently accused of the crime is not present at the coroner's inquest. If he is, and is called upon to give evidence, he may refuse to answer any question which he swears may tend to criminate himself. Indeed, if the coroner thinks that there is any probability of a witness who is called before him

(*b*) See *ante*, p. 333; and *R.* v. *Black*, 74 J. P. 71.

being subsequently tried for the murder or manslaughter of the deceased, he should warn the witness that he need not give evidence unless he wishes to do so. The finding of the jury is recorded in writing, and is attested by the signatures and seals of the jury, as well as of the coroner; the writing is then called an inquisition. If the jury has found any person guilty of murder or manslaughter, the coroner commits him for trial, and the accused may be arraigned on the inquisition without any presentment by a grand jury.

Secondly, in cases of homicide, a declaration made by a person who is in a dying condition as to the cause of his being in that condition is admissible on the subsequent trial of any person for causing the death of such person, provided the declaration was made in settled hopeless expectation of death. The existence of this state of mind must be clearly established, as it is this which takes the place of the sanction of an oath. It is not necessary that the accused should have been present at the time the declaration was made (*c*).

As soon, however, as any person is definitely charged with the commission of a crime and either summoned to appear before a justice of the peace or arrested under a warrant, there is a clear power to compel anyone who possesses relevant knowledge to attend and give evidence at the preliminary hearing (*d*). This may be done by serving on such person a witness summons, which he must obey under pain of attachment.

(*c*) See *ante*, p. 81.
(*d*) *Evans* v. *Rees*, 12 A. & E. 55.

A person who is summoned to give evidence before a Court of petty sessions is not entitled to disobey the summons on the ground that he asked for, but was not paid, his expenses (*e*), although this fact would probably be deemed by the Court a sufficient excuse if the witness could show that he was too poor to attend the Court at his own expense. If he does not attend on being thus summoned, the justice can compel his attendance by issuing a warrant, and he will do so if he has reason to believe that his evidence will be of any value. When brought before the justice he can be compelled to give evidence, unless he swears that to do so would tend to criminate himself. But the accused person cannot be compelled to give evidence, nor can his wife or her husband without the consent of the accused. The accused person must be present whenever evidence is given against him and must be allowed the opportunity of cross-examining the witness.

The evidence of each witness is then taken down by the justice's clerk in the shape of a deposition, which is subsequently read over to the witness, who thus has the opportunity of correcting it in any particular. This the witness signs, and thus makes it evidence against himself. Should the justice decide to commit the prisoner for trial, he can bind over the witnesses to appear at the trial and give evidence. If a witness persists in refusing to attend the trial after the matter has been fully explained to him, he can be imprisoned till the trial and taken to the Court against his will and compelled to give evidence (*f*).

This power of placing on record the evidence of witnesses given shortly after the events have occurred is extremely valuable, for the depositions (*g*):—

(*e*) *R.* v. *Cook*, 1 C. & P. 321; 2 Hawk. c. 46, s. 173.
(*f*) *Bennet and Wife* v. *Watson and Another*, 3 M. & S. 1.
(*g*) The prosecution is entitled to a copy at a cost of 4*d.* per folio of seventy-two words, the defence at 1½*d.* per folio of ninety

(i.) inform the prisoner as to the precise case he has to meet;

(ii.) enable the indictment to be drafted;

(iii.) enable the judge to charge the grand jury; and

(iv.) to decide whether a defence has been disclosed within the Poor Prisoners' Defence Act, 1903;

(v.) serve as a check to the evidence of any witness who varies from his deposition at the trial; and

(vi.) can be read if the witness is dead, too ill to travel, or kept away by the other side.

The procedure as to these depositions is regulated by the Indictable Offences Act, 1848, and other statutes. These have been already dealt with in the chapter on Secondary Oral Evidence (*h*).

If it is desired to call at the trial, either to give evidence or to produce a document, a person who was not bound over by the magistrate or coroner, he can be *subpœnaed* to attend. If he resides within the county where the trial is to take place, the clerk of assize (for Assizes) or the clerk of the peace (for Quarter Sessions) can issue a *subpœna*. A Crown Office *subpœna* must be obtained if the person resides outside the county; such a *subpœna* will bind him in whatever part of England or Wales he resides. The prisoner also can *subpœna* further witnesses (*i*); those whom he has called before the justices will have been bound over to appear at the trial in the same way as the witnesses for the prosecution. Moreover, any person, who is actually in Court during the trial, must if required by the judge go into the box

words, or, if legal aid is granted under the Poor Prisoners' Defence Act, 1903, gratuitously.

(*h*) See *ante*, pp. 326, 332—334. For the attendance of witnesses before a Court of Summary Jurisdiction, see Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), as explained by the Summary Jurisdiction Act, 1849 (12 & 13 Vict. c. 103), s. 9; see also Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

(*i*) 1 Anne, st. 2, c. 9, s. 3.

and give evidence, even though he has not been *subpœnaed* (*k*). The expenses of all witnesses for the prosecution or defence, whether bound over or *subpœnaed*, will be paid out of the County Fund (*l*) unless they are disallowed by the judge at the trial. The King's Bench Division has an inherent jurisdiction to set aside any *subpœna* which has not been issued for the *bonâ fide* purpose of securing the attendance of a witness (*m*).

If the prosecution intends to call any witnesses, whose evidence was not taken before the justice, notice of such intention and a short statement of their evidence should be served on the prisoner in sufficient time before the trial to enable him to prepare his defence accordingly. The prisoner is not entitled to this notice as of right, but if he is likely to be prejudiced by the omission to give it, the Court will adjourn the trial.

### *Documents and Things.*

The police have no general power to search for evidence in the house either of a suspected person or of a third person; they have no general power to examine or seize the books, papers, or other property of the accused. Not even a Secretary of State can issue a general warrant authorising the police to seize all the papers of a person who is suspected of high treason or, indeed, of any other offence (*n*). But when arresting a person for a felony or misdemeanour, the police have power at the same time to seize any instrument, document, or thing believed to have been used by the accused

(*k*) *R.* v. *Sadler*, 4 C. & P. 218.
(*l*) 30 & 31 Vict. c. 35, ss. 3, 5.
(*m*) *R.* v. *Baines*, [1909] 1 K. B. 258.
(*n*) *Wilkes* v. *Wood*, 19 How. St. Tr. 1153; *Entick* v. *Carrington*, 19 How. St. Tr. 1030.

for the purpose of committing the offence, in order to produce them as evidence against him at his trial, such, for instance, as a pistol, a knife, a bloodstained garment, a forged document or the like; and they may take such things by force provided they use no unnecessary violence (*o*).

A wider power, however, exists in the case of stolen property:—

(i.) A justice of the peace may make an order authorising certain persons to enter a building to search for stolen goods, and to seize them if found. Such an order is called a Search Warrant. It is granted only on a sworn information made by the owner to the effect that his property has been stolen, and that he believes that it is in the place which he wishes to have searched. The persons authorised to search, the building to be searched, and the goods for which search is to be made, must all be named or described in the warrant. The officer must take the warrant with him; he should also take with him a person who can identify the stolen property. He should demand admission before exercising his right to enter by force. At common law a search warrant could only be issued in cases of larceny, but by s. 103 of the Larceny Act, 1861 (*p*), however, the power is extended to cases in which any property has been obtained by embezzlement, robbery, false pretences, or any other crime punishable under that Act; and also by 44 & 45 Vict. c. 69, s. 24, to fugitive offenders from the colonies.

(ii.) Under s. 16 of the Prevention of Crimes Act, 1871 (*q*), any chief officer of police may give authority in writing to any police constable to enter any house, shop,

(*o*) *Dillon* v. *O'Brien*, 16 Cox, 245.
(*p*) 24 & 25 Vict. c. 96.
(*q*) 34 & 35 Vict. c. 112; cf. *R.* v. *Halkett*, [1910] 1 K. B. 50.

yard, or other premises, and to search for and seize any property which he believes to have been stolen, but only in the following cases:—

(a) When the premises to be searched are, or within the preceding twelve months have been, in the occupation of any person who has been convicted of receiving stolen property or of harbouring thieves; or

(b) When the premises to be searched are in the occupation of any person who has been convicted of any offence involving fraud or dishonesty, and punishable by penal servitude or imprisonment. It is not necessary for the chief officer to specify any particular property in the authority; he may authorise a search if he has reason to believe generally that the premises are being made a receptacle for stolen goods.

In every other case search without a warrant is illegal.

The police may also be authorised—outside the metropolis by special warrant of justices (*r*), within the metropolis by a written order signed by a commissioner of police (*s*)—to enter, by force (if necessary), any place suspected of being kept or used as a common gaming house, with the object of arresting all persons found therein. The warrant or order also authorises them to search the persons arrested and to seize all gaming instruments (*t*).

A warrant may also be granted authorising police constables to search for and remove to and detain in a place of safety any woman or girl as to whom there is reasonable cause to suspect that she is unlawfully detained for immoral purposes. Such a warrant can only be issued on the sworn information of a parent, relative or guardian of the woman or girl, or of some person who in the opinion of the justice is *bonâ fide* acting in her interest. The procedure, which is regulated

(*r*) 8 & 9 Vict. c. 109, s. 3.
(*s*) *Ibid.*, s. 6.
(*t*) *Ibid.*, s. 7.

by s. 10 of the Criminal Law Amendment Act, 1885 (*u*), is alternative to the remedy by *habeas corpus*.

If a judge, in the course of any trial before him, comes to the conclusion that one or more of the witnesses is committing perjury, he may order all relevant documents and things in Court to be impounded with a view to their being used in a subsequent prosecution.

The power to *subpœna* a witness also includes the power to order him to bring with him any document or thing which is admissible as evidence in the case (*x*).

### *The Trial of an Indictment.*

As soon as a prisoner has been arraigned and pleaded "Not guilty," and the jury which is to try him has been sworn, counsel for the prosecution opens the case for the Crown. If no one appears to prosecute him, the prisoner will be discharged, for he "stands upon his deliverance." The prosecution always begins in a criminal case; for the prisoner is presumed innocent until he is found guilty.

The opening speech of the counsel for the prosecution should state clearly, concisely, and in chronological order, the facts upon which he relies as establishing the guilt of the accused. He must not open any fact which he is not prepared with evidence to prove; and he should at this stage of the proceedings abstain from all denunciation or invective against the accused, whose guilt has not yet been established. The witnesses are then called, examined, cross-examined, and, if necessary,

(*u*) 48 & 49 Vict. c. 69.
(*x*) *R.* v. *Daye*, [1908] 2 K. B. 333.

re-examined. The counsel for the prosecution also can, and usually does, read to the jury the prisoner's statement made before the justices, whether it tells in favour of the prisoner or not, and whether the prisoner is going to give evidence before the jury or not (*y*).

In certain cases it is necessary to show that the indictment has been laid before the grand jury with the consent of the Attorney-General or of the Public Prosecutor. This is usually proved by producing his consent in writing. The Court will take judicial notice of the signature of the Attorney-General, but not, apparently, of that of the Public Prosecutor (*z*). This must be proved in the same way as the handwriting of any private individual.

If, at the close of the case for the prosecution, the judge is of opinion that there is no evidence to go to the jury, he ought to direct the jury to acquit the prisoner. He is not bound to do so, unless asked; and, if the prisoner is represented by counsel, he will usually not do so unless the counsel makes an application for the purpose (*a*).

When the case for the prosecution is closed, the counsel for the defendant—or the prisoner himself, if undefended by counsel—if he intends to call witnesses, will open his case. Besides such openings there are two other kinds of speeches which a counsel may make. In some cases he may "sum up his own evidence"; in other cases he may make "a general reply"; that is, a speech in

(*y*) *R.* v. *Bird*, 79 L. T. 359.
(*z*) *R.* v. *Turner*, [1910] 1 K. B. 346; but see *R.* v. *Waller*, *ibid.*, 364.
(*a*) *R.* v. *George* (1908), 1 Cr. App. R. 168; *R.* v. *Leach* (1909), 2 Cr. App. R. 72.

which he not only sums up his own evidence, but also deals with the evidence called against him and answers the arguments of his opponent.

It is only where the prisoner is defended by counsel that counsel for the prosecution has a right to sum up his case (*b*). It is only where the prisoner calls witnesses, other than himself, who speak to the facts of the case and not merely as to the prisoner's character, that the prosecuting counsel has a right to reply (unless he be the Attorney- or Solicitor-General, both of whom have the right of reply in all cases, though they do not always exercise it) (*c*).

Until 1898, the prisoner and his or her spouse were, as a rule, incapable of giving evidence, whether they wished to do so or not. But now, by the Criminal Evidence Act, 1898 (*d*), the accused person, whether charged solely or jointly with another, is a competent witness for the defence before the justices and before the petty jury (*e*). He cannot, however, be called as a witness except on his own application. It is the duty of the judge to inform him of his right to give evidence (*f*). If he prefers not to give evidence, counsel for the prosecution may not, but apparently the judge may, in his summing up, if he thinks fit, comment on the prisoner's omission so to do (*g*). The accused may, if he prefers, remain in the dock and make therefrom an unsworn statement to the jury (*h*). But if he elects to give evidence,

(*b*) 28 Vict. c. 18, s. 2.
(*c*) In Ireland, every counsel for the prosecution has the right of reply.
(*d*) 61 & 62 Vict. c. 36. This Act does not apply to Ireland.
(*e*) But not before the grand jury: *R.* v. *Rhodes*, [1899] 1 Q. B. 77.
(*f*) *R.* v. *Tate*, [1908] 2 K. B. 680.
(*g*) *R.* v. *Rhodes*, [1899] 1 Q. B. 77.
(*h*) S. 18 of the Indictable Offences Act, 1848, is not affected by the Act of 1898.

he must go into the witness-box (unless the Court otherwise orders) and take an oath like any other witness; and then he is liable to be cross-examined by the counsel for the prosecution. If two persons are jointly indicted, and one of them gives evidence, and, in doing so, incriminates that other, such other is also entitled to cross-examine him (*i*).

The accused may not be asked, and, if asked, cannot be required to answer, any question tending to show (i.) that he has committed, or (ii.) that he has been convicted of, or (iii.) that he has been charged with, any offence other than that with which he stands charged, or (iv.) that he is of bad character. He will, however, lose this protection—

(a) if evidence that he has committed or been convicted of such other offence is admissible as part of the case for the prosecution to show that he is guilty of the offence wherewith he is charged, *e.g.*, in cases of coining, arson, false pretences, etc., or

(b) if he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his own good character; or

(c) if the nature and conduct of the defence is such as to involve imputations on the character of the prosecutor, or of the witnesses for the prosecution; or

(d) if he has given evidence against any other person charged with the same offence (*j*).

Where the accused person is the only witness called by the defence as to the facts of the case, he must be called immediately after the close of the evidence for the prosecution. The fact that he has given evidence does not confer on the prosecution the right of reply (*k*); but the counsel for the prosecution has the right to comment

(*i*) *R.* v. *Hadwen and Ingham*, [1902] 1 K. B. 882.
(*j*) 61 & 62 Vict. c. 36, s. 1 (f).
(*k*) *Ibid.*, s. 3.

on the prisoner's evidence (*l*). The wife of the accused person can now give evidence for him if he wishes her so to do. She cannot give evidence against him, nor for him except on his own application. To this rule, however, there are exceptions which have been already discussed (*m*). But if the prisoner calls his wife or any other witness as to the facts of the case, the counsel for the prosecution will be entitled to the last word. What has been said above of the wife of a male prisoner applies in all respects to the husband of a female prisoner.

If the prisoner only calls witnesses as to his character this will not give the counsel for the prosecution the right to reply; he has the right to cross-examine such witnesses, but it is not usual for him to do so.

It is necessary to deal in some detail with the order of the speeches, etc. in criminal proceedings. There are four cases to be dealt with :—

I. *Where the prisoner is not defended by counsel, and calls no witness to the facts except himself.*

1. Counsel for the prosecution opens his case.
2. Witnesses for the prosecution.
3. Prisoner's statement before the magistrates.
4. Prisoner gives evidence, if he wishes.
5. Prisoner makes a speech in his defence.
6. Witnesses as to prisoner's character.
7. Judge sums up.
8. Verdict.
9. Sentence.

II. *Where the prisoner is not defended by counsel, but calls witnesses as to the facts, in addition to giving evidence himself.*

1. Counsel for the prosecution opens his case.
2. Witnesses for the prosecution.

(*l*) *R.* v. *Gardner*, [1899] 1 Q. B. 150.
(*m*) See *ante*, p. 212, 213.

3. Prisoner's statement before the magistrates.
4. Prisoner opens his case.
5. Prisoner calls his witnesses, including himself, if he wishes, and witnesses to character, if any.
6. Prisoner sums up his case.
7. Counsel for the prosecution replies on the whole case.
8. Judge sums up.
9. Verdict.
10. Sentence.

III. *Where the prisoner is defended by counsel, who calls no witness to the facts except the prisoner.*

1. Counsel for the prosecution opens his case.
2. Witnesses for the prosecution.
3. Prisoner's statement before the magistrates.
4. Prisoner gives evidence, if he wishes.
5. Counsel for the prosecution sums up his case.
6. Prisoner's counsel speaks in his defence.
7. Witnesses to character.
8. Judge sums up.
9. Verdict.
10. Sentence.

IV. *Where the prisoner is defended by counsel, who calls other persons besides the prisoner to give evidence as to the facts.*

1. Counsel for the prosecution opens his case.
2. Witnesses for the prosecution.
3. Prisoner's statement before the magistrates.
4. Prisoner's counsel opens the defence.
5. Witnesses for defence, including, if counsel thinks fit, the prisoner and witnesses to his character.
6. Prisoner's counsel sums up the case for the defence.
7. Counsel for the prosecution replies on the whole case.
8. Judge sums up.
9. Verdict.
10. Sentence.

*Functions of Judge and Jury.*

Every indictment is tried by a jury. The presiding judge, as a general rule, decides all questions of law, the jury all questions of fact. It is the duty of the judge to exclude all evidence that is irrelevant, and therefore inadmissible. It is also his duty to see that each relevant fact is proved in a legitimate way; he must therefore decide all objections which are taken to any proposed method of proving a relevant fact. Thus, it will be for the judge to decide whether a dying declaration is admissible in evidence, or whether a question asked in chief is leading or not.

But when once the evidence has been properly admitted, it is for the jury, not the judge, to determine its value and cogency, and to decide what is the proper inference to be drawn from it.

It is the duty of the judge to call the attention of the jury to the more important facts on either side of the question; he may even state to the jury his own view of the matter in issue, but he should also inform them that they are not bound by the opinion which he has expressed, and that the question is one for them, and not for him, to decide.

On the trial of an indictment, only the jury can find the prisoner guilty; and they should not do so unless his guilt be proved "beyond all reasonable doubt." It is not enough for the prosecution to raise strong grounds for suspicion; it must establish such a degree of probability in the minds of the jury as practically to amount to a moral certainty,

for otherwise the presumption that the prisoner is innocent will not be rebutted. The jury must set aside all preconceptions and prejudices, and calmly review the facts laid before them, not merely counting the witnesses but weighing carefully what each has said. If there is left then in their minds a real doubt such as honest men of business would reasonably act upon in the ordinary affairs of life, they should acquit the prisoner.

The substance of the charge must be proved in accordance with the allegations of the indictment. Thus on an indictment for obtaining money by false pretences, it must be established that the money was obtained by means of the false pretence which is alleged in the indictment (*n*). The day and year on which facts are stated in an indictment to have occurred, are not, in general, material; and the facts may be proved to have occurred upon any other day previous to the finding of the bill by the grand jury. So it is not generally necessary to prove the offence to have been committed at the place named in the indictment, but it is enough to show that it was committed within the county, or within the jurisdiction of the Court.

If, however, time or place is of the essence of the offence, it must be strictly proved. Thus, a burglary may be proved to have been committed on any day prior to that which is charged in the indictment; but it must be proved to have been committed between the hours of 9 p.m. and 6 a.m. So, on a charge of larceny, it is sufficient to prove that the prisoner stole some article or articles of the kind stated in the indictment; it is not necessary to prove that he stole the number of articles alleged, nor to show the value of any of them. A conviction will be warranted by evidence that he stole

(*n*) *R.* v. *Bulmer*, L. & C. 476.

any one article, of any value, of those alleged in the indictment.

It is always enough to prove the substance of the indictment. Thus, where the defendant was indicted for composing, printing, and publishing a libel, and only publication was proved, Lord ELLENBOROUGH said that this warranted a conviction, and added :—

"If an indictment charges that a defendant did, and caused to be done, a particular act, it is enough to prove either. This distinction runs through the whole of the criminal law, and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified" (*o*).

If an indictment charges the prisoner with burglary and larceny, the jury may convict him of either crime, or of both (*p*); and on any indictment for felony the prisoner may be convicted of a lesser felony of the same class if the indictment can be reduced to a charge for that lesser felony by merely striking out certain words. Thus, on an indictment for murder the prisoner can be convicted of manslaughter, the words "murder" and "malice aforethought" being rejected as surplusage (*q*). So, where A. is charged with giving a mortal blow, and B. and C. are charged with being present, aiding and abetting, the prisoners can be convicted upon this indictment, although the evidence proves that B. gave the blow, and A. and C. were present aiding and abetting, since they are all principals (*r*).

But in all other cases, in the absence of express statutory provision (*s*), a prisoner charged with one kind of felony or misdemeanour cannot be convicted of a felony or misdemeanour of a different kind; still less, when he is indicted for a felony, can he be

(*o*) *R.* v. *Hunt*, 2 Camp. 583.
(*p*) 2 Hale, P. C. 302.
(*q*) *Mackalley's Case*, 9 Rep. 61, a.
(*r*) *R.* v. *Bulmer*, L. & C. 476.
(*s*) See, for instance, ss. 9 and 12 of the Criminal Procedure Act, 1851.

convicted of a misdemeanour; nor when indicted for a misdemeanour can he be convicted of a felony. Thus, a prisoner charged with housebreaking cannot be convicted of burglary. When charged with stealing boots or a coat, he cannot be found guilty of stealing shoes or a waistcoat.

Moreover, a very wide power of amendment has been given to the judge at the trial by the Criminal Procedure Act, 1851 (*t*), a highly beneficial measure which prevents justice from being defeated by technicalities after the substance of the charge has been proved. The judge may, in his discretion, amend an indictment which is defective in its details whenever no injustice will thereby be done to the prisoner. No general rule can be laid down for the guidance of the judge in the matter; an amendment, which in one case would not prejudice a prisoner, might in a different case prejudice him materially. The judge will weigh all the circumstances of the case before him and then exercise his discretion judicially. But he may not change the substance of the indictment, as the prisoner might justly complain if he were required suddenly to meet a charge for which he is not prepared.

Under s. 1 of this Act, the name of the owner of stolen property may be altered at the trial (*u*). And where on an indictment for perjury alleged to have been committed on the trial of B. "for setting fire to the barn of P.," the certificate of the trial and conviction of B. stated it to be "for setting fire to a stack of barley," and

(*t*) 14 & 15 Vict. c. 100; see Appendix.
(*u*) *R.* v. *Vincent*, 2 Den. 464; *R.* v. *Fullarton*, 6 Cox, 194; but see *R.* v. *Green*, 1 D. & B. 113.

it appeared that the barn and stack of barley were burning at the same time, WILLIAMS, J., directed the indictment to be amended according to the certificate, considering the case within the words of s. 1, "in the name or description of any matter or thing whatsoever," and observing that this was one of the very cases for which the statute was passed (*r*).

Where goods, the separate property of a wife, were stolen from the house of her husband, and the indictment laid the property in the husband, a conviction thereon was quashed; but the Court for Crown Cases Reserved held that an amendment in the name of the owner should have been allowed (*x*). But in a case where the prisoner was indicted for forgery as a statutory *felony*, and the offence proved was holden to be a *misdemeanour*, HILL, J., refused an amendment, on the ground that the statute does not permit an alteration of the nature or quality of the offence charged (*y*).

Again, where a prisoner was indicted for obtaining credit under false pretences, but the evidence failed to prove the false pretences, it was held that the Court had no power under this Act to amend the indictment by striking out the allegations of false pretences and inserting a charge of obtaining credit by fraud, even though both charges could be established by the same evidence, for this would amount to substituting one offence for another (*z*). But where the prisoner was indicted for wilful and corrupt perjury by making a false affidavit under the Bills of Sale Act, 1854, which was not a judicial proceeding, it was held that he could on this indictment be convicted of the common law misdemeanour of making a false oath, the words "wilfully and corruptly" being rejected as surplusage (*a*).

(*r*) *R.* v. *Neville*, 6 Cox, 69.
(*x*) *R.* v. *Murray*, [1906] 2 K. B. 385.
(*y*) *R.* v. *Wright*, 2 F. & F. 320.
(*z*) *R.* v. *Benson*, [1908] 2 K. B. 270.
(*a*) *R.* v. *Hodgkiss*, L. R. 1 C. C. R., at p. 213.

The Act of 1851 is intended to apply to all cases where amendments may be made in furtherance of justice, and where the defendant cannot be prejudiced in his defence, on the merits, by such amendment (*b*).

It has been ruled that an amendment will not be allowed after the counsel for the prisoner has addressed the jury. The proper course is that, where the counsel for the prosecution has given all the evidence that he means to give, he should, if he wishes for an amendment, ask for it before he closes his case; and then, if the amendment is allowed, the counsel for the prisoner will address the jury on the indictment as amended (*c*).

If the jury acquit the prisoner, he is at once discharged. If, on the other hand, he is found guilty, he may, before sentence, call witnesses in mitigation of punishment. The prosecution may also at this stage prove any previous conviction against the prisoner, and the judge will also inquire into the prisoner's conduct since his last conviction and into any other matters which may assist him in deciding as to his punishment. Such witnesses are usually sworn to give true answers to all such questions as the Court shall demand. The judge may permit them to be cross-examined. They are, however, not bound by the ordinary rules of evidence. At this stage the Court may properly act upon hearsay evidence (*d*) in passing sentence.

By the Criminal Appeal Act, 1907 (*e*), upon the trial of any person at Quarter Sessions or Assizes, the proceedings,—that is, the evidence, the arguments and decision upon points of law, the summing up of the judge (*f*), the verdict of the jury, and, if the prisoner be found guilty, the speeches and evidence as to his character, and the

(*b*) *Per* Lord CAMPBELL in *R.* v. *Sturge*, 3 E. & B. 734.
(*c*) *R.* v. *Rymers*, 3 Car. & K. 326.
(*d*) *R.* v. *Weaver*, 1 Cr. App. R. 12.
(*e*) 7 Edw. VII. c. 23, s. 16 (1), and Criminal Appeal Rules, 1908, r. 5.
(*f*) *R.* v. *Bennett*, 25 T. L. R. 528.

sentence,—must be taken down by the official shorthand writer; and by this means an accurate record of the proceedings properly verified will be before the Court of Criminal Appeal should an appeal be entered. This provision, however, is only directory, and not mandatory, so that if the trial takes place in the absence of a shorthand writer the trial is valid—if the prisoner is acquitted, he cannot be tried again; if he is convicted, his conviction cannot be quashed on that ground (*g*).

*Evidence in the Court of Criminal Appeal.*

At any time before the verdict is given, the prisoner may move to quash the indictment, if he deems it bad in law (*h*). He may also, at any time after verdict and before sentence, move in arrest of judgment on any objection which appears on the face of the record. It is still open to the judge, if he thinks fit, to state a special case, as was frequently done in the days before the Court for Crown Cases Reserved was abolished (*i*). But the most usual course is now for a convicted person to appeal to the Court of Criminal Appeal, which came into existence on April 19th, 1908.

This Court consists of the Lord Chief Justice of England and the other judges of the King's Bench Division (*j*), or as many as are necessary. The Court is properly constituted if there are present not less than three judges; the number

(*g*) *R.* v. *Rutter*, 25 T. L. R. 73; *R.* v. *Elliott*, 100 L. T. 976.

(*h*) In the case, however, of some formal defect apparent on the face of the indictment the motion to quash must be made before the jury are sworn; and then the Court may amend the indictment and proceed with the trial: 14 & 15 Vict. c. 100, s. 25.

(*i*) Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), s. 20; as was done in *R.* v. *Turner*, [1910] 1 K. B. 346.

(*j*) Criminal Appeal Act, 1907, s. 1; Criminal Appeal (Amendment) Act, 1908 (8 Edw. VII. c. 46), s. 1.

must be uneven. It sits in London unless otherwise directed. An appeal lies from this Court to the House of Lords, but only in cases where the Attorney-General has certified that the decision involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought (*j*).

To this Court the convicted prisoner has an unfettered right of appeal on any question of law (*k*). And from the verdict of the jury on any question of fact, or from the decision of the Court on any question of mixed law or fact, the prisoner can appeal, provided he obtains either the leave of the Court of Criminal Appeal, or a certificate from the judge who tried the case that it is a fit case for appeal (*l*), *e.g.*, that the verdict is unreasonable, or that it cannot be supported on the evidence laid before the Court, or that on any ground there has been a miscarriage of justice (*m*). Again, the prisoner can appeal against the sentence passed upon him, but only if he has obtained the leave of the Court of Criminal Appeal (*n*). But in doing so he runs a certain risk, for on such an appeal the Court may, if it thinks fit, quash the sentence appealed against and inflict a more serious one (*o*).

Machinery for the production on an appeal, either of the evidence called in the Court below or of fresh evidence,

(*j*) 7 Edw. VII. c. 23, s. 1 (6).
(*k*) *Ibid.*, s. 3 (a).
(*l*) *Ibid.*, s. 3 (b).
(*m*) *Ibid.*, s. 4.
(*n*) *Ibid.*, s. 3 (c).
(*o*) *Ibid.*, s. 4 (3).

is provided by the Act (*p*), and the rules made under the Act (*q*).

The judge or chairman of any Court before whom a person is convicted must, in the case of an appeal, or of an application for leave to appeal under this Act, furnish to the Registrar of the Court of Criminal Appeal, in accordance with the rules, his notes of the trial; and also a report giving his opinion upon the case or upon any point arising in it (*r*).

Rule 14 provides that the registrar shall request the judge to furnish him with his note of the trial, or with a copy of it, or any part thereof; and the judge shall thereupon furnish the same in accordance with such request. Rule 15 provides that the registrar shall request the judge to furnish him with a report in writing, giving his opinion upon the case generally, or upon any point arising upon the case of the appellant; and the judge shall thereupon furnish the same in accordance with such request.

The registrar takes all necessary steps for obtaining a hearing under this Act of any appeals or applications, notice of which is given to him. He will obtain and lay before the Court in proper form all documents, exhibits, and other things relating to the proceedings in the Court below, which appear necessary for the proper determination of the appeal or application (*s*).

The Court of Criminal Appeal may (*t*), if they think it necessary or expedient in the interest of justice,—

"(*a*) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and

(*b*) if they think fit order any witnesses who would have been compellable witnesses at the trial to attend and be

(*p*) *Ibid.*, ss. 8, 9, 15, 16.
(*q*) Criminal Appeal Rules, 1908.
(*r*) 7 Edw. VII. c. 23, s. 8.
(*s*) *Ibid.*, s. 15 (1).
(*t*) *Ibid.*, s. 9.

examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of Court before any judge of the Court or before any officer of the Court or justice of the peace or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; and

(*c*) if they think fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application; and

(*d*) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the Court conveniently be conducted before the Court, order the reference of the question in manner provided by rules of Court for inquiry and report to a special commissioner appointed by the Court, and act upon the report of any such commissioner so far as they think fit to adopt it; and

(*e*) appoint any person with special expert knowledge to act as assessor to the Court in any case where it appears to the Court that such special knowledge is required for the proper determination of the case;

and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the Court: Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial."

Rule 20 provides that the registrar shall apply to the proper officer of the Court of trial for particulars of the trial and conviction and the calendar; and may, when it appears necessary, or he is so directed by the Court of Appeal, require the proper officer to furnish him with the original depositions, or exhibits, or indictments, or inquisitions, or abstracts, or copies thereof, and such officer shall furnish the same. Rule 32 provides that the registrar may, where he considers it necessary, and shall, where directed by the Court of Appeal, obtain any documents, exhibits, or other things relating to the proceedings, for use by the Court of Appeal, and may arrange for inspection thereof by any party interested.

The rule also provides that the Court of Appeal may, whenever it is necessary or expedient, order any document, exhibit, or other thing connected with the proceedings, to be produced by any person having the custody thereof.

Rule 39 provides that the appellant or respondent may obtain from the registrar copies of documents or exhibits, upon payment of charges according to a fixed scale.

Rule 8 provides that the judge of the Court of trial may make orders as to the custody, disposal, or production of any exhibits. Rule 27 makes it the duty of a prosecutor who declines to defend an appeal, and of his solicitor, to furnish information, documents, matters and things in his possession or under his control connected with the proceedings, which the registrar or Director of Public Prosecutions may require. Rule 40 provides that witnesses ordered to attend before the Court of Appeal shall be served with an order in the prescribed form, which order may be made at any time on the application of the appellant or respondent. The order also provides for examination of witnesses before examiners.

Several cases have been decided with reference to the calling of fresh evidence in the Court of Appeal. Thus, it has been held that the names of the fresh witnesses, and the points they are to prove, must be stated on the application for leave to call them (*u*), and the proposed evidence should be before the Court on affidavit when the application is made (*x*), but the Court may accept the statement in the application for leave. Where the Court makes an order for certain witnesses to be examined, the appellant is not at liberty to call other witnesses (*y*). In one case the hearing was adjourned to enable the Director of Public Prosecutions to make inquiries and have

(*u*) *R.* v. *Lovett*, 1 Cr. App. R. 94.
(*x*) *R.* v. *Atkins*, 24 T. L. R. 807.
(*y*) *R.* v. *Laws*, 24 T. L. R. 630.

necessary witnesses in attendance (*z*). But permission to call fresh witnesses will not generally be given unless the omission to call them at the trial is satisfactorily explained (*a*). But, under exceptional circumstances, an appellant, who had not given evidence himself in support of an *alibi*, was allowed to give evidence on appeal (*b*). And where witnesses were absent from the trial through a misunderstanding, they were allowed to be called on appeal (*c*). The result of producing evidence which was not called at the trial may be that the Court of Appeal will quash the conviction (*d*) or reduce the sentence (*e*), but it cannot on such evidence increase the sentence (*f*).

The Court will rely upon the judge's notes and the shorthand writer's transcript of his notes. When statements have been made at the trial in the presence of the prisoner and his counsel, and the facts are brought before the Court of Appeal on affidavit, the Court will not allow it to be said that they are incorrect, unless some serious mistake is alleged (*g*). The Court will not quash a conviction, when evidence is forthcoming, after the trial, of previous convictions of a material witness for the prosecution, unless such convictions are of such a kind as to affect his credibility (*h*).

(*z*) *R.* v. *Laws*, 24 T. L. R. 630.
(*a*) *R.* v. *Mortimer*, 99 L. T. 204; *R.* v. *Martin*, 1 Cr. App. R. 33.
(*b*) *R.* v. *Malvisi*, 73 J. P. 372.
(*c*) *R.* v. *Hendry*, 25 T. L. R. 635.
(*d*) *R.* v. *Betridge*, 73 J. P. 71.
(*e*) *R.* v. *Dickenson*, 73 J. P. 287.
(*f*) 7 Edw. VII. c. 23, s. 9, *ad finem*.
(*g*) *R.* v. *Weaver*, 1 Cr. App. R. 12.
(*h*) *R.* v. *Hampshire*, 1 Cr. App. R. 212.

## CANADIAN NOTES.

### PROCEDURE IN CRIMINAL CASES.

In addressing the jury counsel for the prosecution commented unfavourably upon the failure of the wife to give evidence. No objection was made at the time, nor until after the jury had retired to consider their verdict.

It was held that the comment was a violation of the Criminal Code, and that there must be a new trial, although no objection was made at the time to the comment. *Per* RITCHIE, J.: "When once a comment is made the mischief which the law was designed to prevent has been done, and nothing can afterwards be said by either counsel or judge that will be calculated entirely to remove the effect of that comment upon the minds of the jury. The accused is entitled to the protection the law has thus afforded him, and it can only be done by granting a new trial. A similar law is in force in several of the United States, and there, in cases like this, a new trial is granted."

The judgment of GRAHAM, E.J., at page 332, is valuable for the careful comparison of the American cases on enactments of a similar nature. *R.* v. *Corby*, 30 N. S. R. 330.

The right of the prisoner in extradition proceedings to call witnesses for his defence is discussed by PATTERSON, J., in *Re Phipps*, 8 O. A. R. 77, at pages 109, 110, 111, and following pages. He concludes: "Now, with all the light that I can gain from the references I have made, I am unable to see any reasonable ground

for the complaint in the present case that evidence to disprove the commission of the act charged against the prisoner was rejected. What was proposed was not to explain the acts proved on the part of the prosecution, so as to remove from them the imputation of criminality. It was to disprove the acts themselves, or, in other words, to present to the judge evidence which should be in conflict with that offered for the prosecution. If he had received such evidence in relation to acts committed here, it would have been his duty, notwithstanding any impression it made upon his own mind, to send the case for trial. That I understand to be the tenor of all the authorities."

In *R.* v. *William Hambly and Edmund Hambly*, 16 U. C. Q. B. 617, it was held that where no evidence appeared against one of several prisoners he ought to be acquitted at the close of the prosecutor's case, but questioned whether, without such formal acquittal, he could be called as a witness for his co-prisoners; and apparently he could not unless it appeared that he had been joined in order to exclude hi testimony.

## CHAPTER II.

### DISCOVERY IN CIVIL ACTIONS.

It will have been gathered from the preceding pages that our law discountenances, and indeed condemns, any attempt to induce an accused person to criminate himself. He may not be either browbeaten or cajoled into making any confession, nor is he called upon in any way to facilitate the proof of his guilt. But in civil proceedings a different rule holds. Each party to an action is invested with wide powers of extracting the truth from his opponent.

As soon as the issues in any civil action have been defined by the interchange of pleadings, each party begins to prepare his case for the hearing. He often discovers that he is without reliable information on certain material points; and he naturally endeavours to obtain this information in the first instance from his opponent. There may be matters as to which neither party is in possession of strict legal evidence; yet it is possible that his opponent may be willing to make admissions which will save the trouble and expense of obtaining such evidence *aliunde*. Hence the Master in a proper case allows one party to administer questions to the other, and compels that other to answer them, subject to certain restrictions; and the admissions

obtained by means of these "Interrogatories" (*a*) often save time, trouble, and expense in preparing for the trial.

But, besides this discovery of facts, a party may also need disclosure of documents. Some material letters have, as a rule, passed between the parties before the dispute arose, which may contain the contract sued on, or be evidence of its breach, or of an independent tort; but the plaintiff has the defendant's letters, and the defendant has the plaintiff's, and neither set is properly intelligible without the other. Moreover, it is highly desirable that any one who intends to give evidence should, if possible, before he enters the witness-box, read over his own letters written at the time when the events happened; for his recollection of an interview which took place many months ago is probably somewhat hazy now, and far less reliable than his account of it given in a letter written at the time. Hence it is always desirable for each party to see all material documents in the possession of his opponent, and to take copies of the more important ones. This object is attained by the process—formerly only available in Equity, but now freely used in all Divisions of the High Court—called "Discovery of Documents." The Master will, in a proper case, and subject to certain restrictions, order each party to make full disclosure to his opponent of all material documents in his possession, thus saving costs and avoiding "surprise" at the trial.

(*a*) Both interrogatories and the answers to them are in writing or printed (Order XXXI., rr. 1, 9) and are interchanged before the trial. An oral question addressed to a witness in the box at

But it is only after the litigation has commenced that there are these opportunities of acquiring information from the opponent. Till a writ has been issued—and, as a rule, until the questions in issue have been defined by the pleadings—the parties stand upon the defensive; neither is bound to facilitate litigation by admitting or disclosing anything. Nor is any third person under any legal duty to supply either of them with information to assist him in the cause.

It is strange that there is in England so little power before litigation has actually commenced of placing reliable information upon record in any shape which will render it admissible at a subsequent trial. In foreign systems of law much larger provision is made for what Bentham calls "pre-constituted" or "pre-appointed" evidence—that is, evidence taken purposely at the time when an event occurred or shortly afterwards (certainly before any litigation commenced).

There is, it is true, the memorandum of an agreement required by the Statute of Frauds, and the declaration as to pedigree made by an ancestor in a family Bible; but these are mere private entries, possessing no official authority. A commission to take the evidence of a witness who is dangerously ill or who will be out of the jurisdiction at the date of the trial cannot be obtained until an action is pending (*b*). So, too, a writ must be issued and served in order "to perpetuate testimony."

When there was a danger that testimony might be lost before the question to which it related could be made the subject of judicial investigation, the Court of Chancery, following the practice of the civil law, lent

the trial which he is to answer then and there is not an "interrogatory."

(*b*) See *post*, p. 666.

its aid to preserve and perpetuate such testimony. A bill was filed, stating the matter respecting which the plaintiff desired to take evidence, and showing that he had an interest in the matter which could not be barred by the defendant, that the defendant claimed an interest adverse to the plaintiff in the matter, and that the matter could not be made the subject of present judicial investigation (*c*). An affidavit of the circumstances by which the evidence desired to be preserved was in danger of being lost was filed with the bill. The plaintiff could only require an answer from the defendant as to the facts and circumstances alleged by the bill as entitling him to examine the witnesses (*d*); and the bill could not be set down for hearing. The witnesses were examined before an examiner, according to the provisions of ss. 31—33 of 15 & 16 Vict. c. 86, and by the defendant as well as by the plaintiff (*e*). An order might be obtained to use the depositions so taken, either after the death of the witness (*f*), or in case he were too infirm (*g*), or could not be compelled to attend (*g*). A case for the perpetuation of testimony was not confined to aged and infirm witnesses, or to a single witness who could alone speak to the matter; but, as Lord ROMILLY said (*h*):—

"You may examine everybody, and all the evidence is sealed up and only brought out when occasion requires it, and if the witnesses are alive it cannot be used, and the evidence must be taken all over again."

Proceedings to perpetuate testimony are now governed by Order XXXVII., Rules 35—38, which are set out in the Appendix.

The practice under these Rules is this—the plaintiff

(*c*) *Earl Spencer* v. *Peek*, L. R. 3 Eq. 415.
(*d*) *Ellice* v. *Roupell*, 32 Beav. 308.
(*e*) *Earl of Abergavenny* v. *Powell*, 1 Mer. 434.
(*f*) *Barnsdale* v. *Lowe*, 2 Russ. & My. 142.
(*g*) *Biddulph* v. *Lord Camoys*, 20 Beav. 402.
(*h*) *Earl Spencer* v. *Peek*, *suprà*.

having commenced his action in the ordinary way, and having in his statement of claim set out the facts which entitle him to commence the action under Rule 35, and the pleadings having been closed or the defendant having made default in delivering a defence (*i*), an order (*j*) will be made for the examination of the witnesses before an examiner of the Court, and the depositions will be filed in the usual manner. These depositions will not be sealed up, as was the former practice, but copies will be obtainable in the ordinary way as soon as they are filed; and they will be admissible in evidence in any subsequent action between the parties to the original action or their privies if the attendance of the witnesses themselves cannot be procured. A defendant can, as stated above, examine witnesses in an action to perpetuate testimony, as well as the plaintiff. The making of an order is a matter in which the Court has a discretion, and, therefore, where the matter in controversy was the legitimacy of the plaintiff, and this could be at once disposed of by an action under the Legitimacy Declaration Act, 1858, the Court refused to make an order in an action to perpetuate testimony (*k*).

A writ is very seldom issued now to perpetuate testimony, as the Court has since 1883 an enlarged power of making declarations as to any right or title, although the time has not yet arrived for claiming any immediate relief thereunder. It is clearly provided by Order XXV., r. 5 (which came into force in October, 1883), that—

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not" (*l*).

(*i*) *Marquess of Bute* v. *James*, 33 Ch. D. 157.
(*j*) As to the form of the order, see *Burton* v. *North Staffordshire Rail. Co.*, 35 W. R. 536.
(*k*) *West* v. *Lord Sackville*, [1903] 2 Ch. 378.
(*l*) See *Honour* v. *Equitable Life Society*, [1900] 1 Ch. 852; *Société Maritime* v. *Venus Steam Shipping Co.*, 9 Com. Cas. 289; and *per* LINDLEY, M.R., in *Ellis* v. *Duke of Bedford*, [1899] 1 Ch. at p. 515.

Hence the Court can now declare what the rights of the parties are or will be, although no ancillary relief is claimed, and even where no substantive relief can at present be given (*m*). Such declaration may be made on an interlocutory application whether by petition or summons (*n*). But the jurisdiction under this rule will be exercised with great caution (*o*). The Court can in its discretion make a declaration as to a future right; but it will not do so if such a declaration would be " embarrassing or useless for any good purpose " (*p*).

There is also the power of making statutory declarations under the Statutory Declarations Act, 1835, which by the practice of conveyancers are accepted as evidence of incidental matters arising on the proof of title to real property (*q*).

As soon, however, as a writ is issued, the Rules of the Supreme Court afford to either litigant abundant opportunities of acquiring—and to some extent of recording—information which will be needed at the trial of the action. Thus, as we have already seen (*r*), the pleadings, if fairly drafted, frequently contain valuable admissions. As soon as notice of trial has been given, each party begins to prepare his case; and, as a rule, he will

(*m*) *Evans* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, 36 Ch. D. at p. 640; *London Association of Shipowners* v. *London and India Docks*, [1892] 3 Ch. 242.

(*n*) *In re St. Nazaire Co.*, 12 Ch. D. at p. 94.

(*o*) *Faber* v. *Gosworth Urban District Council*, 88 L. T. 549.

(*p*) *Per* JELF, J., in *Attorney-General* v. *Scott*, 20 T. L. R. at p. 633; and see, for examples, *Islington Vestry* v. *Hornsey Urban District Council*, [1900] 1 Ch. 695; *Young* v. *Ashley Gardens Properties, Ltd.*, [1903] 2 Ch. 112; *Ankerson* v. *Conelly*, [1906] 2 Ch. 544; [1907] 1 Ch. 678.

(*q*) In some cases, however, a statutory declaration made in a colony under that Act has been received as evidence when verified by an affidavit: see *In re Hardwick*, [1907] W. N. 180.

(*r*) See *ante*, p. 422.

promptly discover that he requires further information as to facts as well as disclosure of the documents which are in the possession of his opponent. It is most important for the parties to ascertain before the hearing what are the exact points on which there will be a conflict of evidence at the trial. This can generally be ascertained by means of interrogatories.

### INTERROGATORIES.

On the hearing of a summons for directions in any action, either party may apply to the Master for leave to deliver interrogatories to his opponent (*s*), and for an order that his opponent shall answer them on oath before the trial. The latter must file an affidavit answering them within ten days or within such other time as the Master may fix (*s*). But a party is not permitted to administer to his opponent whatever questions he pleases. The particular interrogatories proposed to be delivered must be submitted to the Master, whose leave must be obtained before they can be administered. The Master will only allow such questions as "he shall consider necessary either for disposing fairly of the cause or matter or for saving costs" (*t*), and before giving leave to administer them he will take into consideration any offer, which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents relating to any of the matters in question (*u*). The

(*s*) Order XXXI., rr. 1, 8.
(*t*) *Ibid.*, r. 2.
(*u*) *Ibid.*

party interrogating must, before delivering the interrogatories to his opponent, pay into the "Security for Costs Account," to abide further order, a sum of money fixed by the Master, generally not less than £5 (*x*).

A party who administers interrogatories generally has three objects. In the first place, he hopes to obtain admissions to facilitate the proof of his own case; secondly, he desires to ascertain, so far as he may, the case of his opponent; and, thirdly, he may seek to obtain admissions which tend to destroy that case (*y*), whether he has in fact ascertained it or only anticipates that the case he is seeking to destroy will be set up (*z*). Even if he cannot elicit the admissions he desires, he may at all events get some definite statement sworn to from which his opponent cannot afterwards diverge.

There are, however, certain rules (*a*) which determine what interrogatories may be administered and what not. The most important of these rules is that interrogatories must be relevant to the matters in issue (*b*). Thus, where the defendant in an action of libel or slander has set up the defence of fair comment, and placed on the record a plea in what is now the usual form (*c*), commencing with the words "In so far as the words complained of consist of statements of fact the same are in their natural and ordinary signification true in substance and in fact," he will be allowed, notwithstanding the absence of a plea of justification, to administer to the plaintiff interrogatories directed to proving the truth of the statements upon which the action is brought and of

(*x*) Order XXXI., r. 26.
(*y*) See *Grumbrecht* v. *Parry*, 32 W. R. 558; *Hennessy* v. *Wright* (No. 2), 24 Q. B. D. 445, n.
(*z*) *Attorney-General* v. *Corporation of London*, 2 Mac. & G. 260.
(*a*) See Odgers on Pleading and Practice, 6th ed., pp. 270–277.
(*b*) Order XXXI., r. 6.
(*c*) *Penrhyn* v. *Licensed Victuallers' Mirror*, 7 T. L. R. 1.

those alleged in the particulars delivered by him of the materials upon which his defence of fair comment was based (*d*).

But the defendants in an action of libel will not be allowed to administer to the plaintiffs an interrogatory in the following form :—"Do you intend to set up that the defendants, in publishing the words complained of, were actuated by express malice towards the plaintiffs? If yea, state generally the facts and circumstances on which the plaintiffs rely as showing actual malice" (*e*).

But not every question which could be asked a witness in the box may be put as an interrogatory. Thus, questions which are only put to test the credibility of the witness will not be allowed, although, of course, they may be asked in cross-examination (*f*). Again, no question will be allowed which is not put *bonâ fide* for the purposes of the present action, but with a view to future litigation. Thus, an interrogatory which asks the defendant if he did not do the acts complained of who did, will be disallowed. Such a question is quite irrelevant to the action. A person who thinks he has a cause of action and does not know whom to sue is not entitled to sue someone who does know the person liable and compel him to reveal on oath who that person is (*g*).

Again, leave will not be given to administer a question directed in any other respect to elicit facts which cannot assist the plaintiff's case or form a defence to the action (*h*).

The questions should be directed to the evidence by

(*d*) *Peter Walker & Son, Ltd.* v. *Hodgson*, [1909] 1 K. B. 239.

(*e*) *Lever Brothers* v. *Associated Newspapers*, [1907] 2 K. B. 626. But a defendant cannot be interrogated as to what he meant by his words. *Heaton* v. *Goldney*, [1910] 1 K. B. 754.

(*f*) *Allhusen* v. *Labouchere*, 3 Q. B. D. 654; and see the concluding words of Order XXXI., r. 1; *In re Morgan*, 39 Ch. D. 316.

(*g*) *Pankhurst* v. *Wighton*, 2 T. L. R. 745; cf. *Hope* v. *Brash*, [1897] 2 Q. B. 188.

(*h*) *Rogers* v. *Lambert*, 24 Q. B. D. 573; *Pankhurst* v. *Hamilton*, 2 T. L. R. 682; cf. *Kennedy* v. *Dodson*, [1895] 1 Ch. 334.

which it is desired to establish the material facts in issue at the trial (*i*). Either party may interrogate as to any link in the chain of evidence necessary to substantiate his case (*k*). If the defendant wishes to pay money into court, he can interrogate the plaintiff as to the actual damage sustained, in order to have a guide as to the amount to pay in (*l*). So, too—in some cases—interrogatories are admissible as to matters which are only relevant in aggravation or mitigation of damages (*m*).

The party interrogating may put his whole case to his opponent if he thinks it wise to do so; he may also interrogate in full detail as to matters common to the case of both parties; but he is not entitled to obtain more than an outline of his opponent's case. He may interrogate as to "anything which can be fairly said to be material to enable him either to maintain his own case or to destroy the case of his adversary" (*n*). He can compel his adversary to disclose the facts on which he intends to rely, but not the evidence by which he proposes to prove those facts; for instance, he cannot, as a rule, ask his opponent to name the witnesses whom the latter intends to call at the trial (*o*).

But the mere fact that the answer will reveal the names of the witnesses has never been an objection to a question which is otherwise admissible. As Lord LANGDALE said in *Storey* v. *Lord Lennox* (*p*):—

"The defence here is that the letters may disclose the names of the witnesses and the evidence; and so indeed may every

(*i*) *Attorney-General* v. *Gaskill*, 20 Ch. D. 519.
(*k*) See *Jones* v. *Richards*, 15 Q. B. D. 439.
(*l*) *Frost* v. *Brook*, 23 W. R. 260; *Horne* v. *Hough*, L. R. 9 C. P. 135.
(*m*) See *Scaife* v. *Kemp*, [1892] 2 Q. B. 319; *Whittaker* v. *Scarborough Post*, [1896] 2 Q. B. 148.
(*n*) *Per* Lord ESHER, M.R., in *Hennessy* v. *Wright* (No. 2), 24 Q. B. D. at p. 447, n.
(*o*) *Eade* v. *Jacobs*, 3 Ex. D. 335; but see *Marriott* v. *Chamberlain*, 17 Q. B. D. 154; *Birch* v. *Mather*, 22 Ch. D. 629; *McColla* v. *Jones*, 4 T. L. R. 12; *Ashworth* v. *Roberts*, 45 Ch. D. 623.
(*p*) 1 Keen, 341.

discovery which the defendant may be required to give. In telling the truth, as he is bound to do, he may incidentally disclose to the plaintiff that which will enable the plaintiff to learn the names of the witnesses and the nature of the evidence; and, if this consequence could be used as a ground for resisting a discovery, one of the most extensively useful parts of the jurisdiction of the Courts would be lost."

A party may ask anything to make out his own case or answer his opponent's case; he is entitled to know precisely what is the charge made against him, and what is the case which he will have to meet. But he is not entitled to discover in what way his opponent intends to establish that charge (*q*).

Even in interrogating as to his own case, however, neither party must ask "fishing" questions, that is, questions which do not relate to some definite and existing state of circumstances, but are put merely in the hope of discovering something which may help the party interrogating to make out some case. Interrogatories must be confined to matters which there is good ground for believing to have occurred. Thus, where the plaintiff sued the defendant for a libel charging the former with blasphemy on a particular occasion, the defendant was not allowed to interrogate with the object of making the plaintiff admit that he had on other occasions said something very like the words he was alleged to have used on that occasion (*r*).

Interrogatories are not allowed as to the contents of written documents, unless it is admitted that such documents have been lost or destroyed (*s*). Nor will they be allowed to contradict a written document (*t*). But a

(*q*) *Hooton* v. *Dalby*, [1907] 2 K. B. 18; *Johns* v. *James*, 13 Ch. D. 370; *Ashley* v. *Taylor*, 37 L. T. 522; (C. A.) 38 L. T. 44; *Ridgway* v. *Smith & Son*, 6 T. L. R. 275.

(*r*) *Pankhurst* v. *Hamilton*, 2 T. L. R. 682; and see *per* COZENS-HARDY, M.R., in *Hooton* v. *Dalby*, [1907] 2 K. B. at p. 20; but see *Dalgleish* v. *Lowther*, [1899] 2 Q. B. 590.

(*s*) *Stein* v. *Tabor*, 31 L. T. 444; *Fitzgibbon* v. *Greer*, Ir. R. 9 C. L. 294.

(*t*) *Moor* v. *Robert*, 3 C. B. (N.S.) 671.

party may be asked what has become of a particular document, and if it has been lost or destroyed to set out the contents thereof (*u*).

Questions which tend to criminate the person interrogated may be asked, but he is not bound to answer them (*x*). This privilege, if claimed at all, can only be claimed in the affidavit filed in answer to the interrogatories (*y*). Nor is it any objection that the interrogatories will tend to criminate others, if they are put *bonâ fide* for the purposes of the action (*z*). It never has been an objection that answering the questions would expose the party interrogated or third persons to a civil action (*a*).

Objection may also be taken to an interrogatory on the ground that it is scandalous, that is, it alleges something which it is unbecoming for the Court to hear or contrary to good manners. For instance, allegations of crime or reflections on the moral character of individuals are scandalous, if not necessary to the action. But nothing that is material, however disgraceful it may be, is scandalous (*b*). The sole test is whether the fact alleged would be admissible to prove or disprove any material allegation (*c*).

Actions for the recovery of land are, as regards interrogatories, on the same footing as other actions (*d*). The plaintiff can interrogate the defendant in order to

(*u*) *Wolverhampton New Water Works Co.* v. *Hawksford*, 5 C. B. (N.S.) 703; *Dalrymple* v. *Leslie*, 8 Q. B. D. 5; *Lethbridge* v. *Cronk*, 44 L. J. C. P. 381; *Jones* v. *Monte Video Gas Co.*, 5 Q. B. D. 556; but see *Hall* v. *Truman*, 29 Ch. D. 307; *Morris* v. *Edwards*, 15 App. Cas. 309.

(*x*) *Alabaster* v. *Harness*, 70 L. T. 375.

(*y*) Order XXXI., r. 6.

(*z*) *McCorquodale* v. *Bell*, [1876] W. N. 39.

(*a*) *Tetley* v. *Easton*, 18 C. B. 643.

(*b*) *Fisher* v. *Owen*, 8 Ch. D. 645; *Allhusen* v. *Labouchere*, 3 Q. B. D., pp. 660, 661, 666; *National Association, etc.* v. *Smithies*, [1906] A. C. 434.

(*c*) *Per* Lord SELBORNE in *Christie* v. *Christie*, L. R. 8 Ch. 503.

(*d*) *Lyell* v. *Kennedy*, 8 App. Cas. 217; *Milbank* v. *Milbank*, [1900] 1 Ch. 376; *Miller* v. *Kirwan*, [1903] 2 Ir. R. 120.

prove steps in his title. But no interrogatory will be permitted if the answer might subject the defendant to a forfeiture. Thus, a tenant cannot be interrogated as to whether he has not broken the covenant of his lease prohibiting assignment or underletting (*e*), but he may be asked whether his term or interest has not expired by effluxion of time (*f*).

Again, leave may be refused on the ground that the subject of inquiry is not sufficiently material at that stage of the action. The Court will not, as a rule, allow interrogatories, which may injure the defendant and can only assist the plaintiff if he succeeds, to be administered before the right to relief has been established (*g*). Thus, where the defendant in an action for infringing a patent denied the infringement, interrogatories, designed to assist the plaintiff after he had established the infringement, were disallowed (*h*). But where the plaintiff sued for a declaration that the defendants were partners of her late husband, and interrogated them as to their drawings out of the business, it was held that the interrogatory must be answered (*i*). So, an executor, if required, must set out his accounts in his answer (*k*); and a mortgagee in possession who admits that the mortgagor has a right to redeem is bound to answer interrogatories as to the state of the accounts (*l*); for, in actions of account the defendant, even when he denies the plaintiff's title, must answer fully, even as to consequential matters of account. But this right must not be pressed too far. The Court will not allow the questions

(*e*) *Fane* v. *Atlee*, (1700) Eq. Ca. Ab. 77; *Uxbridge* v. *Staveland*, 1 Ves. Sen. 56; *Pye* v. *Butterfield*, 5 B. & S. 829; *Mexborough (Earl of)* v. *Whitwood Urban District Council*, [1897] 2 Q. B. 111.

(*f*) Wigram on Discovery, 81.

(*g*) See *per* COTTON, L.J., in *Fennessy* v. *Clark*, 37 Ch. D., at p. 187.

(*h*) *De la Rue* v. *Dickinson*, 3 K. & J. 388.

(*i*) *Saull* v. *Browne*, L. R. 9 Ch. 364; and see *Saccharin Corporation* v. *Anglo, etc. Works*, [1901] 1 Ch. 414.

(*k*) *Thompson* v. *Dunn*, L. R. 5 Ch. 573; *Alison* v. *Alison*, 50 L. J. Ch. 574.

(*l*) *Elmer* v. *Creasy*, L. R. 9 Ch. 69

if it is satisfied that they are only put in order to cause vexation or oppression (*m*). Thus, where the plaintiff sued the defendant for an account, alleging that the defendant was his agent, he was not allowed to compel the defendant to answer interrogatories as to what appeared to be the latter's private transactions (*n*). The Court said :—

"It would be monstrous that a man, by merely alleging that he had a share in the concern, which allegation was denied and had not been established, and whilst it was doubtful whether it would be established, could get the accounts of the defendant's private business and of his dealings with other people."

Even if the Master has allowed the interrogatories, the party interrogated may take steps to avoid answering. He may appeal from the Master to the Judge at chambers. He has a further appeal from the Judge at chambers to the Court of Appeal, and thence to the House of Lords. But unless there is some error of principle or any substantial injustice can be shown to have been done, the Court of Appeal will not interfere with the Judge's order. It protests against being called upon to settle interrogatories (*o*).

Again, he may apply to have them set aside (*p*), on the ground either that on the whole they are exhibited "unreasonably or vexatiously" or that any one or more or part or parts thereof is or are "prolix, oppressive, unnecessary or scandalous." Applications, however, are rarely made under this order. The more usual course is for the party interrogated to take any objection he may have to answer any particular interrogatory in his affidavit in answer. This he can do, even if he has raised it before (*q*).

(*m*) See, for example, *White & Co.* v. *Credit Reform Association, Ltd.*, [1905] 1 K. B., p. 659.
(*n*) *Great Western Colliery Co.* v. *Tucker*, L. R. 9 Ch. 376.
(*o*) *Per* LINDLEY, L.J., in *Peek* v. *Ray*, [1894] 3 Ch. at p. 286.
(*p*) Order XXXI., r. 7 ; *Oppenheim* v. *Sheffield*, [1893] 1 Q. B. 5 ; and see *Dalgleish* v. *Lowther*, [1899] 2 Q. B. 590.
(*q*) *Peek* v. *Ray*, [1894] 3 Ch. 282 ; *Fisher* v. *Owen*, 8 Ch. D. 645.

Interrogatories must be answered fully and clearly, and with a reasonable amount of detail (*r*). The answers may, however, be guarded and carefully qualified so long as both the admission and the qualification are clear and definite (*s*). But an answer which introduces irrelevant matter is insufficient (*t*). So, too, is an answer which is embarrassing, that is, which prevents the party interrogating from using it without having thrust upon him irrelevant matter as a part of it (*u*).

It is *primâ facie* a good answer to an interrogatory for the person interrogated to answer "I do not know anything about this matter of my own knowledge" (*x*), but before making this answer he is bound to examine all documents in his own possession from which the information could be readily obtained; he is also bound to make inquiries from such of his servants or agents who would naturally, in their capacity as such, have acquired such information (*y*). But he is not bound to make inquiries from his rivals in the trade, or indeed of any third person (*z*), still less of a discharged servant or agent. The mere fact that the investigation of the matter by the party interrogated or his servants or agents would involve great trouble and expense is no excuse for not answering, unless the trouble and expense thereby caused would be wholly out of proportion to the value of the information when obtained (*a*). Where the defendant in an action of libel has pleaded privilege, his

(*r*) *Per* BOWEN, L.J., in *Lyell* v. *Kennedy*, 27 Ch. D., at p. 28.
(*s*) *Malone* v. *Fitzgerald*, 18 L. R. Ir. 187.
(*t*) See *Pegler* v. *King*, L. R. 9 C. P. 9.
(*u*) *Willis* v. *Baddeley*, [1892] 2 Q. B. 324.
(*x*) *Per* BRETT, J., in *Phillips* v. *South*, L. R. 7 C. P. 287; *Field* v. *Bennett*, 2 T. L. R. 91, 122.
(*y*) *Per* NORTH, J., in *Rasbotham* v. *Shropshire, etc. Co.*, 24 Ch. D., at p. 113; *Alliott* v. *Smith*, [1895] 2 Ch. 111; *Bolckow* v. *Fisher*, 10 Q. B. D. 161; *Hall* v. *London and North Western Rail. Co.*, 35 L. T. 848.
(*z*) *Ehrmann* v. *Ehrmann*, [1896] 2 Ch. 611; *Welsbach, etc. Co.* v. *New Sunlight Co.*, [1900] 2 Ch. 1.
(*a*) *Hall* v. *London and North Western Rail. Co.*, *suprà*.

*bona fides* become material, and either party may interrogate the other with a view of proving or disproving malice (*b*). So, too, where the defendant in an action of libel or slander has pleaded that he published the words complained of "in good faith and without malice," or "in the honest belief that they were true," he may be asked what information he had at the date of publication that induced him to believe that the words were true, and what steps, if any, he had taken, before publishing the words, to ascertain whether they were true or not (*c*). He may also, as a general rule, be asked, "From whom did you obtain such information?"—unless the Court is satisfied that this interrogatory is not put *bonâ fide* for the purposes of the pending action, but with a view to future litigation (*d*). In actions against newspapers, however, this question in the absence of special circumstances is not allowed (*e*).

As a general rule, however, unless the state of mind of the party interrogated is in issue, he can only be asked as to matters which are within his own knowledge or that of his servants or agents; he cannot be interrogated as to his information and belief apart from such knowledge. *À fortiori*, he cannot be compelled to answer interrogatories asking as to his knowledge, information, or belief with regard to matters of fact, if he swears that he has no knowledge or information with regard to those matters except such as he has derived from privileged communications made to him by his solicitors or their agents; for since under those circumstances his knowledge and information are protected, so also is

(*b*) *Cooper* v. *Blackmore*, 2 T. L. R. 746; *Martin and Wife* v. *British Museum*, 10 T. L. R. 215; *Caryll* v. *Daily Mail Publishing Co., Ltd.*, 90 L. T. 307.

(*c*) *Elliott* v. *Garrett*, [1902] 1 K. B. 870; *Saunderson* v. *Baron von Radeck*, 119 L. T. Jo. 33 (H. L.).

(*d*) *White & Co.* v. *Credit Reform Association, Ltd.*, [1905] 1 K. B. 653; *Edmondson* v. *Birch & Co., Ltd.*, [1905] 2 K. B. 523.

(*e*) *Plymouth Mutual Co-operative Society, Ltd.* v. *Traders' Publishing Association, Ltd.*, [1906] 1 K. B. 403.

his belief when derived solely from such communications (*f*).

If the answers are insufficient or evasive, the party interrogating may by notice call on the opponent to show cause why he should not make and file a further and better affidavit in answer (*g*). The notice, which must specify the interrogatories or parts of interrogatories to which a better answer is required (*h*), should be given promptly (*i*). The Master has power to order a *vivâ voce* examination (*k*), but this is rarely done. If the answers contain irrelevant matter, which prevents the party interrogating from making a fair use of the answers, he may apply to have such matter struck out (*l*). Where the answers are used at the trial, any one or more or parts thereof may be put in, but if only part is put in, and the Judge is of opinion that answers not put in are so connected with those put in that the latter ought not to be used without the former, he may direct that all the answers which he thinks are material shall be put in (*m*).

The Rules of the Supreme Court do not apply to the procedure in divorce and other matrimonial causes (*n*), but the Probate, Divorce and Admiralty Division has, by the Judicature Act, 1873, the same powers as to discovery which were possessed by the old Courts of law and equity (*o*), and in such matters the Court will now follow the analogy of the Rules of the Supreme Court (*p*).

(*f*) *Lyell* v. *Kennedy* (No. 2), 9 App. Cas. 81 ; *Procter* v. *Raikes*, 3 T. L. R. 229; cf. *Procter* v. *Smiles*, 55 L. J. Q. B. 467, 527.

(*g*) Order XXX., r. 5.

(*h*) *Church* v. *Perry*, 36 L. T. 513; *Chesterfield Colliery* v. *Black*, 24 W. R. 783; *Anstey* v. *North and South Woolwich Subway Co.*, 11 Ch. D. 439.

(*i*) *Lloyd* v. *Morley*, 5 L. R. Ir. 74.

(*k*) Order XXXI., r. 11.

(*l*) For the penalty incurred by default in answering, see *post*, p. 646.

(*m*) Order XXXI., r. 24.

(*n*) Order LXVIII., r. 1 (d).

(*o*) *Harvey* v. *Lovekin*, 10 P. D. 122.

(*p*) In county courts the procedure, which is regulated by the

The Crown is entitled to discovery against a subject, but a subject is not entitled to discovery against the Crown (*q*). But a foreign Sovereign or State bringing an action in this country is in this respect on the same footing as a private individual (*r*). The rules as to interrogatories now apply to infants and their next friends and guardians *ad litem* (*s*). Interrogatories cannot be administered in a penal action (*t*), nor in any action for moneys forfeited under s. 60 of the Patents and Designs Act, 1907 (*u*).

### DISCOVERY OF DOCUMENTS.

Besides the discovery of facts which he can obtain by means of interrogatories, each party will in most cases desire to ascertain what material documents are in the possession of his opponents, and to take copies of such of them as are of importance. This he can do in the ways sanctioned by Order XXXI., the material rules of which will be found set out in the Appendix. The rules are the same for both the King's Bench and Chancery Divisions (*x*).

There are three distinct cases which must be dealt with separately, as the procedure in each case is different :—

(i.) It may be that one party has in his pleadings,

County Court Rules, 1903, is analogous to that of the High Court.

(*q*) *Attorney-General* v. *Newcastle Corporation*, [1897] 2 Q. B. 384.

(*r*) *South African Republic* v. *La Compagnie Franco-Belge*, [1898] 1 Ch. 190; *Prioleau* v. *United States, and Johnson*, L. R. 2 Eq. 659.

(*s*) Order XXXI., r. 29; overruling *Mayor* v. *Collins*, 24 Q. B. D. 361.

(*t*) *Martin* v. *Treacher*, 16 Q. B. D. 507; *Jones* v. *Jones*, 22 Q. B. D. 425; *Hobbs* v. *Hudson*, 25 Q. B. D. 232.

(*u*) 7 Edw. VII. c. 29; cf. *Saunders* v. *Wiel*, [1892] 2 Q. B. 18, 321.

(*x*) In the event of conflict between the practice of the two Divisions the Court will adopt whichever is the more convenient practice: *Newbiggin Gas Co.* v. *Armstrong*, 13 Ch. D. 310.

particulars, or affidavits referred to some document, and he cannot say that it is not material, as he relies on it himself. His opponent is in such a case entitled, without filing any affidavit or making any payment into Court, at once to give notice (*y*) that he will come and inspect that document, and take a copy of it if he thinks fit. And the party who has referred to the document must produce it for inspection, if he has it in his possession, at the time named in the notice; if he does not, he cannot himself put it in evidence at the trial, unless he can satisfy the judge that he had some sufficient reason for not producing it.

It is now sufficient to state in a pleading the effect of any relevant document, unless its precise terms are material (*z*). This rule is intended to give the other party the same advantage as if the documents were fully set out in the pleading or affidavit in which they were referred to (*a*), and for this purpose a mere general reference is enough (*b*).

Copies of the documents referred to cannot be inspected under this rule, but if the documents referred to are themselves copies, then they may (*c*). When certain entries only in a book are referred to, then those entries, but not the entire book, can be inspected (*d*). If a document is exhibited to an affidavit, then a party entitled to see the affidavit can inspect the exhibit (*e*). This does not apply, however, to exhibits which have been laid before the Court for the information of the

(*y*) Under Order XXXI., r. 15.
(*z*) Order XIX., r. 21.
(*a*) *Quilter* v. *Heatly*, 23 Ch. D. 42.
(*b*) *Smith* v. *Harris*, 48 L. T. 868.
(*c*) *Quilter* v. *Heatly*, *supra*.
(*d*) *Ibid.*
(*e*) *In re Hinchliffe*, [1895] 1 Ch. 117.

Court alone. Thus, if a plaintiff sues *in formâ pauperis*, the defendant cannot claim to see the case, laid by plaintiff before counsel, which is required by the rules to be exhibited to an affidavit and filed in the Court (*f*).

The party asking for inspection may apply for an order for production of these documents, if his notice to produce is disregarded or not properly complied with. And the *onus* lies on his opponent to show why the order should not be made (*g*). He does not by referring to a privileged document lose his right to set up his privilege (*h*), but if he does set up the claim after so doing, he cannot put it in evidence at the trial without special leave (*i*). It would seem, in spite of the terms of r. 18, that the term "affidavits," as used in the rule under discussion, includes an affidavit of documents under r. 12, and this is the practice of the King's Bench Division, and, although the contrary practice was followed in the Chancery Division, it has been decided that the same practice should be adopted there (*k*).

It would also seem that an affidavit in answer to interrogatories is within the rule (*l*). And so is an affidavit which is sworn but not filed. Particulars are included within the term "pleadings" (*m*).

(ii.) In the second place, it may be that one party knows, or thinks he knows, that the other has certain material documents in his possession, though they are not referred to in any pleading, particular, or affidavit. In such a case he may file an affidavit stating his belief, and the grounds of his belief, specifying the particular documents, and

(*f*) *Sloane* v. *Britain Steamship Co.*, [1897] 1 Q. B. 185.
(*g*) *Quilter* v. *Heatly*, 23 Ch. D. 42.
(*h*) *Roberts* v. *Oppenheim*, 26 Ch. D. 724.
(*i*) Order XXXI., r. 15.
(*k*) *Pardy's Mozambique Syndicate* v. *Alexander*, [1903] 1 Ch. 191.
(*l*) *Moore* v. *Peachey*, [1891] 2 Q. B. 707.
(*m*) *In re Fenner and Lloyd*, [1897] 1 Q. B. 667.

showing that they are material (*n*). Upon this the Master can order his opponent to state on affidavit whether he has or ever had any of those documents in his possession or power, and, if he ever had one of them and has not now, when he parted with it, and what has become of it (*o*). If in this affidavit he admits that he has any of the documents specified, and that it is material, it becomes at once a document referred to in an affidavit within the preceding paragraph.

Before this rule was made in 1893, an affidavit of documents was conclusive unless the opposite party could show from the terms of the affidavit, or of the documents referred to in it, or from the pleadings, that the deponent had in fact other relevant documents in his possession or power. But now, if the opposite party can swear an affidavit (*p*) that he believes the deponent to have in his possession some other material document or documents, giving reasons for his belief, he can put the deponent to answer specifically as to those particular documents.

(iii.) If a party does not know precisely what documents his opponent possesses, he may, without filing any affidavit, or naming any particular document, apply to a Master for an order (*q*) directing any opponent in the action to disclose on oath all documents which are, or have been, in his possession or power, relating to any matter in question in the action. A plaintiff can obtain such discovery from any necessary defendant (*r*); and one defendant can

(*n*) *White* v. *Spafford & Co.*, [1901] 2 K. B. 241.
(*o*) Order XXXI., r. 19A (3).
(*p*) *White* v. *Spafford & Co.*, *supra*.
(*q*) Under Order XXXI., r. 12.
(*r*) *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q. B. 124.

obtain such discovery from his co-defendant, if there be some right to be adjusted between them in the action (*s*). But whichever party makes the application must pay into court to the "Security for Costs Account," to abide further order, a sum of money to be fixed by the Master, usually £5 (*t*).

On the hearing of the application, the Master will order such discovery only when, and only so far as, he deems it necessary either for disposing fairly of the action or for saving costs (*u*). If he is satisfied that discovery is not necessary, he will refuse the application; if he deems it not necessary at the present stage of the action, he will adjourn the application as being premature. In other cases he will order either general discovery, or, if he thinks fit, discovery limited to certain classes of documents; thus, if particulars have been delivered, discovery will be limited to the issues as narrowed by the particulars (*x*).

The party against whom an order for discovery is made must make an affidavit disclosing all the relevant documents in his possession. Not only those documents which are evidence to prove or disprove any matter in question in the action are relevant. Every document must be disclosed which may either directly or indirectly enable either party to advance his own case or to damage the case of his adversary (*y*).

(*s*) *Shaw* v. *Smith*, 18 Q. B. D. 193; *James Nelson & Sons, Ltd.* v. *Nelson Line, Ltd.*, [1906] 2 K. B. 217.
(*t*) Order XXXI., r. 26.
(*u*) Order XXXI., r. 12; *Attorney-General* v. *North Metropolitan Tramways Co.*, [1892] 3 Ch. 70; *In re Wills' Trade Marks*, [1892] 3 Ch. 201, 207.
(*x*) *Yorkshire Provident Co.* v. *Gilbert*, [1895] 2 Q. B. 148.
(*y*) *Per.* BRETT, L.J., in *Compagnie Financière du Pacifique* v. *Peruvian Guano Co.*, 11 Q. B. D. at p. 63.

A defendant cannot obtain discovery of documents from a co-defendant unless there is an issue between them pending in the action (*z*); nor, it would appear, can a plaintiff obtain discovery of documents from a third party brought in by the defendants, unless the third party has liberty to oppose the plaintiff's claim (*a*). A defendant has been held entitled to production of documents, although in contempt (*b*).

The rules of Court as to discovery now apply to infant plaintiffs and defendants and their next friends and guardians *ad litem*, in the same way as to other litigants (*c*).

No order for discovery will be made against the defendant in an action for the recovery of demised premises on the ground of an alleged forfeiture by breach of covenant (*d*).

### *Affidavit of Documents.*

The party against whom a general order for discovery is made must make an affidavit and specify in the schedules to it all the documents which are, or have been, in his possession, material to the matters in dispute in the action. He must describe them with particularity sufficient to identify them hereafter should the Court think fit to order any of them to be produced (*e*). He must specify all material documents, whether he objects to produce them or not. Any document which he sets out he

(*z*) *Brown* v. *Watkins*, 16 Q. B. D. 125.
(*a*) *Eden* v. *Weardale, etc. Co.*, 34 Ch. D. 223.
(*b*) *Haldane* v. *Eckford*, L. R. 7 Eq. 425.
(*c*) Order XXXI., r. 29.
(*d*) *Mexborough* (*Earl of*) v. *Whitwood Urban District Council*, [1897] 2 Q. B. 111; and see *Miller* v. *Waterford Harbour Commissioners*, [1904] 2 Ir. R. 421.
(*e*) *Taylor* v. *Batten*, 4 Q. B. D. 85; *Bewicke* v. *Graham*, 7 Q. B. D. 400; *Morris* v. *Edwards*, 15 App. Cas. 309; *Budden* v. *Wilkinson*, [1893] 2 Q. B. 432; *Milbank* v. *Milbank*, [1900] 1 Ch. 376.

thereby admits to be material. Hence he should make no reference in his affidavit to any document which he honestly believes to be irrelevant to the action. Every document which will throw any light on any part of the case is material, and must be disclosed. If some portion of a document or book is relevant and the rest not, he must specify which portions he admits to be relevant; he has the document or book in his possession, and he must therefore take upon himself the responsibility of stating on oath which parts do and which do not relate to the matters in question (*f*).

The party who makes an affidavit of documents must also specify in it which of the documents disclosed he objects to produce, and state the grounds for his objections. He may lawfully refuse to produce (though not, as a rule, to disclose) documents of various classes which we now proceed to discuss.

### DOCUMENTS PRIVILEGED FROM PRODUCTION.

A party who is ordered to make a general discovery of all material documents in his possession must disclose every document which is relevant to any issue in the action. But it does not follow that he will be compelled to produce for the inspection of his opponent every document thus disclosed. If the deponent objects to produce any document, he must set out in the body of his affidavit the grounds on which he bases his objection (*g*).

As every relevant document is *primâ facie* open

(*f*) *Yorkshire Provident Co.* v. *Gilbert*, [1895] 2 Q. B. 148, 153.
(*g*) *Heugh* v. *Garrett*, 44 L. J. Ch. 305.

to inspection, the claim of privilege must be clearly made (*h*). If it be upheld, the deponent cannot be compelled to show the document to his opponent (*i*). He may nevertheless produce it at the trial if he thinks fit; if he does not, his opponent will not be able to make any use of it unless he can in some way obtain admissible secondary evidence of its contents.

He may claim privilege for any document which falls within any of the following classes :—

(i.) Documents that relate solely to the party's own title;

(ii.) Documents which relate solely to his own case;

(iii.) Communications passing between him and his legal advisers;

(iv.) Documents prepared with a view to litigation;

(v.) Documents the production of which would tend to criminate the deponent;

(vi.) Documents which though physically in the possession of the deponent are the property of a third person who forbids their production;

(vii.) Documents the production of which would be prejudicial to public interests.

(i.) *Documents that relate solely to the party's own title.*

A party is not bound to produce any documents which he can swear relate solely to his own title to real property and contain nothing which tends to establish his opponent's title (*k*). He need not also swear that they

(*h*) *Per* BLACKBURN, J., in *Hutchinson* v. *Glover*, 1 Q. B. D. 141.
(*i*) *Clegg* v. *Edmondson*, 22 Beav. 125, 167.
(*k*) *Egremont Burial Board* v. *Egremont Iron, etc. Co.*, 14 Ch. D. 158; *Ingilby* v. *Shafto*, 33 Beav. 31; *Minet* v. *Morgan*, L. R. 8 Ch. 361.

contain nothing to impeach his own case (*l*). But if they are material to his opponent's case he must disclose them, even when the deponent is a purchaser for value without notice (*m*). Thus, as a general rule, a mortgagee cannot be compelled to produce his security (including title deeds deposited with him) except on payment of his principal, interest and costs (*n*); nor, if he purchases the equity of redemption, can he be compelled to produce the conveyance to him (*o*). Where, however, a mortgagee purchases the equity from a trustee, with notice of the trust, he is not entitled to refuse production of the conveyance to him in an action brought by the *cestui que trust* for redemption and reconveyance (*p*). When any deed, whether security for a mortgage (*q*) or not (*r*) is impeached, it must be produced, but merely charging the person who has it with fraud will not be enough (*q*). In the case of a mortgage executed after December 31, 1881 (*s*):—

"A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or extracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee."

(ii.) *Documents which relate solely to his own case.*

The party who is seeking discovery has no right to see documents which the deponent swears relate solely to his own case, and contain nothing which tends to impeach it or to support the case of his opponent (*t*).

(*l*) *Morris* v. *Edwards*, 15 App. Cas. 309; *Johnson* v. *Whittaker*, 90 L. T. 535.
(*m*) *Ind, Coope & Co.* v. *Emmerson*, 12 App. Cas. 300.
(*n*) *Chichester* v. *Marquis of Donegall*, L. R. 5 Ch. 502.
(*o*) *Greenwood* v. *Rothwell*, 7 Beav. 291.
(*p*) *Smith* v. *Barnes*, L. R. 1 Eq. 65.
(*q*) Cf. *Republic of Costa Rica* v. *Erlanger*, L. R. 19 Eq. 44.
(*r*) *Bassford* v. *Blakesley*, 6 Beav. 131.
(*s*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 16 (1).
(*t*) *Bewicke* v. *Graham*, 7 Q. B. D. 400; *Budden* v. *Wilkinson*,

As KNIGHT BRUCE, V.-C., said in *Combe* v. *Corporation of London* (*u*):—

"If it be with distinctness and positiveness stated in an answer that a document forms or supports the defendants' title, and is intended to be or may be used by him in evidence accordingly, and does not contain anything impeaching his defence or forming or supporting the plaintiff's title or the plaintiff's case, that document is, I conceive, protected from production, unless the Court sees upon the answer itself that the defendant erroneously represents or misconceives its nature; but where it is consistent with the answer that the document may form the plaintiff's title or part of it, may contain matter supporting the plaintiff's title or the plaintiff's case, or may contain matter impeaching the defence, then I apprehend the document is not protected; nor I apprehend is it protected if the character ascribed to it by the defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness."

(iii.) *Communications passing between a client and his legal advisers.*

Any document prepared by the deponent to enable his solicitor to advise him, or to obtain an opinion from counsel, is privileged from production (*x*), whether prepared before or after the litigation was contemplated (*y*). And so is any document prepared by the deponent's solicitor with a view to the pending or some previous litigation (*z*), and any opinion of counsel is similarly privileged (*a*).

But when in an action it is alleged with some show of reason that the defendant has been guilty of a crime, or of fraud not amounting to a crime, communications between him and his solicitor relating to the alleged crime, or fraud, or to its subject-matter, are not privileged

[1893] 2 Q. B. 432; *Frankenstein* v. *Gavin's Cycle, etc., Co.*, [1897] 2 Q. B. 62; *Attorney-General* v. *Newcastle-upon-Tyne Corporation*, [1899] 2 Q. B. 478; cf. *Hope* v. *Brash*, [1897] 2 Q. B. 188.

(*u*) 1 Y. & C. C. C. 631.

(*x*) *Lowden* v. *Blakey*, 23 Q. B. D. 332.

(*y*) *Minet* v. *Morgan*, L. R. 8 Ch. 361.

(*z*) *Calcraft* v. *Guest*, [1898] 1 Q. B. 759; *Goldstone* v. *Williams*, [1899] 1 Ch. 47; *Ainsworth* v. *Wilding*, [1900] 2 Ch. 315.

(*a*) *Sloane* v. *Britain Steamship Co.*, [1897] 1 Q. B. 185; *Lowden* v. *Blakey*, *supra*.

from production merely because they passed between solicitor and client, even though it be not alleged that the solicitor was a party to the alleged crime or fraud (*b*). Once a communication or document is privileged under this head, it is always privileged, whether made with reference to the existing action or to a previous one (*c*). This privilege does not extend to persons who are not barristers or solicitors. "Professional advice in England is confined to legal advice" (*d*).

(iv.) *Documents prepared with a view to litigation.*

All documents which have come into existence for the information of the deponent's solicitor to enable him to prosecute or defend some contemplated or future litigation are privileged. Thus, transcripts of notes of an interview between deponent's employee and a proposed witness, and a statement of the facts intended for his solicitor's guidance, are privileged (*e*). Nor can an opponent claim to see the other party's opinions, proofs, briefs, draft pleadings, etc. But he can see the indorsement of a brief (*f*). Again, the opponent is, as a rule, entitled to see a copy of a document which was obtained for the purpose of the action when the original can be put in evidence against him (*g*).

The privilege only exists with regard to documents procured for the purpose of a specific action, and not those procured with a view to litigation generally (*h*). But the

(*b*) *Postlethwaite* v. *Rickman*, 35 Ch. D. 722; *Williams* v. *Quebrada*, [1895] 2 Ch. 751; *R.* v. *Cox*, 14 Q. B. D. 153; *Bullivant* v. *Attorney-General for Victoria*, [1901] A. C. 196.

(*c*) *Bullock* v. *Corry*, 3 Q. B. D. 356; *Branford* v. *Branford*, 4 P. D. 72; *Pearce* v. *Foster*, 15 Q. B. D. 114; *In re Strachan*, [1895] 1 Ch. 439; and see generally on this subject, *ante*, p. 231.

(*d*) *Per* JESSEL, M.R., in *Slade* v. *Tucker*, 14 Ch. D. at p. 827.

(*e*) *Southwark Water Co.* v. *Quick*, 3 Q. B. D. 315.

(*f*) *Walsham* v. *Stainton*, 2 H & M. 1; *Nichol* v. *Jones*, 2 H. & M. 588.

(*g*) See *Chadwick* v. *Bowman*, 16 Q. B. D. 561; *Wright* v. *Vernon*, 22 L. J. Ch. 447.

(*h*) See *Westinghouse* v. *Midland Rail. Co.*, 48 L. T. 462.

action need not have been commenced, nor need it be the action in which the order for discovery has been made (*i*). *A fortiori*, documents which have come into existence after the commencement of the proceedings to enable the solicitor to advise his client or to obtain evidence or otherwise conduct the case are privileged (*k*).

The documents need not be obtained by the solicitor; it is sufficient that they have been obtained by his direction, even if obtained by the deponent himself (*l*).

But a copy of a document, which, if in the possession of a litigant, would not be privileged from production, is not privileged merely because it has been obtained by his solicitor for the purposes of defence to an action; a collection of documents so obtained will, however, be privileged, especially if the production would give a clue to the solicitor's opinion and advice to his client (*m*). Thus, where four anonymous letters had been received, two by the plaintiff and one each by her counsel and solicitor, the last two were held privileged (*n*); the ground being that they were information received by the counsel and solicitor for promoting their client's case, and that the letters were sent to them in compliance with a request implied by their position. Nothing turned on the letters being anonymous.

When a solicitor holds a document for his client he cannot, against the will of the client, be compelled to produce it by a person who has an equal interest in it with his client (*o*). But a solicitor cannot refuse to produce a document if the client himself could not

(*i*) *Wheeler* v. *Le Marchant*, 17 Ch. D. 675.
(*k*) *M'Corquodale* v. *Bell*, 1 C. P. D. 471; *Southwark Water Co.* v. *Quick*, *supra*.
(*l*) *Wheeler* v. *Le Marchant*, *supra*; cf. *per* COTTON, L.J., in *Lyell* v. *Kennedy*, 23 Ch. D. 404.
(*m*) *Chadwick* v. *Bowman*, 16 Q. B. D. 561; *Lyell* v. *Kennedy*, 27 Ch. D. 1.
(*n*) *Young* v. *Holloway*, 12 P. D. 167.
(*o*) *Newton* v. *Chaplin*, 10 C. B. 356.

refuse to do so (*p*). The privilege does not extend to communications passing between co-defendants (*q*).

(v.) *Documents the production of which would tend to criminate the deponent.*

This subject has already been fully discussed under the head of "Privilege of Witnesses" (*r*). The deponent will not be forced to produce any document which he swears clearly and distinctly will tend to criminate him (*s*). But he cannot refuse to disclose it on that ground, for he must take the objection in his affidavit of documents (*t*).

(vi.) *Documents which, though physically in the possession of the deponent, are the property of a third person who forbids their production.*

Thus, if a solicitor is a party to an action, he will not be forced to produce documents in his possession solely as solicitor for a client (*u*).

The right to deal with documents will warrant an order for their production; and therefore a party will be ordered to produce documents of his which are in the possession of his agent or of his past or present solicitor. But in such a case the order will contain liberty to apply in case the party cannot obtain the documents, lest the order be made a means of oppression (*x*). The fact that the party makes a claim for negligence against his solicitor makes no difference (*y*); and a solicitor's

(*p*) *Bursill* v. *Tanner*, 16 Q. B. D. 1.
(*q*) *Rochefoucauld* v. *Bousetad*, [1897] 1 Ch. 196; *Tobakin* v. *Dublin Southern Tramways Co.*, [1905] 2 Ir. R. 58.
(*r*) See *ante*, p. 221.
(*s*) *Roe* v. *New York Press*, 75 L. T. Jo. 31.
(*t*) *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q. B. 130; *National Association, etc.* v. *Smithies*, [1906] A. C. 434.
(*u*) *Procter* v. *Smiles*, 2 T. L. R. 474; *Ward* v. *Marshall*, 3 T. L. R. 578.
(*x*) *Lewis* v. *Powell*, [1897] 1 Ch. 678.
(*y*) *Ibid.*

ordinary lien is no defence to an order for production (*z*). Where a contract has been entered into with an agent of a foreign principal and the agent brings an action in his own name, the defendant can indirectly obtain discovery to the same extent as if the principal were a party; for though the Court cannot make an order for discovery on him, it can order that the plaintiff shall not proceed with the action until the principal has done that which, if a party to the action, he would have been ordered to do (*a*). But a party cannot be ordered to produce the private books of his agent (*b*) or solicitor (*c*). Where an agent for the party against whom the application is made possesses the documents jointly with other persons, no order to produce will be made, but the party will be compelled to disclose by answer the information which may be obtained by inspecting the documents. And the same rule applies where the documents are in the possession of the party jointly with others. As Lord COTTENHAM, in *Taylor* v. *Rundell* (*d*), said:—

"It is true that the rule of Court, adopted from necessity, with reference to the production of documents, is, that if a defendant has a joint possession of a document with somebody else who is not before the Court, the Court will not order him to produce it, and that for two reasons: one is, that a party will not be ordered to do that which he cannot or may not be able to do; the other is, that another party not present has an interest in the document which the Court cannot deal with. But that rule does not apply to discovery, in which the only question is, whether as between the plaintiff and the defendant the plaintiff is entitled to an answer to the question he asks; for if he is, the defendant is bound to answer it satisfactorily, or, at least, show the Court that he has done so as far as his means of information will permit."

When privilege is claimed on this ground the party must satisfy the Court as to the nature of the joint ownership (*e*). The mere fact that a person not before

(*z*) *Hope* v. *Liddell*, 20 Beav. 438.
(*a*) *Willis* v. *Baddeley*, [1892] 2 Q. B. 324.
(*b*) *Airey* v. *Hall*, 2 De G. & S. 489.
(*c*) *O'Shea* v. *Wood*, [1891] P. 287.
(*d*) Cr. & Ph. 104; cf. *Clinch* v. *Financial Corporation*, L. R. 2 Eq. 271.
(*e*) *Bovill* v. *Cowan*, L. R. 5 Ch. 495.

the Court has an interest in documents is no ground for resisting production (*f*); but if a defendant in a suit relating to his own personal transactions has made entries of such transactions in the books of a partnership, he cannot be compelled to produce such books without the consent of his partner (*g*).

Where one partner brought an action in the firm's name, giving his co-partner, who disapproved of the action, an indemnity against costs, and the latter declined to join in an affidavit of documents, it was held he could be attached for contempt (*h*).

So, too, the secretary of a company cannot as a rule be compelled to produce the documents of his company if the directors do not consent. It is otherwise if the company or directors be the defendants. As PAGE WOOD, V.-C., said, in *Clinch* v. *Financial Corporation*:—

"But these documents, though in substance they may be the property of the bank, are in the possession or power of the directors, who are the only persons who can give an order for their production. The attempt has often been made in one way or the other to escape the personal order for production, on the ground of the ownership of the documents being in a corporate or partnership body. . . . But it has always been decided that the parties must give all the information in their power, even if the documents be not in their possession in this sense, that they cannot be produced without an order for the purpose, because they are in the joint possession of the directors and others. The Court says, if you have any possession—that is enough. There may be grounds for not producing; but even then you must give discovery" (*i*).

Merely heading a document "Confidential" will not protect it from discovery (*k*), and consequently letters written to and in the possession of a party to the suit will, if material, be ordered to be produced, even if they are marked "Private and confidential," and the writer objects to their production; but the party claiming production must undertake not to use them for any collateral

(*f*) *Kettlewell* v. *Barstow*, L. R. 7 Ch. 693.
(*g*) *Hadley* v. *McDougall*, L. R. 7 Ch. 312.
(*h*) *Seal* v. *Kingston*, [1908] 2 K. B. 579.
(*i*) L. R. 2 Eq. at p. 273.
(*k*) *Per* BOVILL, C.J., in *Mahony* v. *National Widows Life Assurance Fund*, L. R. 6 C. P. at pp. 255, 256.

object (*l*). If documents, whether so marked or not, are confidential, a *primâ facie* case for production must be made out before the Court will order production, but wherever fraud is pleaded, all documents which would throw any light on the alleged fraud ought to be produced (*m*).

(vii.) *Documents the production of which would be prejudicial to public interests.*

This subject has already been dealt with under the heading of Privilege of Documents (*n*). The head of a department alone can claim this privilege (*o*), but it is not necessary that he personally shall claim it, so long as the Court is satisfied that the mind of the responsible person has been brought to bear on the matter (*p*).

So far we have dealt with the practice as to the privilege of documents in actions brought in the King's Bench and Chancery Divisions of the High Court. Closely analogous is the practice as to the inspection of documents under the control of the judges in Lunacy. It was thus stated by LINDLEY, L.J. (*q*):—

"It is not the practice in lunacy to produce documents in the office to any one who wants to see them. No one is allowed to see them without an order of one of the masters or of a judge in lunacy: see *Re Silcock's Lunacy* and *In re Wood*. A person who has no interest except curiosity to see such documents is not allowed to see them. On the other hand, any one who can satisfy the master or judge that he desires to see such documents for any reasonable and proper purpose is allowed to see them, provided always, if the lunatic is living, that he is not prejudiced thereby. If the lunatic is dead, the cases of *In re Wood*, *In re Ferrior*, and *In re Smyth* show that, if the applicant wants to see documents in the custody

(*l*) *Hopkinson* v. *Lord Burghley*, L. R. 2 Ch. 447.
(*m*) *Mahony* v. *National Widows' Life Assurance Fund*, L. R. 6 C. P. 252.
(*n*) See *ante*, pp. 241, 273; and see *Admiralty Commissioners* v. *Aberdeen Steam Trawling Co.*, [1909] S. C. 335.
(*o*) *Beatson* v. *Skene*, 5 H. & N. 838.
(*p*) *Kain* v. *Farrer*, 37 L. T. 469; *Hennessy* v. *Wright*, 21 Q. B. D. 509; *In re Joseph Hargreaves*, [1900] 1 Ch. 347.
(*q*) *In re Strachan*, [1895] 1 Ch. at pp. 443, 444.

of the Court, in order to make good a claim to the lunatic's property, such a purpose is *primâ facie* sufficient to induce the Court to allow inspection, even although the request is opposed by a rival litigant. Nor have I found any case in which an application by such a person, for such a purpose, has been made and refused. But it is obvious that there are some exceptions to this general rule. The Court would not, under any circumstances, make an order for the inspection of the reports which are confidentially made to the Court by its own medical advisers. But, with this exception, and possibly some others which do not occur to me at the moment, the general rule is to allow inspection by any person claiming an interest in the property of a deceased lunatic or alleged lunatic, who can satisfy the Court that he wants inspection for some reasonable and proper purpose.

The fact that the documents are of such a kind that a litigant who had them could not be compelled to produce them does not, as a matter of law, disentitle his opponents from seeing them. As a matter of law, as distinguished from a matter which the Court ought to consider in the exercise of its discretion, privilege is no bar to inspection in such a case as I am now considering."

## PRODUCTION AND INSPECTION OF DOCUMENTS.

If an affidavit of documents be in the proper form, it is as a rule conclusive. No affidavit in reply to it will be permitted, nor can the deponent be cross-examined upon it before the trial. The affidavit, therefore, should be full (*r*), and will be strictly construed. If, however, the party seeking discovery believes that the deponent has in his possession documents which are not referred to in the affidavit, he may apply for leave to interrogate him (*s*). The interrogatory must be as to specific documents, and must not be general in its terms. But the course more usual now is to proceed under Order XXXI., r. 19A. (*t*).

Again, if it can be shown from the affidavit of

(*r*) *Per* COTTON, L.J., in *Gardner* v. *Irvin*, 4 Ex. D. at p. 53.

(*s*) See judgment of BRETT, L.J., in *Jones* v. *Monte Video Gas Co.*, 5 Q. B. D. 556; *Hall* v. *Truman*, 29 Ch. D. 307; but see *Morris* v. *Edwards*, 15 App. Cas. 309.

(*t*) See *ante*, pp. 628, 629.

documents itself, or from the documents disclosed in it, or from any admission on his pleadings, that the deponent has in his possession any material document which he has not disclosed, a further affidavit will be ordered (*u*)

A master at chambers may at any stage of the action order any party to produce such of the documents in his possession or power as the master shall think right; and may deal with such documents, when produced, in such manner as shall appear just (*x*). It is on an application under this rule that the parties obtain a decision as to the validity of a claim of privilege.

Moreover, a master may make an order for the inspection of any document in such place and in such manner as he may think fit, provided such inspection be necessary for disposing fairly of the action, or will save costs (*y*). The party producing any book or document for the inspection of his opponent may seal or cover up any part which he can swear is not material to any issue in the action.

The inspecting party is entitled to make a copy of any document produced to him (*z*). In a proper case (*e.g.*, when one party denies that he wrote an important document which purports to be in his handwriting), the master will order the party in possession of the document to permit his opponent

(*u*) *Welsh Steam Coal Collieries, Ltd.* v. *Gaskell*, 36 L. T. 352; *Johnson* v. *Smith*, *ibid.*, 741; *Attorney-General* v. *Emerson*, 10 Q. B. D. 191; *Frankenstein* v. *Gavin's Cycle, etc., Co.*, [1897] 2 Q. B. 62; *Kent Coal Concessions* v. *Duguid*, 25 T. L. R. 345.

(*x*) Order XXXI., r. 14.

(*y*) *Ibid.*, r. 18.

(*z*) *Ormerod* v. *St. Georges*, [1905] 1 Ch. 505; *Pratt* v. *Pratt*, 47 L. T. 249; *Bevan* v. *Webb*, [1901] 2 Ch. at p. 74; followed in *Norey* v. *Keep*, [1909] 1 Ch. 561.

to take photographic or facsimile copies of it—of course, at his own expense (*a*).

The privileged or irrelevant parts of documents which also contain unprivileged relevant matters may be sealed up on production (*b*). Thus, part of a pedigree was allowed to be sealed up on the defendants filing an affidavit that the part so sealed up related to their title and not to the plaintiffs' (*c*); but when parts which might be thus concealed are so interspersed with parts which are producible that sealing up is impossible, then, except in extraordinary cases, no order to produce will be made (*d*). Where such sealing up would interfere with the conduct of his business, or be otherwise oppressive, the party producing documents may simply cover up the irrelevant portions, provided he states upon oath that no relevant portions have been covered up (*e*).

The order usually made is for the party, his solicitors and agents, to inspect the documents. The usual rule of the Court of Chancery was that witnesses were not allowed to inspect documents before the hearing (*f*). But it has been held that a confidential agent whose assistance is necessary to carry on the suit may inspect, although he is a witness in the cause (*g*). If the solicitor deems it necessary in the interests of his client, he may instruct counsel to attend and inspect the documents with him. When one person was named on the record as the agent of the plaintiffs (a foreign republic) in this country, the defendants were required to produce their documents to a different person, who was stated in

(*a*) *Davey* v. *Pemberton*, 11 C. B. (N.S.) 628; *Lewis* v. *Earl of Londesborough*, [1893] 2 Q. B. 191.
(*b*) See *Pardy's Syndicate* v. *Alexander*, [1903] 1 Ch. 191.
(*c*) *Kettlewell* v. *Barstow*, L. R. 7 Ch. 693; and see *Graham* v. *Sutton*, [1897] 1 Ch. 761; *Pickering* v. *Pickering*, 25 Ch. D. 247.
(*d*) *Churton* v. *Frewen*, 2 Dr. & Sm. at p. 394.
(*e*) *Graham* v. *Sutton*, *supra*.
(*f*) *Boyd* v. *Petrie*, L. R. 3 Ch. 818.
(*g*) *Attorney-General* v. *Whitwood Local Board*, 40 L. J. Ch 592.

the affidavit of the plaintiffs' solicitor to be their agent for the purposes of the suit (*h*). An order may be made on special grounds for any other person (besides the solicitor or agent of the party) to inspect (*i*). Thus the assistance of surveyors will be allowed in mining actions (*k*), of scientific persons in patent actions (*l*), and of accountants when complicated accounts are involved (*m*).

Again, it must be observed that, where the plaintiff's title to relief is denied by the defendant, the defendant ought not to be compelled to produce all documents, but only those which are necessary or material to the question to be decided at the hearing or trial. This principle was acted upon by the Court of Chancery, and has been substantially adopted in r. 20 of Order XXXI., and is constantly applied by the High Court (*n*).

An inspection ought not, of course, to be granted when it appears to be sought, not *bonâ fide* for the pending action, but to assist the applicant to bring an action against a third person (*o*); nor will a party be permitted to make public, information which he has obtained from the inspection of his opponent's documents (*p*).

The Court will not compel a person, who is not a party to the suit, to produce a document for inspection (*q*), unless he has obtained it from a party to the suit, or holds it in the nature of a trust for such party (*r*). Where such a person holds independently, and by a title paramount to the title of the party, he will not be

(*h*) *Republic of Costa Rica* v. *Erlanger*, L. R. 19 Eq. 44.
(*i*) *Boyd* v. *Petrie*, *supra*.
(*k*) *Swansea Rail. Co.* v. *Budd*, L. R. 2 Eq. 274.
(*l*) *Bonnardet* v. *Taylor*, 1 J. & H. 386.
(*m*) *Lindsay* v. *Gladstone*, L. R. 9 Eq. 132.
(*n*) *Rowcliffe* v. *Leigh*, 6 Ch. D. 256; *Verminck* v. *Edwards*, 29 W. R. 189.
(*o*) *Temperley* v. *Willett*, 6 E. & B. 380.
(*p*) *Williams* v. *Prince of Wales' Life Assurance Co.*, 23 Beav. 338; cf. *Hopkinson* v. *Lord Burghley*, L. R. 2 Ch. 447.
(*q*) *Cocks* v. *Nash*, 9 Bing. 721.
(*r*) *Doe* v. *Roe*, 1 M. & W. 207.

subject to an order for inspection. In one case, STUART, V.-C., refused to order an executor to produce certain cheques of his testator which were at the date of the application in the possession of the banker on whom they were drawn (*s*).

Rule 7 of Order XXXVII. provides that—

"The Court or a judge may in any cause or 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 or judge 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 hearing or trial" (*t*).

This rule does not give a litigant the right to obtain discovery which he did not previously possess against persons who are not parties to the action. Its object is to facilitate the production of documents on the hearing of motions, petitions, etc. (*u*). It does not, it is submitted, entitle a party to an order that a third person should produce a material document to him or his solicitor before the trial. The person on whom such an order is made must attend with the specified documents at the time and place named. But he can then raise any legal objection to the production of all or any of the documents (*x*). An order under this rule may be made *ex parte* (*y*).

Any party, who fails to answer interrogatories or to discover or produce or allow inspection of documents when ordered so to do, is liable to be attached, and, if a plaintiff, to have his action dismissed for want of prosecution; if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if

(*s*) *Bayley* v. *Cass*, 10 W. R. 370.
(*t*) See as to Bankers' Books, *ante*, p. 374.
(*u*) *Elder* v. *Carter*, 25 Q. B. D. 194.
(*x*) See *Williams* v. *Frere*, [1891] 1 Ch. 323; *Central News Co.* v. *Eastern News Telegraph Co.*, 53 L. J. Q. B. 236.
(*y*) *Williams* v. *Frere*, *supra*.

he had never pleaded (*z*). But this highly penal provision will only be enforced in the last resort. Before making any application of this kind, the other party should obtain a peremptory order insisting on such discovery being made within a time specified in the order.

The County Courts have, under the County Court Rules, 1903, powers of granting and enforcing inspection and production of documents, in a similar manner to the procedure in the High Court.

(*z*) Order XXXI., r. 21; *Salomon* v. *Hole*, 53 W. R. 588.

## CANADIAN NOTES.

### DISCOVERY.

"The granting of a commission to take evidence is in the discretion of the judge to whom application is made, but where strong reasons are shown to the Court of Appeal why the commission should not have been granted, such as failure to exercise due diligence on the part of the party applying, or unreasonable delay caused to the opposite party, the discretion will be reviewed."

Where the case had been twice tried and was coming on for the third trial, where it appeared that two commissions had already been obtained and evidence taken under each, that the facts sought to be established had been previously known to or their existence suspected by the party applying, where it was not alleged that the evidence sought to be obtained was material and necessary, and that the party could not safely proceed to trial without it, but only that the examination it was believed would be effectual, and where no defence based upon the facts sought to be established had been set up and no application made to amend pleadings to set it up, it was held that the order for the commission should be set aside. *McLeod* v. *Insurance Companies*, 32 N. S. R. 481.

Where a judge in chambers has ordered the inspection and discovery of documents, the Court will not interfere unless it appears that such order has not been made with due discretion with reference to the facts before him. *Commercial Bank of Canada* v. *Great Western Railway*, 25 U. C. Q. B. 335.

A commission issued out of the Supreme Court of New Brunswick to two commissioners to examine witnesses abroad, one of them the nominee of the plaintiff and the other of the defendant. Some of the interrogatories were not administered according to the terms of the commission, and one of the commissioners refused to certify, or at least did not certify, to the return. It was held that the failure to administer the interrogatories according to the terms of the commission was a substantial objection and rendered the evidence incapable of being received, but the majority of the Court held that the refusal of one of the commissioners to sign the certificate to the return was not fatal, that part of the requirement being merely directory. GWYNNE, J., held, dissenting from the decision on this point, that this also was a fatal defect, that the return should have been signed by both commissioners, and not having been so signed was void, and the evidence under it would not be received. *Millville Mutual Marine Insurance Co.* v. *Driscoll*, 11 S. C. R. 183.

A commission to take evidence issued to one G., of the city of Hartford, in the United States, to take the evidence of S. of the same city. It was returned with an affidavit of the commissioner of due execution, sworn at Hartford before the mayor of that city, but there was nothing in the affidavit to show that the witness was examined there. This was held sufficient; and *quære* whether it is essential that the affidavit shall be sworn before the mayor, etc., of the place where the evidence is taken. *Stebbins* v. *Anderson*, 22 U. C. Q. B. 239.

A commission for the examination of witnesses, and directed to two persons named, provided as follows: "And we give each of you full power and authority to administer such oath or affirmation to the other." The sole acting commissioner, instead of being sworn before

his fellow commissioner, was sworn before an ordinary commissioner of the court. It was held that the commission was admissible in evidence and doubted whether the plaintiff could impeach the validity of the commission, having by his counsel attended before the commissioner sworn in this way, and taken part in the examination of the witness produced, without further objection than refusing to consent to the mode of administering the oath. *Heyland* v. *Scott*, 19 U. C. C. P. 165.

In *Tenant* v. *Brown et al.*, 31 N. B. 408, a new trial was granted on the ground of the improper admission of evidence taken under commission, where it appeared that the attorney for the successful party had been allowed before the trial to take the evidence out of the office of the Clerk of the Circuits, contrary to the provision of Act 48 Vict. c. 18.

On a commission to examine witnesses, if the answer to an interrogatory extends to matters not enquired of, and which the opposite party could not have anticipated, and therefore did not file a cross-interrogatory, the answer will be suppressed. *Barber* v. *Roberts*, 24 N. B. 211.

It was held in Manitoba, following *Gordon* v. *Fuller*, 1835, 5 O. S. 174, that although a commission to examine witnesses had issued at the instance of the plaintiff, and the depositions so taken had been returned by the commissioner into court, the plaintiff was not bound to offer them in evidence at the trial, but that the defendant had a right to call for and make use of the evidence on his own behalf. *Richardson* v. *MacMillan*, 18 Man. 359.

Where a defendant, having made one objection to evidence taken under a commission, which was overruled, allowed it to be read, and commented upon it, it was

held that he was precluded from taking any further exceptions. *Farrel* v. *Stephens*, 17 U. C. Q. B. 250.

The fact that evidence is not objected to at the time the witnesses are examined before commission does not preclude the defendant from objecting to it on the trial. *Boston Belting Co.* v. *Gabel*, 20 N. B. 347.

Under the Consolidated Rules of Ontario, 439 A, in the case of a corporation, any officer or servant of such corporation may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation.

On a motion to commit for refusal to be examined, the point was taken that Mr. Vicars, who had so refused to be examined, was not a party subject to the provisions of the rule. The defendant was a foreign corporation, and by power of attorney appointed Mr. Vicars, who resided in Toronto, its true and lawful attorney to sue and be sued, plead or be enpleaded on behalf of the company, and to accept service, and do all acts, and execute all duties, etc., relating to matters within the scope of the power of attorney. The purpose of this power was to enable the company to carry on business in Ontario by complying with the Act respecting the licensing of extra-provincial corporations. It was held that, under these circumstances, the attorney was an officer of the company within the meaning of the rule, and liable to be examined. *McNeill* v. *Lewis Bros., Ltd.*, 16 O. L. R. 652.

While the Imperial Act 19 & 20 Vict. c. 113, s. 1, relates to witnesses, the Ontario Act R. S. C., 1886, c. 40, extends to parties as well as witnesses, and it was held under the latter act, that a former manager of a company while the matters in dispute in the action were alleged to have taken place, was, as such officer, a *quasi* party, and stood for the person to be examined for

discovery for the corporation defendant. An order to compel him to attend to be examined, in pursuance of an order of the Manitoba Court, which he had refused to do, was made on *ex parte* application. *Re Kirchoffer and Imperial Loan Investment Co.*, 7 O. L. R. 295.

An engine driver who never was in charge of the train to which it was attached at the time the accident occurred, had never assumed the duties of a conductor, and never answered to defendants in relation to the control of the train so as to make him responsible to the defendants, except for the management of his engine, was held not to be an officer of the company examinable under Con. R. 439, Ontario, in an action under the Fatal Accidents Act of Ontario. *Morrison* v. *Grand Trunk Rail. Co.*, 5 O. L. R. 38, reversing the decision of the Divisional Court reported in 4 O. L. R. 43.

## CHAPTER III.

### PROCURING EVIDENCE.

HAVING thus obtained all the information he can from his opponent, each party begins to search for missing letters and account books, to inspect ancient registers and to obtain certified copies of any material entries which they contain, lest the action should fail for want of some formal piece of proof (*a*). He must consider what witnesses he can call, and what documents he can put in evidence, on any issue the burden of proving which lies on him. He must also be ready with evidence to rebut the case of his adversary on the other issues, and also with evidence in aggravation or mitigation of damages.

The success of the action greatly depends upon the care with which the case is prepared before the trial.

### ADVICE ON EVIDENCE.

It is the usual practice, as soon as notice of trial has been given, for the solicitor on either side to lay before his junior counsel a case for his advice as to the evidence which it will be necessary to produce at the trial. Every material document in the case should be laid before counsel at this stage,

(*a*) See, for instance, *Collins* v. *Carnegie*, 1 A. & E. 695, *ante*, p. 194.

especially the affidavits of documents, the interrogatories and the answers to them, the draft notices to produce and to inspect and admit documents, and statements of the evidence which can be given by the witnesses whom it is proposed to call at the trial.

In advising upon evidence, counsel must go carefully into every necessary detail. He should first consider whether everything is in proper order for the hearing. The answers to interrogatories or the documents disclosed by the defendant may throw a new light on the matters in dispute. It may be necessary to amend the pleadings or particulars in order that his client's case may be properly presented at the trial; if so, application should be made at once to the master under Order XXVIII., rr. 1—6 (*b*). Or it may be that the opponent's answers to interrogatories are evasive or insufficient; or that material documents have improperly been omitted from the schedule to his affidavit; in either case an application to the master should be promptly made.

As soon as counsel is satisfied that all preliminaries are in order, and that all material questions are properly raised on the pleadings, he writes an opinion on evidence, in which he states briefly what are the issues of the action and on which party lies the burden of proving each issue, and then advises how each is to be proved or rebutted. He must, in the first place, decide what witnesses his client should *subpœna*. He must next consider

(*b*) See these rules in the Appendix.

what documents will be required for the proof of his client's case, or for the cross-examination of the witnesses called by the other side. The original document must be produced in Court, if it still exists and is within jurisdiction. If it is produced, it may be necessary to call a witness to prove the handwriting (*c*). If it be not produced, there may be considerable difficulty in obtaining leave to read a copy, and the copy will have to be proved a true copy. Copies of official and other public documents, however, if duly authenticated, have been made admissible in evidence by various statutes (*d*). Counsel must be careful to advise his client to obtain the proper kind of copy which is made evidence by the particular Act. In other cases it may be necessary for him to advise his client to make an application under the Bankers' Books Evidence Act, 1879 (*e*).

Under this Act (*f*) an order may be made that a party shall be at liberty to inspect and take copies of entries in the books of any bank for the purposes of the litigation, provided the case be one in which the applicant could, before the Act, have compelled the banker to attend at the hearing and produce his books. Such an order can be made, although the account to which the entries relate is kept in the name of a stranger, provided the entries would be evidence in the action. Formerly it was necessary to compel an officer of the bank to attend the trial to produce the books or to give evidence of their contents. But now a copy of an entry in the book of any banker or

(*c*) See *ante*, p. 277.
(*d*) See *ante*, pp. 248 *et seq.*
(*e*) See *Emmott* v. *Star Newspaper Co.*, 9 T. L. R. 111.
(*f*) 42 Vict. c. 11, as extended by 45 & 46 Vict. c. 72, s. 11.

any company carrying on the business of bankers is made *primâ facie* evidence in all legal proceedings of such entry, and of the matters, transactions, and accounts therein recorded, provided that the book was at the time of the making of the entry one of the ordinary books of the bank, and the entry was made in the usual and ordinary course of business, and the book is in the custody or control of the bank. The copy must be verified by the affidavit of a partner or officer of the bank, who must state that the copy has been examined with the original entry and is correct.

Again, where inspection of any business books is applied for, the master may, if he thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries; such affidavit should state whether or not there are in the original book any and what erasures, interlineations, or alterations (*g*). And such copies will be evidence against the party supplying them.

Nor will counsel overlook the value and importance of real evidence. He may consider it advisable for his client or some skilled person on his behalf to inspect premises or things which are in the possession of his opponent. Thus if a landlord alleges that his tenant has left the demised premises in a bad state of repair, both he and the tenant may reasonably desire to send a surveyor over the property to report as to its condition. So, in an action for goods sold and delivered, the purchaser may wish to inspect the bulk and the vendor the sample. In such cases the master has power under Order L., r. 3, upon the application of either party to the

(*g*) Order XXXI., r. 19A (1)

action, and upon such terms as may be just, to make an order for the detention, preservation, or inspection of any property or thing, which is the subject of the action, or as to which any question may arise therein. A master may also under the same rule authorise any persons to enter upon or into any land or building in the possession of any party to the action, and for all or any such purposes to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence. Moreover, in a proper case either party can obtain an order that the jury who will try the action shall view the *locus in quo* before the trial.

### ATTENDANCE OF WITNESSES.

#### *Attendance in the High Court.*

If a party wishes to ensure the attendance of a person as a witness at the trial of an action in the High Court, he must serve him with a *subpœna ad testificandum* (*h*). If the person is required to produce a document, he is served with a *subpœna duces tecum*. A witness who is merely called to produce a document need not be sworn, and in that case he cannot be cross-examined (*i*). He is often called upon to produce the document when some other witness is in the box.

A *subpœna* can be issued without leave of the Court at any stage of the proceedings (*k*), but must not be issued

(*h*) Order XXXVII., rr. 26—34; see also r. 20.
(*i*) *Wood* v. *Mackinson*, 2 M. & R. 273; Cockle, 197.
(*k*) *Raymond* v. *Tapson*, 22 Ch. D. 430.

oppressively (*l*) or prematurely (*m*). The High Court has jurisdiction, both in civil and criminal cases, to set aside a *subpœna*, if satisfied that the person served cannot give relevant evidence, and that the *subpœna* has been served for some ulterior purpose. Thus, *subpœnas* served on Ministers of the Crown were set aside on such ground, although Ministers have no special privilege from the obligation of obeying *subpœnas* (*n*). A *subpœna duces tecum* ought to specify the documents required, and the Court will not enforce a *subpœna* which is too general; but if a person served with a *subpœna* admits that he has the documents required with him, he must produce them (*o*). He may be asked what documents he has with him, and he is bound to answer the question without being sworn, and produce the documents. The witness produces the document to the Court and not to the parties, and the Court decides whether it is to be used or not. The witness can, of course, take any legal objection to producing the document. If a witness attends on a *subpœna duces tecum*, with a document which he properly refuses to produce on the ground of privilege, secondary evidence will be admissible (*p*). If he does not attend on such a *subpœna* or attends and refuses to produce the writing on any other ground but that of privilege, secondary evidence will not be admissible, but the witness will be punishable for contempt (*q*). A person cannot, of course, be compelled by *subpœna* to produce documents which are not in his possession or under his control. Thus, a secretary of a company served with a *subpœna* to produce the books of the

(*l*) *Steele* v. *Savory*, 8 T. L. R. 94.
(*m*) *London and Globe Finance Corporation* v. *Kaufman*, 69 L. J. Ch. 196.
(*n*) *R.* v. *Baines*, [1909] 1 K. B. 258.
(*o*) *Lee* v. *Angas*, L. R. 2 Eq. 59.
(*p*) Except in the case of public documents, where the same public policy which renders the original inadmissible also excludes secondary evidence thereof.
(*q*) *R.* v. *Llanfaethly*, 2 E. & B. 940; Cockle, 158.

company was held not to have disobeyed the *subpœna* by not producing the books, they having been removed from him since the service of the *subpœna* by the board of directors of the company (*r*). A sealed packet may be a "document," and therefore liable to production on a *subpœna duces tecum* (*s*).

### *Attendance in the Bankruptcy Courts.*

The Bankruptcy Rules provide that a *subpœna ad testificandum* or *duces tecum* shall be issued by the Court at the instance of an official receiver, trustee, creditor, debtor, applicant, or respondent, in any matter (*t*). The names of three witnesses may be inserted in the *subpœna*, which must be duly served. Service may be proved by affidavit. Wilful non-compliance with a *subpœna* is punishable as a contempt of Court.

With the view of facilitating the obtaining of information as to the debtor, his dealings, or his property, the Bankruptcy Act, 1883 (*u*), contains the following provisions :—

Section 27. (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 before it the debtor or his wife, or any person known or suspected 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 (*x*).

(2) If any person so summoned, after having been tendered a reasonable sum, 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

(*r*) See *R.* v. *Stuart*, 2 T. L. R. 144.
(*s*) *R.* v. *Daye*, [1908] 2 K. B. 333.
(*t*) Bankruptcy Rules, 1886, rr. 61—71.
(*u*) 46 & 47 Vict. c. 52.
(*x*) The deponent may be cross-examined, but his evidence cannot be contradicted (*In re Scharrer, Ex parte Tilly*, 20 Q. B. D. 518).

sitting and allowed by it, the Court may, by warrant, 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.

. . . . .

(6) The Court may, if it think fit, order that any person who if in England would be liable to be brought before it under this section shall be examined in Scotland or Ireland, or in any other place out of England (*y*).

The following cases were decided under the Bankruptcy Act, 1869, which in this respect is re-enacted by the above section :—

An irregularity in the summons is waived by the appearance of the witness (*z*). A witness summoned is not entitled to any costs for the attendance of his counsel or solicitor, unless he is charged with having property of the bankrupt in his possession, and is summoned to give evidence with respect to it (*a*). If a creditor establishes a *primâ facie* case, he can obtain the examination of the debtor or any other person under the above-mentioned provisions; but the Court must be satisfied that some benefit will result to the estate before it will issue a summons on the application of any person other than an official receiver or a trustee (*b*). A witness cannot be ordered to furnish accounts (*c*), and is entitled to refuse to answer any question on the ground that his answer would tend to criminate himself, but this, of course, does not extend to the bankrupt (*d*).

Personal service of a summons under sect. 27 (1) is not necessary. It may be sent by registered post (*e*). The reasonable sum, under sect. 27 (2), is conduct money, and is to be measured by the distance the witness

(*y*) By sect. 3 (16) of the Bankruptcy Act, 1890, the section applies *mutatis mutandis* to a trustee appointed under or in pursuance of a composition or scheme.
(*z*) *R.* v. *Widdop*, L. R. 2 C. C. R. 3.
(*a*) *Ex parte Waddell*, 6 Ch. D. 328.
(*b*) *Ex parte Nicholson*, 14 Ch. D. 243.
(*c*) *Ex parte Reynolds*, 21 Ch. D. 601.
(*d*) *Ex parte Schofield*, 6 Ch. D. 230.
(*e*) *In re Weinberg*, 96 L. T. 790.

has to travel, and must be sent with the summons in cash or postal orders (*f*).

The words "any other place out of England," in sect. 27 (6), have been construed as limited to the British dominions (*g*).

The mere fact that there is an action pending between the trustee and a third party relating to property alleged to belong to a bankrupt's estate is not enough to entitle the trustee to examine such third party under s. 27 (*h*). The registrar must be personally present during the examination of a witness (*i*). When a person summoned under s. 27 is too ill to attend the Court, an order may be made for his examination at his own residence (*k*).

*Attendance in the County Courts.*

The County Courts Act, 1888 (*l*), provides that—

Section 110. 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 [*and provides how such summonses are to be served*].

Section 111. 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 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 treasurer.

Section 112. A judge in any case where he shall think fit, upon

(*f*) *In re Weinberg*, 96 L. T. 790.
(*g*) *In re Drucker*, [1902] 2 K. B. 210.
(*h*) *Ex parte Gittens*, [1892] 1 Q. B. 646.
(*i*) *R.* v. *Lloyd*, 19 Q. B. D. 213.
(*k*) *Ex parte Hawkins*, 23 Q. B. D. 226.
(*l*) 51 & 52 Vict. c. 43.

application on an affidavit by either party, may issue an order under his hand and the seal of the Court for bringing up before such Court any prisoner or person confined in any gaol, prison, or place, under any sentence or under commitment for trial, or otherwise, except under process in any civil action, or matter, to be examined as a witness in any action or matter depending or to be inquired of or determined in or before such Court; and the person required by any such warrant or order to be brought before the Court 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 the High Court to be brought before such Court to be examined as a witness in any action or matter pending before such Court is by law required to be dealt with: Provided always, that the person having the custody of such prisoner or person shall not be bound to obey such order unless a tender be made to him of a reasonable sum for the conveyance and maintenance of a proper officer or officers and of the prisoner or person in going to, remaining at, and returning from such Court (*m*).

Where the witness is beyond the jurisdiction of the Court, the summons is sent by the bailiff to the bailiff of the Court of the district in which the witness resides.

*Attendance in the winding up of companies for the purpose of giving information.*

Section 174 of the Companies (Consolidation) Act, 1908 (*n*), gives the Court, after it has made an order to wind up a company, power to summon before it and examine upon oath, *viva voce* or on written interrogatories, concerning the trade, dealings, affairs or property of the company, any officer of the company or person known or suspected to have in his possession any property of the company, or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade, dealings, affairs or property of the company; and the Court may require any such officer or person to produce any books and papers in his custody or power relating to the company. An order under s. 174 may

(*m*) The County Court Rules as to evidence will be found in the Appendix.

(*n*) 8 Edw. VII. c. 69.

be obtained by the liquidator of the company, or by a contributory, on notice to the liquidator, as the latter has the prior right to the order. The making or refusing of the order is entirely in the discretion of the judge (*o*). The witness can refuse to answer questions on the ground that his answers would incriminate him or would involve a breach of professional confidence, and he can appeal to the judge, before whom the examination takes place, against unnecessary or irrelevant questions; the decision of the judge in such a matter is final (*p*).

The examination under this section is a private one, although the Court can authorise any particular person to attend (*q*). The depositions are not evidence against other persons (*r*). But s. 175 of the Act of 1908 (*s*) provides for a public examination on oath, before the Court which has made an order for winding up a company, on a day appointed for the purpose, of any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as director or officer of the company. A person so examined is to answer all questions which the Court may put or allow to be put to him, and the Court may put such questions as it thinks fit. The notes of the examination are to be read over to, or by, and signed by, the person examined, and may be afterwards used in evidence against him. But it would seem that the statements made by the person examined, even though the notes of his examination are not read over to, or by him, and signed by him, may be proved

(*o*) *In re Imperial Continental Water Corporation*, 33 Ch. D. 314.
(*p*) *In re London Gas Meter Co., Ltd., Ex parte Webber*, 41 L. J. Ch. 145; and *Whitworth's Case*, 19 Ch. D. 118.
(*q*) *In re Greys Brewery Co.*, 25 Ch. D. 400; cf. *In re Norwich Equitable Fire Insurance Co.*, 27 Ch. D. 515.
(*r*) *In re Norwich Equitable Fire Insurance Co., supra.*
(*s*) 8 Edw. VII. c. 69.

against him by the evidence of a shorthand writer, or any other person who was present (*t*).

But no person can be directed to attend to be examined under this section until the official receiver has made his further report (if any) under sub-s. (1) of the section, stating that, in his opinion, a fraud has been committed by any person in the promotion or formation of the company, or by any director or officer of the company in relation to the company since its formation. It is only upon consideration of such further report that the Court has jurisdiction to direct any person to attend to be examined, and obviously it can only direct a person to attend who is stated in such report to have committed fraud (*u*). In addition the report must state facts showing a basis for the official receiver's opinion sufficient to warrant a judge in calling upon the person, who has in the opinion of the official receiver committed a fraud, to undergo a public examination (*x*). The order can be made *ex parte* (*y*). It should be noticed that by sub-s. (5) of the section, the person examined "shall" answer all such questions as the Court may put or allow to be put to him; and, by sub-s. (4), the Court may put such questions as it thinks fit. It is doubtful whether the person examined can refuse to answer a question which the Court puts or allows to be put to him on the ground of privilege, *e.g.*, that the answer would criminate him. Lord HALSBURY has expressed the view that he cannot (*z*).

*Attendance in other cases.*

Revising barristers may summon by writing any person, assessor, or collector of taxes, to attend before

(*t*) See *R.* v. *Erdheim*, [1896] 2 Q. B. 260, a decision upon the Bankruptcy Act, 1883.
(*u*) *Ex parte Barnes*, [1896] A. C. 146.
(*x*) *In re Civil, Naval, and Military Outfitters*, [1899] 1 Ch. 215.
(*y*) *In re Trust and Investment Corporation of South Africa*, [1892] 3 Ch. 332.
(*z*) *Ex parte Barnes*, [1896] A. C. at p. 152. As to the costs and

them and give evidence on oath (*a*). The attendance of witnesses before arbitrators is enforced by *subpœna* (*b*). A witness may be brought from a lunatic asylum on a writ of *habeas corpus ad testificandum*, on an affidavit that he is fit to be brought up and is not dangerous (*c*). In the House of Lords, the summons is by an order of the House, signed by the Clerk of the Parliaments, but in select committees attendance is generally secured by notice from the clerk attending the committee; in the House of Commons, by an Order of the House, signed by the Clerk; in select committees, by an order of the chairman. But if a witness does not attend on such order he will be summoned to the Bar of the House (*d*). Provision is made for the summoning, examination, expenses of and indemnity to witnesses on election petitions by 31 & 32 Vict. c. 125, ss. 31, 32 and 34; and 46 & 47 Vict. c. 51, s. 59.

*When a witness is in prison.*

An application may be made to a judge of the High Court at chambers, on affidavit, stating the cause of the imprisonment of the witness, whether on civil or criminal process, that his evidence is material to the applicant, who cannot proceed safely to trial without securing his attendance. The judge, if satisfied with the substance of the application, will then grant the applicant a writ of *habeas corpus ad testificandum* directed to the governor of the gaol in which the prisoner is confined, and commanding him to bring up the prisoner for examination

expenses of witnesses under the Companies Acts, see *In re Appleton, French and Scrafton, Ltd.*, [1905] 1 Ch. 749.

(*a*) Parliamentary and Municipal Registration Act, 1878, s. 36. The revising barrister is bound by the ordinary rules of evidence: *Storey* v. *Town Clerk of Bermondsey*, [1910] 1 K. B. 203.

(*b*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 8.

(*c*) *Fennell* v. *Tait*, 1 C. M. & R. 584.

(*d*) See May's Parliamentary Practice, 11th ed., pp. 424 *et seq.*

at the trial (*e*). A Secretary of State or a judge of the High Court or of a county court has power, on a similar application, to issue a warrant, or order to bring up, as a witness in any civil or criminal proceeding, any prisoner in custody on a criminal charge (*f*). An order ought not to be drawn up until the case is in the paper for trial (*g*). By the Prisons Act, 1898, s. 11, a Secretary of State on proof to his satisfaction that the presence of a prisoner at any place is required in the interest of justice or for the purpose of any public inquiry may, by writing under his hand, order the prisoner to be taken thither.

*When a witness is out of the jurisdiction.*

In this case the process of the Courts does not, as a general rule, reach a witness; and the examination must be by means of a commission or letter of request, the proceedings upon which will be regulated by the law of the country to which it issues (*h*). Where the commission issues to a part of the realm which is subject to different laws from that part in which the commission issues, the commissioner may, by a written notice, signed by him, require the attendance of a witness, and, on his refusing to attend, may apply to the local Courts for an order to compel attendance; and the witness will then be subject to the ordinary penalty for disobeying a *subpœna*, or a writ in the nature of a *subpœna* (*i*). This extends to the examination of witnesses in any of His Majesty's dominions, colonies, or possessions (*k*).

But, by 17 & 18 Vict. c. 34, s. 1, any judge of the High Court in England or Ireland, or of the Court of Session

(*e*) *Graham* v. *Glover*, 5 E. & B. 591; *Marsden* v. *Overbury*, 18 C. B. 34.
(*f*) 16 & 17 Vict. c. 30, s. 9.
(*g*) *Jenks* v. *Dillon*, 76 L. T. 591.
(*h*) See *post*, p. 667; *Lumley* v. *Gye*, 3 E. & B 114.
(*i*) 6 & 7 Vict. c. 82, ss. 5, 6.
(*k*) 22 Vict. c. 20, s. 1.

or Exchequer in Scotland, may, at discretion, in any action pending in any such Court, issue a *subpœna ad testificandum*, or *duces tecum*, or warrant of citation, commanding a witness in any part of the United Kingdom to attend the trial; and in default of attendance, after due service of the writ and tender of travelling expenses, the Court from which the writ issued may certify the default to the other superior Courts, and so render the defaulting witness liable to all the penalties which he would have incurred by disobeying a similar writ issued within the jurisdiction in which he resides. This Act does not affect the power of Courts to issue commissions, and its operation is confined to process from the superior Courts. Under this section a rule has been granted to compel a plaintiff resident in Ireland to appear in England as a witness for the defendant (*l*). The jurisdiction can by virtue of s. 16 of the Judicature Act, 1884, be now exercised by a judge in chambers whether the High Court is sitting or not.

*Service of subpœna.*

The service must be on the witness personally (*m*); and is effected by delivering a copy of the writ, and at the same time producing the original. The service must be a reasonable time before trial; and, generally, service on the day of trial, even when the witness resides in the town, is insufficient (*n*), unless the witness receives the service without objection (*o*).

During his attendance the witness is privileged from arrest on civil process, and he is allowed a reasonable time for going to and returning from Court (*p*). If he is arrested during that time, it is a contempt of Court (*q*).

(*l*) *Harris* v. *Barber*, 25 L. J. Q. B. 98.
(*m*) *In re Pyne*, 1 D. & L. 703.
(*n*) *Barber* v. *Wood*, 2 M. & R. 17.
(*o*) *Maunsell* v. *Ainsworth*, 8 Dowl. 869.
(*p*) *Montague* v. *Harrison*, 3 C. B. (N.S.) 292.
(*q*) *Kimpson* v. *London and North Western Rail. Co.*, 9 Ex. 766.

The privilege does not extend to an arrest on criminal process (*r*), nor where the witness is retaken by his bail, after he has finished his evidence. The privilege exists whether the witness's attendance be compulsory or voluntary (*s*), but not in cases in which the witness attends rather as an unprofessional adviser than as a solicitor or witness (*t*).

A witness may be arrested for a contempt of Court if the contempt is in its nature or by its incidents criminal, but not where the contempt consists in the breach of an order of a personal description if the breach is not accompanied by criminal incidents, *i.e.*, where the arrest is mere process, privilege exists; where it is punitive or disciplinary, privilege does not exist (*u*). So, as a process of commitment for non-payment of rates is a mere civil process to enforce payment, a witness cannot be arrested thereunder (*x*).

*Penalty for non-attendance.*

The statute 5 Eliz. c. 9, s. 6, provides:—

"If any person or persons upon whom any process out of any of the Courts of record within this realm or Wales, shall be served to testify or depose concerning any cause or matter depending in any of the same Courts, and having tendered unto him or them according to his or their countenance or calling, such reasonable sums of money for his or their costs and charges, as having regard to the distance of the places is necessary to be allowed in that behalf do not appear according to the tenor of the said process, having not a lawful and reasonable lett or impediment to the contrary, that then the party making default to lose and forfeit for every such offence £10, and to yield such further recompense to the party grieved as by the discretion of the judge of the Court, out of which the said process shall be awarded according to the loss and hindrance that the party which procured the said process shall sustain by reason of the non-appearance of the said witness or witnesses."

(*r*) *In re Douglas*, 3 Q. B. 825.
(*s*) *Meekins* v. *Smith*, 1 H. Bl. 636.
(*t*) *Jones* v. *Marshall*, 2 C. B. (N.S.) 615.
(*u*) See *In re Freston*, 11 Q. B. D. 545, approving *Long Wellesley's Case*, 2 R. & M. 639; and see *In re Dudley*, 12 Q. B. D. 44.
(*x*) *Hobern* v. *Fowler*, 62 L. J. Q. B. 49.

If a witness does not attend on his *subpœna* he may be proceeded against in either of three ways: (1) Under the above statute he may be sued for the penalty of £10, and further recompense; or (2) in an action for damages (*y*), but actual damage must be proved; or (3) he may be attached for contempt of Court; on the motion for an attachment, it must be shown distinctly on affidavit that the witness was served; that his expenses were paid or tendered to him at the time of service; and that everything reasonable has been done to secure his attendance (*z*).

Where there is disobedience to a *subpœna duces tecum*, the Court has jurisdiction to enforce obedience by attachment, even though the disobedience is not wilful (*a*).

### *Expenses of Witnesses.*

In civil proceedings, no witness, although served with a *subpœna*, is bound to attend (*b*) at the trial, unless his reasonable expenses are tendered to him when he is served, or a reasonable time before trial. The sum tendered should be a reasonable compensation for his travelling expenses and subsistence during the attendance (*c*). A witness will be entitled to his expenses, although a party to the cause, if he is a material and necessary witness (*d*). If the witness is a married woman, her expenses should be tendered to her and not to her husband. If a witness is *subpœnaed* by both parties, he is entitled to be paid all his expenses by the party calling him before giving evidence (*e*). The

(*y*) *Pearson* v. *Isles*, 2 Doug. at p. 561.
(*z*) *Garden* v. *Cresswell*, 2 M. & W. 319.
(*a*) *R.* v. *Daye*, [1908] 2 K. B. 333, explaining *R.* v. *Lord John Russell*, 7 Dowl. 693.
(*b*) See *ante*, pp. 652 *et seq.*
(*c*) *Dowdell* v. *Australian Royal Mail Co.*, 3 E. & B. 902; *Brocas* v. *Lloyd*, 23 Beav. 129.
(*d*) *Howes* v. *Barber*, 18 Q. B. 588.
(*e*) *Per* PARKE, B., in *Allen* v. *Yoxall*, 1 Car. & K. 316.

witness may waive his right to demand payment of his expenses either expressly or by implication (*f*). The amounts which will be allowed on taxation for the expenses of witnesses are at present entirely in the discretion of the taxing masters under Order LXV., r. 27 (9), and the old common law scale of allowances of 1853 is not binding on them even in actions in the King's Bench Division (*g*).

In criminal cases a witness for the prosecution is not entitled absolutely to his expenses, and he cannot refuse to attend or give evidence on the ground that his expenses have not been tendered or paid; but in Courts of final jurisdiction they are generally allowed by the Court by statute (*h*). When the witness lives out of the jurisdiction of the Court, and in a distinct part of the United Kingdom, as in Scotland or Ireland, by the 45 Geo. III. c. 92, s. 3, he is not bound to appear to give evidence in a criminal prosecution unless his reasonable expenses are paid or tendered to him at the time when he is served with the *subpœna* (*i*). In any other case a witness, *subpœnaed* on a criminal trial, is bound to attend without any tender of expenses, and will be liable to attachment for non-attendance; although if it appeared that he could not defray the expenses of his journey, the Court would probably refuse to attach him.

If a witness appears on his *subpœna* in a civil proceeding, he will not be compellable to give evidence until his reasonable expenses have been paid, or tendered by the party who *subpœnas* him (*k*). If he does not arrive before a cause has been referred, he will be entitled to costs in the reference, but not in the cause (*l*).

(*f*) See *Newton* v. *Harland*, 1 Man. & G. 956.
(*g*) See *East Stonehouse Local Board* v. *Victoria Brewery Co.*, [1895] 2 Ch. 514. See also notes to Order LXV., r. 27 (9) in the Yearly Practice, 1910, p. 1055.
(*h*) See Costs in Criminal Cases Act, 1908 (8 Edw. VII. c. 15).
(*i*) *R.* v. *Brownell*, 1 A. & E. at p. 602.
(*k*) *Newton* v. *Harland*, 1 Man. & G. 956.
(*l*) *Fryer* v. *Sturt*, 16 C. B. 218.

A successful party may pay a witness his costs, and recover them from the defeated party (*m*); but the costs of an immaterial witness who has been rejected by a judge or arbitrator cannot be claimed as between party and party (*n*). The reasonable expenses of qualifying a witness to give evidence may now be allowed (*o*). If the witness, after being *subpœnaed*, is not required to attend, and has incurred no expense, he must refund the money paid to him (*p*).

## COMMISSIONS AND LETTERS OF REQUEST.

It sometimes happens that, when the solicitor for a litigant seeks to serve a necessary witness with a *subpœna*, he finds that his intended witness is too old or too ill to attend the trial, or will leave the country before the trial, or is already absent abroad. In the first two cases the person who needs his evidence must at once apply for "a commission" to take his deposition before the trial. Some barrister or solicitor is appointed commissioner; he goes to the bedside or other place where the witness is, accompanied by the parties or their representatives. The witness is sworn and tells his story, is cross-examined and re-examined. The commissioner takes down all the evidence and any objections to any part of it. This he then reads over to the witness, and both he and the witness sign it. As soon as this is done the record becomes a deposition and is subsequently filed in Court. It may be

(*m*) *Hale* v. *Bates*, E. B. & E. 575.
(*n*) *Galloway* v. *Kenworth*, 15 C. B. 228.
(*o*) *Mackley* v. *Chillingworth*, 2 C. P. D. 273.
(*p*) *Martin* v. *Andrews*, 7 E. & B. 1.

necessary to apply to postpone the trial while this is taking place.

But there is more difficulty if the witness be already abroad so that he cannot be served with a *subpœna*. In some cases an order will be made for a commission as above described, and then the evidence of the witness will be taken abroad before a commissioner or examiner appointed by the English Court or judge, and the depositions taken before him can be used at the trial in England unless the witness can be induced to return to England.

But several foreign governments object to commissions being issued and to examiners administering oaths to witnesses within their dominions. Hence now the Foreign Office, at the request of the Lord Chancellor or the Lord Chief Justice, frequently sends through diplomatic channels "a letter of request" addressed to the tribunal of such other country, asking the judges of that tribunal to order the required evidence to be taken and remitted to the English Court. This plan is found to be cheaper than the writ of commission, which, however, is still employed for the examination of witnesses in the United States of America, and occasionally in our Colonies.

The practice as to commissions is governed by Order XXXVII., rule 5 of which is as follows:—

"The Court or a judge may, in any cause or matter (*q*) where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the Court or judge or any

(*q*) This does not include an arbitration under an agreement (*In re Shaw and Ronaldson*, [1892] 1 Q. B. 91).

officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a judge may direct."

Under this rule it has been held that orders will be made where "necessary for the purposes of justice," *i.e.*, in the interests of all parties to the litigation, and not merely in the interest of the applicant (*r*). The order may be made *ex parte*, but in such a case it is liable to be discharged if it can be shown to be improper as not being necessary for the purposes of justice (*s*). The plaintiff himself will not, as a rule, be allowed to give his evidence abroad on commission; it should be given before the jury here (*t*). But a defendant, if resident abroad, will be allowed this indulgence (*u*). No order will be made either for a commission or letters of request if it can be shown that the witnesses could be brought to England without much greater expense, or that witnesses now in England could give the same evidence (*x*). Sometimes the mere delay, which will thus necessarily be caused, is a sufficient reason for refusing the application. A defendant will obtain a commission or letters of request more readily than a plaintiff (*y*). The affidavit filed in support of the application must state the name of at least one witness whom it is desired to examine (*z*), and the general nature of the evidence he is expected to give (*a*).

When the ground for the application is the age of the witnesses, those above seventy-five will be examined as a matter of course; as to those between seventy and seventy-five, it will depend on the nature of the evidence

(*r*) *Berdan* v. *Greenwood*, 20 Ch. D. 764, n.
(*s*) *Bidder* v. *Bridges*, 26 Ch. D. 1.
(*t*) *Keeley* v. *Wakley*, 9 T. L. R. 571.
(*u*) *New* v. *Burns*, 64 L. J. Q. B. 104.
(*x*) *Ehrmann* v. *Ehrmann*, [1896] 2 Ch. 611.
(*y*) *Ross* v. *Woodford*, [1894] 1 Ch. 38.
(*z*) *Howard* v. *Dulau & Co.*, 11 T. L. R. 451.
(*a*) *Barry* v. *Barclay*, 15 C. B. (N.S.) 849.

they can give, and the number of other witnesses who can give similar evidence (*b*), but age alone is not a sufficient ground where the witness is under seventy. If there is only one witness who can depose to an important fact, an order will, following the practice of the Court of Chancery, be made to examine such witness (*c*). It should be observed, that rule 5 of Order XXXVII. does not apply to cases in which the parties have agreed that the evidence in an action shall be taken by affidavit, and it afterwards transpires that one of the proposed witnesses will not make an affidavit (*d*).

If the witness is in England, his examination will, unless the Court or a judge shall otherwise direct, be taken before one of the examiners of the Court (*e*). This rule, however, does not affect the practice as to examinations in the Admiralty Division. In cases where the witness is not examined before one of the examiners of the Court, a special examiner has to be appointed, who is usually, though not necessarily, a barrister. All persons interested have a right to be heard on the question who shall be appointed special examiner, and if they cannot agree the judge appoints (*f*). A mere witness, however, has no voice in the matter (*g*).

When the witness is to be examined abroad (and a letter of request is not resorted to), a special examiner has of course to be appointed (*h*) and such special examiner need not be a barrister. In one case the British Minister at Teheran was appointed (*i*), and a commission may issue to the judges of a foreign Court, if willing to act. Rule 6A of Order XXXVII. authorises the Court or a judge to issue a letter of request to the

(*b*) *Bidder* v. *Bridges*, 26 Ch. D. 1.
(*c*) *Shirley* v. *Earl Ferrers*, 3 P. Wms. 77.
(*d*) *Nadin* v. *Bassett*, 25 Ch. D. 21.
(*e*) Rules of the Supreme Court, Order XXXVII., r. 39.
(*f*) *In re Smith, Knight & Co.*, L. R. 8 Eq. 23.
(*g*) *In re Contract Corporation*, L. R. 13 Eq. 27.
(*h*) *Ongley* v. *Hill*, [1874] W. N. 157.
(*i*) *Banque Franco-Egyptienne* v. *Lütscher*, 28 W. R. 133.

judges of a foreign Court to examine witnesses for the purposes of an English action. It is as follows:—

"If in any case the Court or a judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission. The Forms 1 and 2 in the Appendix hereto shall be used for such order and request respectively, with such variation as circumstances may require, and may be cited as Forms 37A and 37B in Appendix K."

This procedure is now very generally adopted, and, in some cases, it is the only procedure that is feasible. But letters of request should be issued for the examination of witnesses only; they should not be applied for merely to gain inspection of documents in a foreign country (*k*).

An application for a commission to take evidence abroad will be refused where there has been undue delay (*l*), or where it is not made *bonâ fide;* and therefore, where the Court was satisfied that the reason alleged for the plaintiff not coming to England was a pretence, and that the real reason was that he desired to avoid cross-examination in Court, a commission to take his evidence abroad was refused (*m*). In a later case, however, where the Court of Appeal was of opinion that it was not necessary for the purposes of justice that the plaintiffs should be examined in Court, a commission was granted to examine them in America, where they resided (*n*). In another case the Court of Appeal qualified an order appointing a commission to take the plaintiff's evidence in New Zealand, where he resided, by inserting a proviso that the depositions of the plaintiff were not to be read if the defendant required him to appear at the trial to be examined and cross-examined (*o*). No general rule can be extracted from the cases, but it seems that the Court will in each case

(*k*) *Cape Copper Co.* v. *Comptoir d'Escompte de Paris*, 38 W. R. 763.
(*l*) *Stewart* v. *Gladstone*, 7 Ch. D. 394.
(*m*) *Berdan* v. *Greenwood*, 20 Ch. D. 764, n.
(*n*) *Armour* v. *Walker*, 25 Ch. D. 673.
(*o*) *Nadin* v. *Bassett*, 25 Ch. D. 21.

be guided by the nature of the action, the importance to be attached to the plaintiff's cross-examination, and the circumstances under which it is asked to dispense with the plaintiff's personal attendance in Court, in deciding whether it will or will not grant a commission to take his evidence abroad. The matter is entirely one within the discretion of the Court (*p*). But an application by a defendant to take his evidence abroad will be more favourably regarded than an application by a plaintiff (*q*).

When in a divorce suit the petitioner had obtained a commission to examine witnesses in Vienna, which was suspended pending the hearing of the act on the petition, and he nevertheless summoned certain witnesses before a Court in Vienna to take their evidence for the perpetuation of testimony under the Austrian law, he was restrained by injunction from prosecuting these proceedings before the Vienna Court (*r*). The Court will not appoint a shorthand writer as a commissioner to take evidence in a divorce suit (*s*).

With regard to a proposed witness who is abroad, the Court must in all cases be satisfied that he can give material evidence before it will issue a commission (*t*) or letters of request, and the evidence must be directly material to the case and not merely evidence which incidentally might be useful for the purpose of corroborating a witness or the like (*u*). Subject to this, the rule is that a commission will issue if the applicant satisfies the Court that it is impracticable or unreasonable to bring the witness to England for the trial. In one case the Court of Appeal affirmed a decision refusing a commission to examine a witness in America, on the

(*p*) *Coch* v. *Allcock*, 21 Q. B. D. 178.
(*q*) *Ross* v. *Woodford*, [1894] 1 Ch. 38.
(*r*) *Armstrong* v. *Armstrong*, [1892] P. 98.
(*s*) *Bicknell* v. *Bicknell*, [1908] W. N. 97.
(*t*) *Langen* v. *Tate*, 24 Ch. D. 522; but see *Valentine* v. *Valentine*, [1901] P. 283; *Gribbon* v. *Gribbon*, 24 T. L. R. 160.
(*u*) *Ehrmann* v. *Ehrmann*, [1896] 2 Ch. 611.

ground that there was not enough to show that the witness could not be brought or would not come to England (*x*), COTTON, L.J., observing:—

"This is not the case of a plaintiff but of a witness, and undoubtedly a most material witness—a witness who is coming to give evidence on the part of the plaintiff to assist the plaintiff in upsetting for fraud a scheme in which the witness had himself been one of the principal actors. It is most desirable that such a witness should be examined in open Court. If, however, it could be shown that he could not be induced to come here, or that the plaintiff could not reasonably be expected to bring him here, I think it would be right to give leave to examine him abroad, and it would be for the Court or the jury at the trial to determine how far the weight of his evidence was affected by their not having seen or heard him. But I think that in a case of this sort, where it is important that the witness should be examined in Court, a heavy burden lies on the party who wishes to examine him abroad to show clearly that he cannot be reasonably expected to come here. On that point the plaintiff has failed. In my opinion there is not sufficient evidence to satisfy me that this witness cannot be brought here or will not come here. It is true we are told he is in the service of some company, but we do not know what is the character of his occupation, or whether he would not be able, at comparatively small expense, to leave for a time his position there and come over to this country."

A commission is sometimes granted to examine witnesses in a foreign country for the purpose of proving what is the law of that country on any point. The granting of such commission will depend entirely on the question whether competent witnesses can be called to prove the law in question at the trial in England. If they can be called, the commission will be refused (*y*). If they probably cannot, the commission will generally be granted (*z*), but the matter is entirely within the discretion of the Court (*a*).

Any objection to the evidence taken before a commission ought to be made at the time the evidence is taken, and not afterwards, and this is especially the case with an objection which could be removed at the time. Therefore, where upon the face of the depositions it

(*x*) *Lawson* v. *Vacuum Brake Co.*, 27 Ch. D. 137.
(*y*) *The M. Moxham*, 1 P. D. 116.
(*z*) *Armour* v. *Walker*, 25 Ch. D. at p. 677.
(*a*) *Coch* v. *Allcock*, 21 Q. B. D. 178.

appeared that the witness had affirmed, an application to take the depositions off the file, on the ground that the witness's evidence could not under the circumstances have been legally taken on affirmation, was refused, as no objection had been made thereto at the time (*b*). So, where copies of certain documents and answers of the witnesses with regard to such copies were received by the commissioners without objection by the defendant at the time, and the copies were appended to the depositions, it was held that the defendant could not afterwards object to such copies being used in evidence (*c*).

Where an order has been made for the examination of a witness under Rule 5 of Order XXXVII., it is not an order on him to attend for examination, and, therefore, if he is unwilling to attend he must be served with a *subpœna*. If he then fails to attend, or attends and refuses to be sworn, or refuses to answer a lawful question, the party requiring his evidence must apply to the Court or a judge under Rule 13 of Order XXXVII. In such a case the Court will order a recalcitrant witness to attend at his own expense (*d*), and can make him pay the costs of the order (*e*). A witness who refuses to answer a lawful question when ordered so to do by the Court or a judge can be committed for contempt of Court, but an examiner has no power to compel a witness to answer. All that he can do is to take down the question and the objection for the purpose of the matter being brought before the Court or a judge by the party who desires to have the witness's answer (*f*).

A commission may be issued to the judges of any foreign Court if willing to act (*g*). So a commission may

(*b*) *Richards* v. *Hough*, 51 L. J. Q. B. 361.
(*c*) *Robinson* v. *Davies*, 5 Q. B. D. 26.
(*d*) *Steuart* v. *Balkis Co.*, 32 W. R. 676.
(*e*) Under Order XXXVII., r. 15.
(*f*) *Ibid.*, r. 14.
(*g*) *Fischer* v. *Sztaray*, E. B. & E. 321. Now, however, the practice is to issue a letter of request; *ante*, p. 667.

issue to the judges of the High Court of Justice in England, and of the Court of Session in Scotland, and of any Supreme Court in any of His Majesty's colonies or possessions abroad, and to any judge in any such colony or possession appointed for the purpose by Order in Council, with respect to whom it is provided by the Evidence by Commission Act, 1859 (*h*), s. 1, as follows:—

"Where upon an application for this purpose it is made to appear to any Court or judge having authority under this Act that any Court or tribunal of competent jurisdiction in Her Majesty's dominions has duly authorised, by commission, order, or other process, the obtaining the testimony in or in relation to any action, suit, or proceeding pending in or before such Court or tribunal of any witness or witnesses out of the jurisdiction of such Court or tribunal, and within the jurisdiction of such first-mentioned Court, or of the Court to which such judge belongs, or of such judge, it shall be lawful for such Court or judge to order the examination before the person or persons appointed, and in manner and form directed by such commission, order, or other process as aforesaid, of such witness or witnesses accordingly; and it shall be lawful for the said Court or judge by the same order, or for such Court or judge, or any other judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced, and any disobedience thereof punished, in like manner as in case of an order made by such Court or judge in a cause depending in such Court or before such judge."

The English Courts will also upon request take evidence in this country for Courts in foreign countries (*i*).

Section 2 provides, that every person examined as a witness under any such commission, order, or other process as aforesaid, who shall upon any such examination wilfully and corruptly give any false evidence, shall be deemed and taken to be guilty of perjury. Section 4 provides:—

"That every person examined under any such commission, order, or other process as aforesaid, shall have the like right to

(*h*) 22 Vict. c. 20. And see now, Order XXXVII., rr. 54—59.
(*i*) Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113); Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 24; and see also Order XXXVII., rr. 54—58, 60.

refuse to answer questions tending to criminate himself, and other questions which a witness in any cause pending in the Court by which, or by a judge whereof, or before the judge by whom the order for examination was made, would be entitled to; and that no person shall be compelled to produce under any such order as aforesaid any writing or other document that he would not be compellable to produce at a trial of such a cause."

Section 5 provides, that His Majesty's High Court of Justice in England and Ireland, the Court of Session in Scotland, and any Supreme Court in any of His Majesty's colonies or possessions abroad, and any judge of any such Court, and every judge in any such colony or possession who by any order of His Majesty in Council may be appointed for this purpose, shall respectively be Courts and judges having authority under the Act. A single commissioner under this section must administer the oath to himself, and should be expressly authorised so to do by the commission (*j*).

Under this Act the attendance of witnesses before a special examiner can be enforced by the Court having jurisdiction where the examination is to take place; and in such case it is the duty of such Court, and not of the Court that appoints the special examination, to determine what witnesses are to be summoned, and what documents they are to produce, as well as to decide all questions of privilege on the evidence which may arise in the examination (*k*).

Under s. 2 of the Evidence by Commission Act, 1885 (*l*), it is provided that—

"Where in any civil proceeding in any Court of competent jurisdiction an order for the examination of any witness or person has been made, and a commission, mandamus, order, or request for the examination of such witness or person is addressed to any Court, or to any judge of a Court, in India or the colonies, or elsewhere in Her Majesty's dominions, beyond the jurisdiction of the Court ordering the examination, it shall be lawful for such Court, or the chief judge thereof, or such judge, to nominate some fit

(*j*) *Wilson* v. *De Coulon*, 22 Ch. D. 841.
(*k*) *Campbell* v. *Attorney-General*, L. R. 2 Ch. 571.
(*l*) 48 & 49 Vict. c. 74.

person to take such examination, and any deposition or examination taken before an examiner so nominated shall be admissible in evidence to the same extent as if it had been taken by or before such Court or judge."

Section 5 of the Evidence by Commission Act, 1843 (*m*), provides machinery for the execution in any part of the United Kingdom of commissions issued in any other part (*n*).

## NOTICES TO PRODUCE AND TO ADMIT.

The notice to produce, and the notice to inspect and admit, documents must also be carefully prepared. The importance of these notices has already been pointed out. Unless one party has given to his opponent express notice to produce a particular document which is in the latter's possession, he cannot give any secondary evidence of its contents. Unless one party has given notice to his opponent to inspect and admit the documents in his own possession, the opponent will not admit them, and then they must be strictly proved at the trial. If, after notice to admit, the opponent refuses to admit the handwriting, he will probably, even though he win the action, have to pay the costs of proving this document. But the party in possession of the document, even if successful, will not be allowed the costs of proving it unless he served on his opponent notice to admit it, and so gave him the opportunity of saving the expense (*o*).

The service of a notice to produce is then an

(*m*) 6 & 7 Vict. c. 82, s. 5; see Appendix.
(*n*) As to the jurisdiction conferred by this Act, see *Burchard* v. *Macfarlane*, [1891] 2 Q. B. 241.
(*o*) Order XXXII., r. 2.

essential preliminary to the admissibility of secondary evidence of its contents, whenever the document is in the possession of the opponent. But a party does not insure the production of the original document at the trial merely by giving his opponent notice to produce it. The opponent may disregard the notice and refuse to produce the document at the trial, although such conduct will be matter for adverse comment. If, therefore, a party has no copy of a document, which is of importance to his case, he should do something more than merely give a notice to produce it. As a rule, it will be sufficient to serve the opponent with a *subpœna duces tecum* to produce the particular document. But if the document is essential to the proof of a party's case, he should apply for an order compelling his opponent to produce the original at the hearing. The Court can, under Order XXXI., r. 14, compel the production by a party of any document at the trial, and will, if necessary, adjourn the case to enable it to be produced.

To entitle a party to give secondary evidence of a document, it is not enough for him duly to serve notice to produce it on his opponent; he must also prove, or at least raise, a reasonable presumption that the original is in the hands of the adverse party or of a third person in privity with him (*p*). Slight evidence of this fact will be sufficient, when the document naturally, necessarily or probably might be expected to be in the custody, or under the control, of the adverse party. Thus, it has been presumed that a bankruptcy certificate came into the hands of a bankrupt who was proved to have applied

(*p*) *Sharpe* v. *Lamb*, 11 A. & E. 805.

for it, and to have been charged for it by his solicitor (*q*). Generally, where documents have been traced into a party's possession, it lies upon him to show what has become of them, before he can object, after notice to produce, to the substitution of secondary evidence (*r*); and where there is a privity of title between the adverse party and a third person who holds the original, the former is equally compellable to produce. In such a case the question is, whether the custody was virtually, although not actually, the custody of the adverse party; or whether he had such a control over the holding by the third party as made it virtually a personal holding. Thus, generally, where the document is in the possession of an agent, he may either be served with a *subpœna duces tecum*, or the principal may be served with notice to produce. Where a notice was given to an owner of a vessel to produce a document which appeared to be in the possession of the captain (*s*); where it was given to the drawer to produce a cheque which was proved to have been delivered to the drawer's banker (*t*); and to a sheriff to produce a warrant which had been returned to the under-sheriff (*u*), secondary evidence has been received; but where the possession was independent of the adverse party, as where he had assigned a lease (*x*); or where the writing was held as a security by a third party (*y*); or where it has been traced by a party satisfactorily into the possession of a stranger with whom he is unconnected, and over whom he has no control, a litigant will not be affected by notice unless he has wilfully parted with the document after receiving the notice (*z*).

A party may produce an original document at any

(*q*) *Henry* v. *Leigh*, 3 Camp. at p. 502.
(*r*) *R.* v. *Thistlewood*, 33 How. St. Tr. at p. 757.
(*s*) *Baldney* v. *Ritchie*, 1 Stark. 338.
(*t*) *Partridge* v. *Coates*, Ry. & M. 156.
(*u*) *Taplin* v. *Atty*, 3 Bing. 164.
(*x*) *Knight* v. *Martin*, Gow. 103.
(*y*) *Parry* v. *May*, 1 M. & Rob. 279.
(*z*) *Knight* v. *Martin*, *supra*.

time when secondary evidence is tendered; and then the latter becomes inadmissible. If there is any question as to the originality of the document, such question is for the judge (*a*); but where the existence of a duly stamped document is denied upon the pleadings, and the plaintiff, after giving notice to produce, tenders a copy of it, the judge cannot hear evidence to decide the question of the existence of the stamped original as a question preliminary to that of the admissibility of the copy, because he would be thereby determining an issue which is in the province of the jury (*b*).

A notice to produce might formerly have been given to the adverse party or his agent, either verbally or in writing (*c*); but it must now in civil cases be given in writing (*d*). It may be served either on the party or on his solicitor (*e*), and it will be sufficient to leave it with a servant at the residence of the former, or with a clerk at the office of the latter (*f*). If a new trial is ordered, fresh notices to produce are not necessary (*g*).

The notice to produce need not be minutely descriptive, and the Courts will not entertain frivolous or technical objections to its validity, if it points out, with sufficient distinctness, to the adverse party the documents which he is required to produce (*h*). Notices to produce "all letters written by the plaintiff to the defendant, relating to the matters in dispute in the action" (*i*); and "all letters written to and received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person on their

(*a*) *Boyle* v. *Wiseman*, 11 Ex. 360.
(*b*) *Stowe* v. *Querner*, L. R. 5 Ex. 155.
(*c*) *Smith* v. *Young*, 1 Camp. 439; *Suter* v. *Burrell*, 2 H. & N. 867.
(*d*) By Order XXXII., r. 8, which also prescribes a form of notice: see R.S.C., Appendix B., No. 14.
(*e*) *Hughes* v. *Budd*, 8 Dowl. 315.
(*f*) *Evans* v. *Sweet*, Ry. & M. 83.
(*g*) *Hope* v. *Beadon*, 17 Q. B. 509.
(*h*) *Lawrence* v. *Clark*, 14 M. & W. 250.
(*i*) *Jacob* v. *Lee*, 2 M. & Rob. 33.

behalf; and also all books, papers, etc., relating to the subject-matter of this cause" (*k*); and also "all accounts relating to the matters in question in this cause" (*l*); have been held sufficient notice to produce any document reasonably included in the description. Notice to produce a letter purporting to enclose an account has been held sufficient notice to produce the account (*m*).

The notice ought to be given within a reasonable time before the trial comes on; and it will be for the judge to determine, in the circumstances of the case, whether the notice has been served within such reasonable time (*n*).

In town causes, and also in country causes, where the solicitor lives in the assize town, if the documents are such as from the nature of the case may reasonably be presumed to be in his hands, notice may be served during business hours in the afternoon of the day preceding the trial (*o*); but if they are not such as are immediately connected with the cause, or are such as would presumably be in the hands of a client or other person, the notice must be proportionately earlier, according to an estimate of the time necessary to obtain them (*p*). In such a case, and in all country causes, where the adverse solicitor does not live in the assize town, the notice ought to be served on him before the commission day, and within a reasonable time before he is required to leave home for the assize town (*q*); but if he has the document with him at the assize town, service there will be sufficient (*r*).

Where the adverse holder is abroad, or beyond the

(*k*) *Morris* v. *Hanser*, 2 M. & Rob. 392.
(*l*) *Rogers* v. *Custance*, 2 M. & Rob. 179.
(*m*) *Engall* v. *Bruce*, 9 W. R. 536.
(*n*) *Per* PARKE, B., in *Lloyd* v. *Mostyn*, 10 M. & W. at p. 483; see *Dwyer* v. *Collins*, 7 Ex. 639; Cockle, 156.
(*o*) *Atkyns* v. *Meredith*, 4 Dowl. 658.
(*p*) *Byrne* v. *Harvey*, 2 M. & Rob. 89.
(*q*) *George* v. *Thompson*, 4 Dowl. 656.
(*r*) *R.* v. *Hawkins*, 2 Car. & K. 823.

jurisdiction of the Court, and leaves his solicitor to conduct his case, it will be presumed that he has also left with him all papers naturally connected with his case; and the Courts, under such circumstances, have been inclined to maintain the validity of a notice to the solicitor (*s*); but the circumstances must be such as to support a supposition that the papers are producible, and the notice must be sufficient. Thus, a three days' notice to produce letters written by a defendant to his partners in New South Wales, was held sufficient, on its appearing that there had been litigation between the same parties some years previously, for the purposes of which it was reasonable to suppose that the letters must have been remitted to England (*t*).

If a party, on being served with notice to produce, states that the document does not exist, secondary evidence will be admissible, and the adverse party cannot object to the lateness of the notice (*u*).

Rule 8 of Order XXXII. provides, that an affidavit of the solicitor, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall, in all cases, be sufficient evidence of the service of the notice, and of the time when it was served. Sufficient evidence in this rule means *primâ facie* and not conclusive evidence (*x*).

Notice to produce is unnecessary—

(1) When a party holds a duplicate original, or a counterpart of his adversary's document (*y*). Such duplicate or counterpart must not be a mere copy, but in all respects of equal and co-extensive character and validity with the adversary's document. In such a case it is receivable as being itself primary evidence.

(*s*) *Bryan* v. *Wagstaff*, Ry. & M. 327.
(*t*) *Sturge* v. *Buchanan*, 10 A. & E. 598.
(*u*) *Foster* v. *Pointer*, 9 C. & P. 718.
(*x*) See *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612.
(*y*) *Colling* v. *Treweek*, 6 B. & C. at p. 398.

(2) When the nature of the case and proceedings sufficiently inform the adverse party that he will be required to produce the document. Thus, in an action of trover for a bond or other instrument (*z*), or on an indictment for stealing a writing (*a*), the plaintiff or prosecutor may give secondary evidence without proving notice to produce. So in an action on a solicitor's signed bill of costs, no notice need be given to produce it (*b*).

Where the nature of the action or indictment is such that the defendant must know that he is charged with the possession of the document, and is called upon to produce it, notice is not necessary, and such is the case in an action of trover, or on an indictment for stealing; but if the matter is collateral, it is necessary to give notice (*c*).

Hence, where on an indictment for perjury, the prisoner having sworn that a certain draft did not exist, and the materiality of its existence depended on its contents and certain alleged alterations in it, it was held that no parol evidence was admissible, either of its existence or of its contents, without notice to produce (*d*).

The general rule stated above is subject to several special limitations. Thus, in forgery, the prosecutor must give notice to the prisoner to produce the original instrument (*e*); in arson, for setting fire to a dwelling-house with intent to defraud an insurance company, notice must be given to produce the policy (*f*). In civil cases, in an action on a cheque or a bill, if the defendant

(*z*) *Scott* v. *Jones*, 4 Taunt. 865.
(*a*) *R.* v. *Aickles*, 1 Leach, 294; and see also *Marshall* v. *Ford*, 99 L. T. 796.
(*b*) *Colling* v. *Treweek*, 6 B. & C. 394.
(*c*) See *per* KELLY, C.B., in *R.* v. *Elworthy*, L. R. 1 C. C. R. at p. 105.
(*d*) *R.* v. *Elworthy*, L. R. 1 C. C. R. 103.
(*e*) *R.* v. *Halworth*, 4 C. & P. 254.
(*f*) *R.* v. *Ellicombe*, 5 C. & P. 522.

does not traverse the making or acceptance, the plaintiff need not produce without notice (*g*).

(3) When the document is itself a notice (*h*), *e.g.*, a notice to quit, a notice of action, a notice of dishonour of a bill, or a notice to produce (*i*).

The principle of this rule is that the service of the original notice is in itself a sufficient notice to produce it at the trial if required. It does not apply where the notice has been given to one who is not a party to the action, nor where it contains the terms of a contract; as where a carrier, relying upon a notice served on the plaintiff to limit his liability, was held bound to give notice to produce it (*j*). This exception has recently been extended to other formal documents besides notices. In a recent case, where a person was charged with exceeding the speed limit for motor cars, the constable gave evidence that the name and address in the licence were those of the person charged. No notice to produce the licence had been given, but it was held that the evidence was admissible (*k*). So it has been held that it is unnecessary to serve upon the prisoner a notice to produce the notice which is required by the Prevention of Crime Act, 1908, to be served upon a person whom it is intended to indict for being a habitual criminal (*l*).

(4) When a party or his solicitor is shown to have an original with him in Court and refuses to produce it, secondary evidence will be received, notwithstanding the want of a notice to produce (*m*).

(5) When the adverse party has admitted the loss of the original; or when it is absolutely impossible or highly inconvenient to produce it in Court, as in the

(*g*) *Goodered* v. *Armorer*, 3 Q. B. 956.
(*h*) *Philipson* v. *Chase*, 2 Camp. 111.
(*i*) *Colling* v. *Treweek*, 6 B. & C. 394.
(*j*) *Jones* v. *Tarleton*, 9 M. & W. 675.
(*k*) *Marshall* v. *Ford*, 99 L. T. 796.
(*l*) *R.* v. *Turner*, [1910] 1 K. B. 346; 8 Edw. VII. c. 59, s. 10.
(*m*) *Dwyer* v. *Collins*, 7 Ex. 639; Cockle, 156.

case of a mural inscription (*n*), but not a removable and portable notice or inscription (*o*).

(6) Merchant seamen (*p*) are permitted to prove orally an agreement with the master of a ship, without producing the original, or giving notice to produce it.

Lastly, although a party has been duly served with a proper notice to produce a document it will still be open to him at the trial to object to its being read on the ground that it is wholly irrelevant, or is marked "without prejudice" (*q*), and also on any ground on which he might have refused to produce to his opponent before the trial a document included in the schedule to his Affidavit of Documents (*r*).

(*n*) *Bartholomew* v. *Stephens*, 8 C. & P. 728; see *Mortimer* v. *M'Callan*, 6 M. & W. 58; Cockle, 161.
(*o*) *Jones* v. *Tarleton*, 9 M. & W. 675.
(*p*) Merchant Shipping Act, 1894, s. 123.
(*q*) See *ante*, p. 292.
(*r*) See *ante*, p. 632 *et seq.*

## CANADIAN NOTES.

### COMPELLING ATTENDANCE, PRODUCTION, ETC.

It was held in *Patchin* v. *Davis*, 10 U. C. Q. B. 639, that the second clause of 16 Vict. c. 19 (Ontario), by which plaintiffs and defendants might be compelled to attend as witnesses at a trial, did not apply when the parties resided out of the jurisdiction.

In *Street* v. *Faulkner*, 15 U. C. Q. B. 116, it was held that when a party to a suit was notified to attend as a witness by the opposite party, a proper sum for his expenses should be tendered with the notice, or judgment would probably not be given against him *pro confesso* if he should fail to attend (1857).

In *Doe* d. *Girvan* v. *MacLean*, 31 N. B. 474, the Supreme Court of New Brunswick was equally divided on the question whether a notice of intention to offer a certified copy of a deed in evidence, under Con. Stat. c. 74, s. 14, was sufficient, where the notice was served six days before the time it operated, but less than six days before the opening of the circuit.

The plaintiff's witness swore that work was done, upon a written agreement, which he had in court, but refused to produce. He had not been subpœnaed. It was held that the witness was as much bound to produce the writing as if in attendance under a *subpœna duces tecum*, but, *semble*, that if the witness had been required by the Court to produce the agreement, and had still refused, this would not have been sufficient to warrant the reception of secondary evidence. *Farley et al.* v. *Graham*, 9 U. C. Q. B. 438.

# CHAPTER IV.

## TRIAL OF A CIVIL ACTION.

In a civil case, as soon as the jury, if there is one, has been sworn and the pleadings opened (*a*), the counsel for the plaintiff usually, but not always, proceeds to make his opening speech. Even if the defendant does not appear, the plaintiff must briefly open and prove his case. If the defendant appears and the plaintiff does not, the defendant, if he has no counterclaim, is entitled to judgment dismissing the action, even though the burden of proof be on him (*b*). If he has a counterclaim, he must either withdraw it or proceed to prove it.

If, however, both parties appear, the one on whom the burden of proof rests should begin. But practically the defendant never begins unless the plaintiff has nothing at all to prove. Although the burden of proof of the main facts in issue, or of substantially the whole of such facts except the amount of damages may be on the defendant, yet in practice the plaintiff generally begins.

The reason for this rule was thus given by Lord Denman, in *Mercer* v. *Whall* (*c*):—

"The plaintiff should bring his own cause of complaint before the Court and jury, in every case where he has anything to prove, either as to the facts necessary for his obtaining a verdict, or as to

(*a*) See Odgers on Pleading and Practice, 6th ed., pp. 298 *et seq.*
(*b*) Order XXXVI., r. 32; *Armour* v. *Bate*, [1891] 2 Q. B. 233.
(*c*) 5 Q. B. at p. 458; Cockle, 90.

the amount of damage. It appears expedient that the judge, the jury, and the defendant himself, should know precisely how the claim is shaped. This disclosure may convince the defendant that the defence which he has pleaded cannot be established. On hearing the extent of the demand, the defendant may be induced at once to submit to it rather than persevere. Thus the affair reaches its natural and best conclusion. If this does not occur, the plaintiff, by bringing forward his case, points his attention to the proper object of the trial, and enables the defendant to meet it with the full understanding of its nature and character."

Thus the plaintiff begins in actions of libel, slander and injuries to the person, and in all other actions in which the plaintiff seeks to recover unliquidated damages. So wherever there are several issues and the burden of proving any one of them lies on the plaintiff, he is entitled to begin, provided he undertakes to give evidence on such issue. In an action brought to prove a will in solemn form the executors begin, whether they are defendants or plaintiffs.

Whichever side begins, the opening speech of counsel should state clearly, concisely and in chronological order the facts upon which he relies in support of his case. He must not open any fact which he is not prepared with evidence to prove. He may also, if he thinks it expedient, deal with any defence which has been raised by his opponent on the pleadings. But it is unwise at this stage of the proceedings to indulge in rhetoric or invective against the other party. The witnesses are then called, and each in turn will be examined in chief, cross-examined, and sometimes also re-examined.

Any witness who has been *subpœnaed* to attend the trial may refuse to give any evidence, unless he is first paid his proper expenses for attending. This is so even though the witness has been sworn (*d*). And, although

(*d*) *In re Working Men's Mutual Society*, 21 Ch. D. 831; and see *ante*, p. 665.

he has sworn to speak the truth, the whole truth, and nothing but the truth, he may nevertheless refuse to answer any questions which are unnecessarily offensive or against public policy (*e*). So, too, "the judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be inquired into in the cause or matter." (*f*).

When all the plaintiff's witnesses have been examined, and all documents material to his case have been put in and read, his case is closed. If the counsel for the defendant does not intend to call any witnesses, the plaintiff's counsel must at once address the jury, summing up his own evidence, and commenting on the defence, so far as it has been disclosed by the cross-examination; the defendant's counsel then addresses the jury, criticising the evidence for the plaintiff. If, however, the defendant's counsel intends to call witnesses, or if he has already put in any document, he addresses the jury at the conclusion of the plaintiff's case, opening the defence. He then calls his witnesses, each of whom may be examined, cross-examined, and re-examined, and he usually makes a second speech for the defendant, at the conclusion of which the counsel for the plaintiff replies on the whole case. Calling witnesses for the defendant necessarily entails this disadvantage, that it gives the plaintiff the last word with the jury. If there are two defendants, of whom one calls evidence material to the defence of both, and the other calls no evidence

(*e*) See *ante*, pp. 227, 241.
(*f*) Order XXXVI., r. 38.

at all, the latter has apparently a right of reply after the plaintiff's counsel has addressed the jury (*g*).

It is sometimes the duty of the judge to withdraw the case from the jury and to direct judgment to be entered for the defendant. He cannot do so after hearing merely the opening statement of the plaintiff's counsel, unless that counsel consents (*h*). The jury has no right to interpose and stop the case by finding in favour of one party, until they have heard all the evidence tendered by the other party and the speech of his counsel. If there is no evidence to go to the jury on any issue, the judge should withdraw that issue from the jury, but this should not be done if evidence has been given on either side on which the jury might reasonably act.

When all the evidence which either party wishes to place before the Court has been given, and the counsel for both sides have addressed the jury, the judge sums up the case. He will explain to the jury what are the issues which they have to decide. He will direct them as to the law applicable to the facts proved before them; and the jury must follow the judge's ruling on any matter of law. But it is for the jury to find the facts. The judge may state his own opinion on any question of fact, but the jury is not bound to accept it. They must give their verdict according to their own view of the evidence. Upon the verdict follows judgment.

(*g*) *Ryland* v. *Jackson and Brodie*, 18 T. L. R. 574. Where there are two defendants, who are separately represented and each calls witnesses, the counsel for the defendant who first opens his case will be the first to sum up to the jury. *Medley* v. *London United Tramways*, 26 T. L. R. 315.

(*h*) *Fletcher* v. *London and North Western Rail. Co.*, [1892] 1 Q. B. 122; cf. *Fox* v. *Star Newspaper Co.*, [1900] A. C. 19; but see *Speake* v. *Hughes*, [1904] 1 K. B. 138.

It is the duty of the judge to decide all questions as to the admissibility of evidence (*i*). As, for instance, whether a witness is mentally capable of giving evidence, or whether secondary evidence of a document may be given (*k*). Thus, if the plaintiff tender a copy of a material document as secondary evidence on the defendant's refusing to produce the original, it is for the judge to decide whether he will admit that copy or not, even though the question whether an original ever existed is the main issue in the action, and must therefore be ultimately left to the jury (*l*). If, after admitting a witness to give evidence, the judge is convinced by proof of subsequent facts, and by observation of the witness's demeanour, that the latter is not competent, he may withdraw such evidence from the jury (*m*). But in a jury case the judge cannot decide as to the *credibility* of a competent witness ; this is solely for the jury (*n*).

It is also the duty of the judge to point out to the jury the considerations by which the value of evidence has to be tested; but he need not, unless he pleases, in his summing up express his own opinion as to the weight to be attached to any particular piece of evidence. Again, before he leaves the decision of any issue of fact to the jury, the judge must first decide whether there is any sufficient evidence to be left to them. He should not do so unless there is some evidence fit for their consideration on the issues which they have to try. Where there is merely a *scintilla* of evidence he ought not to leave it to a jury (*o*); and the test whether the evidence only amounts to a *scintilla* is this: Would it, if wholly uncontradicted, justify a jury in finding a verdict

(*i*) *Bartlett* v. *Smith*, 11 M. & W. 483; Cockle, 4.
(*k*) *Boyle* v. *Wiseman*, 10 Ex. 647.
(*l*) *Stowe* v. *Querner*, L. R. 5 Ex. 155.
(*m*) *R.* v. *Whitehead*, L. R. 1 C. C. R. 33; see also *R.* v. *Hill*, 2 Den. 254.
(*n*) *Heslop* v. *Chapman*, 12 Q. B. 928.
(*o*) *Giblin* v. *McMullen*, L. R. 2 P. C. at p. 335; *Ryder* v. *Wombwell*, L. R. 4 Ex. 32.

in accordance with it? (*p*). If it would, the judge should not withdraw the case from them (*q*). He cannot do so, where a witness has positively sworn to something having taken place within his own knowledge, by which, if it did take place, the case was proved (*r*). A judge at a trial cannot nonsuit a plaintiff upon the opening of his counsel without that counsel's consent when he desires to call his witnesses (*s*).

In a case of wrongful dismissal, Lord JAMES OF HEREFORD laid down the rules which should guide a judge where evidence fit to be laid before the jury has been given on any issue of fact:—

"If this be so, the questions raised in the present case had to be tried by the jury. But in cases where the trial must so take place the presiding judge has important duties to fulfil. It is for him to say whether there is any evidence to submit to the jury in support of the allegation of justifiable dismissal. If no such evidence has in his opinion been given, he should not submit any issue in respect of such allegations. The judge may also direct, guide, and assist the jury. He may direct by informing them of the nature of the acts which as a matter of law will justify dismissal. He may guide them by calling their attention to the facts material to the determination of the issues raised, and he may assist them in a manner and to an extent there is no reason to define. There have been judges –more numerous in the past than in the present—who possessed and exercised the power of addressing a jury in terms of apparent impartiality, and yet of placing before them views which seldom failed to secure the verdict desired by the judge to be recorded. Some trace of the exercise of this influence may be found in the following terms in which Sir FREDERICK POLLOCK guided the jury in the case of *Horton* v. *McMurtry* (*t*): 'Gentlemen, I believe it is for you to decide whether this was a proper ground of dismissal—but if it be a matter of law . . . my opinion is that it is a good ground of dismissal.' The jury found for the defendant" (*u*).

Questions of law, then, other than foreign law, are for the judge; questions of fact are for the jury. But it is

(*p*) *Per* MELLISH, L.J., in *Ex parte Morgan*, 2 Ch. D. at p. 90.
(*q*) *Dare* v. *Heathcote*, 25 L. J. Ex. 245; *Jewsbury* v. *Newbold*, 26 L. J. Ex. 247.
(*r*) *Ex parte Morgan*, 2 Ch. D. at p. 90.
(*s*) *Fletcher* v. *London and North Western Rail. Co.*, [1892] 1 Q. B. 122; see *Fox* v. *Star Newspaper Co.*, [1900] A. C. 19.
(*t*) 5 H. & N. 667.
(*u*) *Clouston & Co., Ltd.* v. *Corry*, [1906] A. C. at pp. 129, 130.

not always easy to distinguish a question of fact from one of law. In any action founded upon a contract the question whether an act has been done within a reasonable time or in a reasonable manner is for the jury. Thus, under the Sale of Goods Act, 1893 (*x*), it is for the jury to say whether, in the circumstances of the case, goods have been made or delivered within a reasonable time. But where the length of time necessary is governed by fixed legal principles, the question is for the judge, as in cases of notices to quit or to terminate employment. So, too, the question whether a covenant in restraint of trade is reasonable or not is one for the judge, but if any of the facts which the judge must take into account in deciding the question are disputed, the jury should be asked to find them (*y*). When an infant is sued for the price of goods supplied to him, the judge will decide first whether the plaintiff must prove that the goods were necessaries to the infant and whether he has given any evidence to go to the jury in proof thereof, but it is for the jury to find whether the goods were, in fact, necessaries or not (*z*).

In cases of tort the same rule applies. Thus questions of reasonable skill (*a*), diligence, and negligence are all for the jury, if there is any evidence to go to them. As was laid down by the House of Lords in *Metropolitan Rail. Co.* v. *Jackson* (*b*), in actions claiming damages for negligence, it is for the judge to say on the facts in evidence whether negligence can be inferred, and, if not, to withdraw the case from the jury. But if there is any such evidence, the question whether negligence ought to be so inferred is one for the jury. The burden of proving negligence is on the plaintiff (*c*), and he does

(*x*) 56 & 57 Vict. c. 71, s. 56.
(*y*) *Dowden and Pook, Ltd.* v. *Pook*, [1904] 1 K. B. 45; *Haynes* v. *Doman*, [1899] 2 Ch. 13.
(*z*) *Ryder* v. *Wombwell*, L. R. 4 Ex. 32.
(*a*) *McCall* v. *Australian Meat Co.*, 19 W. R. 188.
(*b*) 3 App. Cas. 193.
(*c*) For the doctrine of *Res ipsa loquitur*, see *ante*, p. 165.

not discharge that burden by proving facts equally consistent with diligence or negligence (*d*). Even where the question depends on matters of technical legal detail the rule applies, and the jury must decide the issue (*e*).

The issues of malice, good faith, actual knowledge, and real intention are for the jury. Thus, in actions for defamation, it is for the judge to decide whether the occasion was privileged or not (*f*); if he finds that the occasion was privileged, it will be for the jury to find whether the defendant was actuated by malice, if there be any evidence of malice to be left to them (*g*). When "fair comment" is pleaded as a defence, the judge decides whether it is comment at all (*h*), and whether the matter is one of public interest (*i*); but then it is for the jury to decide whether the comment is fair (*k*) and whether the defendant was actuated by malice (*l*). So, too, the jury find whether a report of a judicial proceeding was fair or not (*m*).

The question, libel or no libel, is pre-eminently one for the jury (*n*). The judge, however, must withdraw the case from them if he comes to the conclusion that the words are not reasonably capable of a defamatory

(*d*) *Cotton* v. *Wood*, 8 C. B. (N.S.) 568; *Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 41; *Pomfret* v. *Lancashire and Yorkshire Rail. Co.*, [1903] 2 K. B. 718; and see *Manzoni* v. *Douglas*, 6 Q. B. D. 145.

(*e*) *Doorman* v. *Jenkins*, 2 A. & E. at pp. 260, 261.

(*f*) *Stace* v. *Griffith*, L. R. 2 P. C. 420; see *Hebditch* v. *McIlwaine*, [1894] 2 Q. B. p. 58; *Hope* v. *D'Anson*, 18 T. L. R. 201.

(*g*) *Harrison* v. *Bush*, 5 E. & B. 344; and see *Hart* v. *Gumpach*, L. R. 4 P. C. 439; *Clark* v. *Molyneux*, 3 Q. B. D. 237; *Jenoure* v. *Delmege*, [1891] A. C. 73.

(*h*) *Henwood* v. *Harrison*, L. R. 7 C. P. p. 628; *McQuire* v. *Western Morning News Co.*, [1903] 2 K. B. pp. 112, 113.

(*i*) *Dakhyl* v. *Labouchere* (H. L.), [1908] 2 K. B. 325 n.

(*k*) *Merivale* v. *Carson*, 20 Q. B. D. at p. 280; *Cooney* v. *Edevain*, 14 T. L. R. 34.

(*l*) *Thomas* v. *Bradbury, Agnew & Co.*, [1906] 2 K. B. p. 637

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

(*n*) *Per* Lord COLERIDGE, C.J., in *Saxby* v. *Easterbrook*, 3 C. P. D. at p. 342.

meaning (*o*). He should not do so unless he is satisfied that the publication cannot be a libel, and that a verdict finding that it was a libel would be set aside (*p*). The jury decides the meaning of words of a cant or slang character, whether written or spoken, which are alleged to be defamatory (*q*). Again, it is for the jury to find whether the words complained of are true in substance and in fact (*r*).

The question what is a reasonable and probable cause is, as a rule, for the jury. Actions for malicious prosecution and false imprisonment are exceptional. Thus in the former the plaintiff must show (among other things) that the defendant had no reasonable and probable cause for prosecuting him, and this is a question for the judge (*s*); and in so doing was actuated by malice, which is a fact to be found by the jury (*t*). So, too, in actions of false imprisonment, in certain cases the defendant will succeed if he can show that he had reasonable and probable cause for arresting the plaintiff, and this the judge will decide (*x*).

It is enough if only the substance of the issue is proved. A party will not be prejudiced by failing to prove any matter which he has alleged in his pleading, if it be unnecessary to support his claim (*y*). Thus, it is

(*o*) *Speake* v. *Hughes*, [1904] 1 K. B. 138; *Cooney* v. *Edevain*, 14 T. L. R. 34; *Dauncey* v. *Holloway*, [1901] 2 K. B. 441.

(*p*) *Cox* v. *Lee*, L. R. 4 Ex. 288; but see *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741.

(*q*) *Barnett* v. *Allen*, 3 H. & N. 376; *Stannus* v. *Finlay*, 8 Ir. R. C. L. 264.

(*r*) *Alexander* v. *North Eastern Rail. Co.*, 6 B. & S. 340.

(*s*) *Lister* v. *Perryman*, L. R. 4 H. L. 521; cf., *West* v. *Baxendale*, 9 C. B. 141.

(*t*) *Haddrick* v. *Heslop*, 12 Q. B. 275; *Brown* v. *Hawkes*, [1891] 2 Q. B. 718.

(*x*) *Howard* v. *Clarke*, 20 Q. B. D. 558.

(*y*) *King* v. *Pippett*, 1 T. R. 235; *Ricketts* v. *Salwey*, 2 B. & Ald. 360; cf. *Bowen* v. *Jenkins*, 6 A. & E. 911; but see *Alexander* v. *Bonin*, 4 Bing. N. C. 799. Such cases as *Gwinnet* v. *Phillips*, 3 T. R. 643, *Bristow* v. *Wright*, 2 Doug. 665, and *Williamson* v. *Allison*, 2 East, 446, are no longer law.

immaterial that the plaintiff has succeeded in recovering an amount less than that claimed on his pleadings—except, possibly, with regard to costs. A plea of tender is proved by evidence of tender of a larger sum than is alleged (*z*). So, a plea of payment in accord and satisfaction is proved by proof of payment of a sum sufficient to cover the plaintiff's real demand (*a*). In an action of slander it is enough to prove the material words on the record: and where there are several actionable words, it is enough to prove any of them (*b*); or any words which bear practically the same meaning as any of them (*c*).

Moreover, the judge now has a very large power of amending the pleadings at a trial, whenever he is of opinion that the justice of the case requires it. This power is now regulated in the High Court by Rules 1—6 of Order XXVIII., which will be found set out in the Appendix. The Court of Appeal has, by virtue of Order LVIII., r. 4, the same powers of amendment as the High Court. Under these provisions, the Court will allow any pleading to be amended at any stage of the action, including the trial or hearing, unless the amendment changes the whole nature of the action (*d*), or unless the party applying has been acting *malâ fide*, or by his blunder has done some injury to the other side which cannot be compensated by costs or otherwise (*e*), The Court will allow any amendment which would tend to the determination of the real question in controversy, but not for the purpose of enabling a purely technical objection to be raised (*f*).

(*z*) *Dean* v. *James*, 4 B. & Ad. 546; but see *Rivers* v. *Griffiths*, 5 B. & Ald. 630.
(*a*) *Falcon* v. *Benn*, 2 Q. B. 314.
(*b*) *Compagnol* v. *Martin*, 2 W. Bl. 790.
(*c*) *Ecklin* v. *Little*, 6 T. L. R. 366, overruling the *dictum* of LAWRENCE, J., in *Williamson* v. *Allison*, 2 East, at p. 447.
(*d*) *Newby* v. *Sharpe*, 8 Ch. D. 39.
(*e*) *Per* BRAMWELL, L.J., in *Tildesley* v. *Harper*, 10 Ch. D. 396; cf. *Steward* v. *North Metropolitan Tramways Co.*, 16 Q. B. D. 556.
(*f*) *Australian Steam Navigation Co.* v. *Smith*, 14 App. Cas. 318;

*Evidence by Affidavit.*

By Rule 1 of Order XXXVII. (*g*), discretionary powers are vested in the Court: (i.) to order any particular fact or facts to be proved by affidavit; (ii.) to allow the affidavit of any witness to be read at a hearing or trial on such conditions as it may think reasonable, with this proviso, that when the opposite party *bonâ fide* desires to cross-examine a witness, and the witness can be produced, such witness's evidence shall not be allowed to be given by affidavit. The first of these powers, which can be exercised by the Court, even against the wishes of both parties, can be advantageously employed to the manifest saving of expense in proof of formal matters, even in trials by jury. The second, which, subject to the proviso, can be exercised by the Court at the instance of one party, but against the wish of the other, enables, in proper cases, the evidence of an absent witness to be brought before the Court without the expensive interposition of a commissioner or examiner.

Upon any motion, petition or summons, however (*h*), and in default actions *in rem*, and in references in Admiralty actions (*i*), evidence may be given by affidavit. Further exceptions have been created by statute (*k*). In all other cases, every witness, at the trial of any action or at any assessment of damages, must be examined *viva voce* and in open Court, unless the solicitors of all parties to an action consent to the evidence being taken by affidavit; or unless an order has been made under the above rule. The parties frequently consent to evidence

*Dillon* v. *Balfour*, 20 L. R. Ir. 600; *Hyams* v. *Stuart King*, [1908] 2 K. B. 696, 724.

(*g*) For which see the Appendix.

(*h*) Order XXXVIII., r. 1; and see *Abrahams* v. *Dunlop*, [1905] 1 K. B. 46.

(*i*) Order XXXVII., r. 2.

(*k*) *E.g.*, the Bankers' Books Evidence Act, 1879, for which see *ante*, p. 374.

being taken on affidavit in actions for partition, and in actions where the object of the parties is to obtain a judicial decision upon facts as to which there is little, if any, dispute. But where the parties are at arm's length, and there is a serious dispute as to the facts, it is obviously better that the witnesses should be examined *viva voce* and in open Court. The two chief defects in affidavit evidence are these—that the Court has no opportunity of observing the demeanour of the witness while under examination; and that the version given of the story is too often that of the lawyer who prepares the affidavit rather than that of the deponent. The agreement to take the evidence by affidavit must be a formal one, and cannot be gathered from correspondence (*l*). If one of the parties to the agreement finds himself afterwards unable to procure affidavits by reason of the reluctance of his witnesses to make them, or from any other good cause, he should take out a summons to be relieved from the agreement, and the Court can make an order that the reluctant witness be examined at the trial, or, at the option of the other party, discharge the agreement, and direct all the evidence to be taken *viva voce* (*m*). In one case where the agreement was that the evidence should be taken by affidavit, but the word "only" was not used, the plaintiffs gave notice to cross-examine some of the deponents, and failed to cross-examine one of them, the defendant's counsel then claimed and was allowed to examine such deponent *viva voce* (*n*). Where the opposite party desires to cross-examine a witness who can be produced, his affidavit cannot be read at the trial if the cross-examining party objects (*o*). An affidavit once filed cannot be withdrawn for the purpose of preventing the deponent being cross-examined thereon (*p*). Even where

(*l*) *New Westminster Brewery Co.* v. *Hannah*, 1 Ch. D. 278.
(*m*) *Warner* v. *Mosses*, 16 Ch. D. 100.
(*n*) *Glossop* v. *Heston Local Board*, 26 W. R. 433.
(*o*) *Blackburn Guardians* v. *Brooks*, 7 Ch. D. 68; see proviso to Order XXXVII., r. 1.
(*p*) *In re Quartz Hill, etc., Co., Ex parte Young*, 21 Ch. D. 642.

the parties have agreed that the evidence shall be taken by affidavit, the Court can, if it thinks it necessary for the purposes of justice, decide that the evidence shall be taken *viva voce* (*q*).

Affidavits 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 (*r*). The words "with the grounds thereof" have been very frequently disregarded in practice, but unless they are acted upon, statements on information and belief ought to be disregarded *in toto* (*s*). In a case in the Court of Appeal (*t*), RIGBY, L.J., dealing with this subject, stated that he never paid the slightest attention to such defective affidavits, and said :—

"In the present day, in utter defiance of the order, solicitors have got into a practice of filing affidavits in which the deponent speaks not only of what he knows, but also of what he believes, without giving the slightest intimation with regard to what his belief is founded on. Or he says, 'I am informed' without giving the slightest intimation where he has got his information. Now every affidavit of that kind is utterly irregular, and, in my opinion, the only way to bring about a change in that irregular practice is for the judge, in every case of the kind, to give a direction that the costs of the affidavit, so far as it relates to matters of mere information or belief, shall be paid by the person responsible for the affidavit."

Evidence by affidavit in the County Courts is regulated by Orders XVIII. and XIX. of the County Court Rules, 1903.

### *Evidence in the Court of Appeal.*

After judgment has been given, there are two courses open to the unsuccessful party if he wishes

(*q*) *Lovell* v. *Wallis*, 53 L. J. Ch. 494 ; see also *B.* v. *B.*, 51 Sol. Jo. 430.
(*r*) Order XXXVIII., r. 3.
(*s*) Cf. judgment of JESSEL, M.R., in *Quartz Hill, etc. Co.* v. *Beall*, 20 Ch. D at p. 508.
(*t*) *Young* v. *Young Manufacturing Co., Ltd.*, [1900] 2 Ch. 753.

to take the matter further. He may either apply to the Court of Appeal to enter judgment for him on the ground that, on the facts proved at the trial, the judgment entered is bad in law, or he may move that Court for a new trial. He may, if he thinks fit, do both at the same time.

It is unnecessary, in this book, to say anything as to an appeal in point of law.

He may move for a new trial on several different grounds, with only four of which we are here concerned. These are :—

(i.) That the verdict is against the weight of evidence.

(ii.) That fresh evidence has been newly discovered.

(iii.) That he was taken by surprise at the trial.

(iv.) That the judge wrongly received or wrongly rejected evidence.

In the first place, however, it is necessary to consider how the evidence in the Court below must be brought before the Court of Appeal. This is regulated by Rules 11—13 of Order LVIII., which will be found set out in the Appendix.

The evidence given orally must be brought before the Court of Appeal by production of the judge's notes—if any were taken—on the point (*u*). His mere private memoranda, however, are not admissible (*x*). The judge's notes are not public property, and a copy of them will not be supplied to the litigants, nor even to the Lords on

(*u*) *Ellington* v. *Clark*, 38 Ch. D. 332. It is the duty of the appellant's solicitor to cause copies to be supplied to the Court of Appeal: *Lewis* v. *Cory*, [1906] W. N. 95.

(*x*) *Baudains* v. *Liquidators of Jersey Banking Co.*, 13 App. Cas. 832.

the hearing of an appeal in the House of Lords unless specially asked for (*y*).

The Court may also permit such evidence to be brought before it in other ways. Thus, where the parties have agreed in the Court below with the consent of the judge that shorthand notes should be taken, transcripts of those notes may be used on the appeal. But if the judge has himself taken notes, the Court of Appeal can always refer to them, in spite of any agreement between the parties, for the parties have no right to deprive the Court of the advantage of such notes (*z*).

When shorthand notes have been taken, without any agreement, a transcript of them may by special leave be used to supplement the judge's notes. The Court of Appeal frequently, if the case has been reported in a recognised series of law reports, also looks at the report of the case.

(i.) It is, as we have seen (*a*), a question of law for the judge whether on any issue there is evidence fit to be laid before the jury, and if he decides this question wrongly, there is ground for an appeal. But the objection that the verdict of the jury is against the weight of the evidence raises a question of fact, and is therefore ground for a motion for a new trial. The judge and jury below who saw the witnesses and heard them cross-examined are the best judges of the weight of their evidence. It does not matter how many witnesses swore one way, and how few the other. Where there is any evidence on both sides proper to be submitted to a jury, their verdict once found must stand (*b*). In the absence of any misdirection, the Court will not

(*y*) *Schweppes, Ltd.* v. *Gibbens*, [1905] W. N. 28.
(*z*) *Yorkshire Laundries, Ltd.* v. *Pickles*, [1901] W. N. 28.
(*a*) See *ante*, p. 689.
(*b*) *Commissioner for Railways* v. *Brown*, 13 App. Cas. 133.

interfere to set aside a verdict or grant a new trial on the ground that the verdict was against the weight of evidence, unless the verdict was one which no reasonable men could have found (*c*). "The verdict ought not to be disturbed unless it was one which a jury, viewing the whole of the evidence reasonably, could not properly find" (*d*).

The hearing of an appeal from a judge sitting without a jury is a rehearing, and it is the duty of the Court of Appeal to reconsider the evidence, and, if the circumstances warrant, to differ from the judge even on a question of fact turning on the credibility of the witnesses (*e*).

When, however, the decision does not depend on the credibility of the witnesses, but is based on inferences drawn from the evidence, it may, even without much pressure, be reversed by the Court of Appeal (*f*). This has been sometimes pushed so far as to say that a Court of Appeal cannot, or perhaps rather ought not to, interfere with the finding of a judge of first instance on a question of fact, but this is not so. The judge of first instance has heard the witnesses, and had an opportunity, "which the appellate tribunal does not possess," of testing their credit by their demeanour under examination. Hence great weight should be always attached to the finding of fact at which he has arrived.

AS COZENS-HARDY, M.R., said in *In re Wagstaff* (*g*):—

"The Court below has had the inestimable advantage of judging from the demeanour of the witnesses whether they are or are not

(*c*) *Webster* v. *Friedeberg*, 17 Q. B. D. 736; *Phillips* v. *Martin*, 15 App. Cas. 193; *Australian Newspaper Co., Ltd.* v. *Bennett*, [1894] A. C. 284; *Cox* v. *English, etc., Bank*, [1905] A. C. 168.

(*d*) *Per* Lord HERSCHELL, L.C., in *Metropolitan Rail. Co.* v. *Wright*, 11 App. Cas. at p. 154; and see *per* Lord HALSBURY, *ibid.*, at p. 156; *per* LOPES, L.J., in *Spencer* v. *Jones*, 13 T. L. R. 174; and *Jones* v. *Spencer* (H. L.), 77 L. T. 536.

(*e*) *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704.

(*f*) *The Glannibanta*, 1 P. D. 283.

(*g*) 98 L. T. at p. 151.

speaking the truth; and I think, further, that the Court of Appeal ought not in a case of this kind to depart from or vary the findings of fact of the learned judge in the Court below, unless the Court of Appeal is clearly satisfied that there has been something important overlooked or, in short, that the learned judge has made such a mistake as would almost have justified another division of the Court in directing a new trial on the ground that the verdict was against the weight of evidence."

But the hearing upon an appeal is a rehearing, and there is no presumption that the judgment in the Court below is right. Upon appeal from a judge, where both fact and law are open to appeal, the appellate tribunal is bound to pronounce such judgment as in their view ought to have been pronounced by the Court from which the appeal proceeds (*h*).

The case is very different when a jury has found a fact. In that case an appeal is not a rehearing of the facts, because the law has entrusted to the jury the duty of finding the facts. Hence the appellate Court can only disturb the verdict where, in their judgment, honest men could not reasonably have found that verdict.

As the EARL OF SELBORNE, L.C., said in *Metropolitan Rail. Co.* v. *Wright* (*i*):—

"It is not enough that the judge who tried the case might have come to a different conclusion on the evidence than the jury, or that the judges in the Court where the new trial is moved for might have come to a different conclusion, but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury, as to make it unreasonable, and almost perverse, that the jury when instructed and assisted properly by the judge should return such a verdict."

Where the real question to be determined was properly left to the jury, and they have answered it reasonably, their verdict cannot be disturbed (*k*). A judgment will not be set aside merely on the ground that it was obtained by perjury (*l*); but the Court has, of course, jurisdiction

(*h*) See *per* Lord HALSBURY, L.C., in *Rickmann* v. *Thierry*, 14 R. P. C. at p. 116.

(*i*) 11 App. Cas. at p. 153; this passage was cited with approval by Lord DAVEY in *Cox* v. *English, etc., Bank*, [1905] A. C. at p. 170.

(*k*) *Jones* v. *Spencer*, 77 L. T. 536.

(*l*) *Baker* v. *Wadsworth*, 67 L. J. Q. B. 301.

o set aside any judgment obtained by fraud (*m*). A juryman, after he has left the jury box, cannot be heard to complain of a verdict to which he was a party (*n*).

(ii). The defeated litigant may also move for a new trial on the ground that he is now in possession of fresh material evidence of which he was not aware at the date of the trial. The Court of Appeal has power to receive further evidence upon questions of fact, either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. In all other cases such further evidence will not be admitted except on special grounds, and by special leave of the Court (*o*).

The Court of Appeal will not grant such leave unless it is satisfied that the fresh evidence tendered could not with reasonable diligence have been discovered before the trial, and further, when it is so conclusive as to make it practically certain that the verdict would have been different if it had been adduced (*p*).

JESSEL, M.R., in delivering judgment in the Court of Appeal in *Sanders* v. *Sanders* (*q*), said:—

"The appellant has applied for leave to adduce fresh evidence, but I am of opinion that it ought not to be granted. The application is for an indulgence. He might have adduced the evidence in

(*m*) *Cole* v. *Langford*, 67 L. J. Q. B. 698.
(*n*) *Nesbitt* v. *Parrett*, 18 T. L. R. 510.
(*o*) Order LVIII., r. 4.
(*p*) *Phosphate Sewage Co.* v. *Molleson*, 4 App. Cas. 801; *Young* v. *Kershaw*, 81 L. T. 531; *Turnbull & Co.* v. *Duval*, [1902] A. C. 429. *Evans* v. *Merthyr Tydfil Urban District Council*, [1899] 1 Ch. 241.
(*q*) 19 Ch. D., at pp. 380, 381.

the Court below. That he might have shaped his case better in the Court below is no ground for leave to adduce fresh evidence before the Court of Appeal. As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in Court. The exact point on which evidence is wanted having thus been discovered, to allow fresh evidence to be introduced at that stage would offer a strong temptation to perjury."

The Court of Appeal will not give leave to adduce any fresh evidence which the applicant might, if he had thought fit, and had used due diligence, have adduced in the Court below (*r*). The Court of Appeal, however, can in any case admit fresh evidence by the consent of both parties (*s*).

(iii.) Again, the unsuccessful party may, in exceptional circumstances, apply for a new trial on the ground of "surprise." This term is used to describe those cases in which either party has been prevented from having a fair trial through no fault of his own, *e.g.*, if the case be unexpectedly called on when he was reasonably absent; if his opponent misled him as to the time or place of the trial; if the case took a wholly unexpected turn which could not reasonably have been anticipated; or if a material witness was kept away by his opponent. Whenever a new trial is moved for on the ground of surprise, there must be an affidavit setting out the facts. "Surprise is a matter extrinsic to the record and the judge's notes, and consequently can only be made to appear by affidavit" (*t*).

(iv.) It is possible, though not probable, that the learned judge at the trial in the Court below may have received some evidence which ought not to

(*r*) See *Evans* v. *Bengon*, 37 Ch. D. 345, in which leave was given.

(*s*) *Saccharin Corporation* v. *Wild*, [1903] 1 Ch. 410.

(*t*) *Per* MAULE, J., in *Hoare* v. *Silverlock* (No. 2), 9 C. B. 22.

have been admitted, or refused to admit some evidence which he should have received. In either event, the party whose case was prejudiced thereby has good ground for applying for a new trial, if "in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial" (*u*). But this rule does not apply if the party now objecting to the evidence as having been wrongly received made no objection to it when it was tendered by his opponent in the Court below. He is not entitled to raise any objection to the evidence for the first time after it has once been received. Nevertheless the Court of Appeal may, if it thinks fit, of its own motion reject any evidence which was improperly received in the Court below, although no objection was taken to it there, and decide the case on legal evidence only (*x*).

The fact that evidence was improperly admitted or rejected at the trial is a good *primâ facie* ground for granting a new trial. The *onus* of proving that no substantial wrong or miscarriage was thereby occasioned lies on the respondent (*y*). The Court will not grant a new trial if it is satisfied that the jury, if rightly directed, would still have returned the same verdict (*z*).

The Court of Appeal will not entertain technical objections to the admissibility of documentary evidence not taken in the Court below, and which if taken might have been met by calling further evidence (*a*).

(*u*) Order XXXIX., r. 6.
(*x*) *Jacker* v. *International Cable Co.*, 5 T. L. R. 13.
(*y*) *Anthony* v. *Halstead*, 37 L. T. 433; *Bray* v. *Ford*, [1896] A. C. 44; *Tait* v. *Beggs*, [1905] 2 Ir. R. 525.
(*z*) *Per* Lord ESHER, M.R., in *Mericale* v. *Carson*, 20 Q. B. D. at p. 281; *Floyd* v. *Gibson*, 100 L. T. 761.
(*a*) *Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430.

*Evidence in the House of Lords.*

From the Court of Appeal there is a further appeal to the House of Lords. This tribunal can grant a new trial on the same grounds as the Court of Appeal. For the practice on such a motion, the reader is referred to Denison & Scott's House of Lords Practice. The House of Lords when sitting as the Court of final appeal, has power to hear witnesses, but this power is seldom exercised.

## CANADIAN NOTES.

### ORDER OF TRIAL.

A plaintiff is not allowed in presenting evidence to divide his case, either by omitting to give evidence originally upon a material point and then offering such evidence in reply, or by giving some evidence upon a particular point in his original case and offering other evidence upon the same point in reply. In an action for damages for negligence sustained in alighting from a train, the defendant gave evidence that the train was in motion. The plaintiff in reply desired to contradict this evidence. There was a dispute as to whether plaintiff had touched the point in making his case. It was held that the evidence was properly excluded because it was part of the plaintiff's case to show that the train had stopped. *Harvey* v. *Canadian Pacific Rail. Co.*, 3 Man. 266.

It does not necessarily follow that, because the plaintiff's witness, who has been called to rebut the evidence of the defendant makes statements which in fact amount to setting up a new case on the part of the plaintiff, the judge must therefore refuse to allow such statements to go to the jury. But in the case of *Devlin* v. *Crocker*, where, after the defendant had closed his case, a witness was recalled for the plaintiff, who was allowed to make statements which really amounted to setting up a new case on the part of the plaintiff, and gave evidence very different from that which he had just before given, so that it looked as if he might have been receiving some

instructions from the plaintiff in the meantime, or was willing to go further than he had gone before, when he saw there was a difficulty in the plaintiff's case, a new trial was granted. *Devlin* v. *Crocker*, 7 U. C. Q. B. 398.

It was held in *Barnes* v. *Bellyea*, 19 N. B. 542, that the fact of plaintiff having denied, on cross-examination, a fact afterwards testified to by the defendant, would not prevent plaintiff calling witnesses to rebut defendant's testimony on the point as to which plaintiff had been cross-examined.

The order of marshalling evidence is in discretion of trial judge. The plaintiff submitted evidence to show that the architect had acted maliciously in the rejection of materials in the execution of a building contract, but the trial judge required evidence in the first instance that the materials had been wrongfully rejected, reserving until that should be established the consideration of the question whether malice was necessary to be proved, and, if necessary, what evidence would be sufficient to establish it. It was held that this was not a rejecting of the evidence tendered, but merely a direction as to the marshalling of the evidence which was in the discretion of the trial judge. *Neelon* v. *City of Toronto*, 25 S. C. R. 579.

The precise point of time at which upon a trial particular evidence may be introduced is a matter exclusively for the judge, at *nisi prius*, to determine. *Per* ROBINSON, C.J., in *Robinson* v. *Rapelje*, 4 U. C. Q. B. 289.

In *Duncan* v. *The Bank of Nova Scotia*, Trueman's N.B. Eq. Rep. 513, where the evidence in a suit taken before a referee had been closed, and counsel were engaged in summing it up before the Court, an application by the defendant to recall a witness for the purpose of giving

evidence of a corroborative nature that had always been available and of such materiality that it could not have been previously overlooked was refused.

Where after the close of the plaintiff's case he is allowed to examine a defendant, this does not re-open the matter so as to entitle him to call other witnesses. The plaintiff had closed his case, and, after a motion for nonsuit had been made, the learned judge allowed the plaintiff to call the defendant as a witness. Another witness, whose name had been mentioned during the progress of the trial, but who was not then in court, came in during the examination of the defendant, and the plaintiff claimed the right to call him also, on the ground that the case had been re-opened. The judge refused to receive this evidence. No doubt he could have received it had he thought fit, but it was by no means a matter of course that he should do so, and it was a matter of discretion to the judge. *Wilkes* v. *Heaton*, 17 U. C. Q. B. 95.

In *Davison* v. *King*, 16. N. B. 396, it was held that where evidence when offered may be irrelevant and could only become material by the giving of subsequent testimony, it was discretionary with the judge whether to receive it or not.

In the *Bank of Nova Scotia* v. *Duncan*, 32 N. B. 308, an application was made by the bank, after the case had been partly heard on evidence taken before a barrister, for leave to call a witness who had been examined, and to produce the books.

It was held by the full Court, affirming the judgment of PALMER, J., that the application ought not to have been granted.

When collateral issues arise out of comparison of handwriting, and evidence in relation to them becomes admissible at a stage of the cause when it would otherwise

be excluded, such evidence should be treated as applicable to the case generally, when it properly applies to it. Plaintiff sued as endorsee of a promissory note. A witness for the defence said he thought the signature of the endorser not genuine. On cross-examination he was asked whether two signatures on a paper shown to him were the endorser's, and he said he thought not. In reply, plaintiff proved that they were. Defendant objected to such proof as being in support of the plaintiff's original case. It was received at the trial for the purpose of impeaching the witness, but withheld from the jury as evidence to sustain the plaintiff's case. *Held*, that being admissible for one purpose, it was evidence in the cause, and should have been left so to the jury. *Royal Canadian Bank* v. *Brown et al.*, 27 U. C. Q. B. 41.

*Contradicting Party's own Witness.*

In an action of trespass against a sheriff for taking goods, the plaintiff called the bailiff who made the seizure and sale. He swore that the plaintiff, after giving notice of his claim to the goods, withdrew it, and that the sale then went on. The plaintiff offered to disprove the withdrawal. *Per curiam*, "Before the Common Law Procedure Act, the rule on this subject was laid down in Buller's N. P. 297: 'A party never shall be permitted to produce general evidence to discredit his own witness . . . but if a witness prove facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise, for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only.' Nevertheless, the question of how far a party should go in calling evidence to discredit his own witness was not a settled one, and by the English Common Law Procedure Act, followed in our own, it is enacted etc." (Here

follow the familiar terms of the statute.) It was held, therefore, that the evidence was admissible as relevant to the issue, although contradicting the plaintiff's own witness. *Robinson* v. *Reynolds*, 23 U. C. Q. B. 560.

See also to the same effect, *Stanley Piano Co.* v. *Thomson*, 32 O. R. 341.

Where the plaintiff in an action of trespass for cutting and carrying away timber, on which issue was joined on a revocation of licence, called the agent of the defendant to prove that he had revoked the licence to him, and that the defendant still continued to cut the timber, and the witness denied the revocation to him, it was held that the plaintiff might call other witnesses to prove that they had heard this witness admit that the licence had been revoked to him, and that the witnesses knew that he had still gone on and cut the timber after he had made the admission. *Per* ROBINSON, C.J., "I think it was undoubtedly proper for the plaintiff to call other witnesses to prove facts which his witness, Campbell, the defendant's agent, failed to prove, or rather what he disproved. The evidence which they were called to give was evidence of facts in the cause, and not merely evidence tending to impeach the credibility of the witness Campbell. The distinctions which have been taken on this point are founded in reason, and are obviously just, and indeed the principle that the party cannot call a witness to impeach the credibility of another witness whom he has himself called, has been found to require some reserve in its application, which it is not necessary, however, to consider here, because the latter witnesses were not called in this case for the purpose merely of discrediting the other." *McNab* v. *Stinson*, 6 U. C. Q. B. O. S. 445 (1842).

Where a party to a suit calls the opposite party, he is not necessarily concluded by his answers. In an action of ejectment under a mortgage, the defendants pleaded

usury and produced two papers purporting to be copies of letters written by the mortgagor to the plaintiff, the mortgagee, as tending to show that they were replies made by the mortgagor to letters written by the plaintiff. which were produced. The plaintiff was called and swore that he had never received the letters of which the defendants professed to produce copies. It was held that it should, nevertheless, have been left to the jury to say whether they did not believe, from the plaintiff's own letters, that such answers had been received, as the defendants relied upon. *Mair* v. *Culy and Young*, 10 U. C. Q. B. 321.

Where the plaintiff proved a trespass committed by the defendant and then called a witness whose evidence, if true, proved that no trespass was committed, it was held in *Getchell* v. *Burchell*, 22 N. B. 631, that the question whether a trespass had been committed should be submitted to the jury.

### *Further Evidence on Appeal.*

In *Dinsmore* v. *Shackelton*, 26 U. C. C. P. 604, Moss, J., referred to the 11th section of the Administration of Justice Act, 1874, with reference to the production of further evidence after the trial, and said: "The section referred to gives this Court 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 by any person whom the court may direct. It is manifest that there must be some practical difficulty in making use of this power where, as in this case, the trial was by a jury. It may be usefully employed in such a case where, by accident or oversight, a party has been unable or has failed to prove some fact or document essential to his case of the existence or authenticity of which there is no reasonable doubt, or no room for serious dispute, but if

the proofs desired to be added are in themselves proper subjects for consideration, as disputed questions of fact, and the jury have found a general verdict, I do not see how this Court can be properly substituted for the jury, or supplement the verdict by hearing or pronouncing upon further evidence."

*New Trial.*

In *Arnold* v. *Higgins*, 11 U. C. Q. B. 191, a material witness for plaintiff, being present during the assizes, stated that he was obliged to go to the United States on business, and on affidavit of this fact, a commission was applied for and granted and the witness examined. The defendant's counsel objected to the issuing of the commission, and refused to cross-examine, as he had no opportunity of consulting his client, but he attended the trial and made the best defence he could. It being very important, under the circumstances, that the witness should be subjected to a cross-examination, the Court granted a new trial upon payment of costs.

In an action by a workman for compensation for injuries, the plaintiff was allowed against the remonstrance of the defendant's counsel, to prove that the company were indemnified against an adverse verdict by a policy of insurance. The judge warned the counsel that he must take the risk of the admissibility of the evidence, and instructed the jury that it should form no element in their determination. It was held that this evidence was improperly received and its admission was a substantial wrong or miscarriage. FALCONBRIDGE, J., said that the mere putting of the question did all the mischief. "The jury will draw their own inferences from the objection by defendant's counsel, and the ruling of the Court. The real defendant is placed in a position of manifest and incurable disadvantage. The proper course for a judge in such a case would be to discharge the

jury and put off the trial to the next ensuing sitting, or preferably, to discharge the jury, and try the case himself."

This, of course, is *obiter dictum*. There was a dissenting opinion by ANGLIN, J., to the effect that it was not a substantial wrong or ground for a new trial. *Loughead* v. *Collingwood Ship Building Co.*, 16 O. L. R. 64.

In *Rex* v. *Grobb*, 17 Man. 191, it was held that where a witness at a trial before the jury volunteered evidence which the judge had already ruled to be inadmissible, and which might have weight with the jury, yet the judge should not for that reason immediately discharge the jury and impanel a new jury to try the issue.

The judge may withdraw from the consideration of the jury evidence that has been improperly admitted. *Ferguson* v. *Johnson*, 19 N. B. 279.

See also *Stewart* v. *Snowball*, 19 N. B. 597, in which it was held, under the authority of *Wilmot* v. *Van Wart*, 1 P. & B. 456, that where evidence which has been improperly received has been withdrawn by the judge from the consideration of the jury, such improper admission of evidence is not a ground for a new trial. DUFF, J., however, added in this case: "While yielding to the authority of that case, however, the Chief Justice and myself desire to re-affirm the opinion which was there expressed, namely, that where improper evidence has been forced in which may have affected the minds of the jury, there ought to be a new trial."

Where reputation and hearsay evidence were received in respect to boundaries of property in dispute, the verdict of the jury was set aside, although there was other admissible testimony to the same effect. The objectionable evidence went to the crucial point of the case and there was contradictory testimony on the subject apart from the objectionable evidence so introduced.

*Per* TOWNSHEND, J.: "From my experience I know of nothing better calculated to sway the judgment of jurymen than the declarations of deceased persons in relation to their boundaries. It is therefore most necessary to exclude from their consideration statements of that kind, or any statements which the witness may be repeating which amount to mere hearsay. It is not necessary to comment on the danger and injustice which would result in trying boundary lines by reputation in the neighbourhood. The wisdom of the law has always restricted such evidence to boundaries in which the whole community are interested, such as township or county lines." *Bartlett* v. *Nova Scotia Steel Co., Ltd.*, 27 N. S. R. 259.

A direction to the jury that offensive questions put by defendant's counsel on cross-examination, after consultation with his client and a warning by the judge, might be considered in estimating damages in an action for assault and battery, is erroneous, and where the jury under the influence of such direction found a verdict for $250, it was set aside. *Driscoll* v. *Collins*, 31 N. B. 604.

On the trial of an action involving disputed accounts, it is not ground for a new trial that the judge told the jury they might draw inferences, favourable or unfavourable to defendant's case, from the fact that he refused to produce, under notice, documentary evidence in his possession which it was admitted contained some account of the transaction in dispute. *Hale* v. *Layton*, 36 N. B. 256.

The case of *Makin* v. *Attorney-General of New South Wales* was distinguished in *R.* v. *Wood*, 5 B. C. 585, to the effect that the improper admission of evidence at a criminal trial cannot be said in itself to constitute a wrong or miscarriage, but it is a question for the Court on the hearing of any appeal whether in the particular case, it did so or not.

On the second trial of a case, objection was made by defendant's counsel to the use of the evidence taken in the former trial, but was overruled, and the plaintiff's counsel then proceeded to read the evidence taken in the former trial, including that of several witnesses for the defence. The trial judge held that, having read the evidence of the defendant's witnesses, plaintiff had made it his own evidence, and gave judgment for the defendant. RITCHIE, J., said that, although the judge was technically right, it would work such an injustice to the plaintiff that he thought the case should be sent back, and the Court concurred in ordering a new trial. *Travers* v. *McMurray*, 7 R. & G. 19, N. S. R. 509.

At the trial of an action under the Temperance Act of 1864, commonly called the Duncan Act, the learned trial judge declined to allow a witness who had been twice called in the progress of a suit to be recalled, or to wait for the possible arrival of another witness. The Court refused to review the exercise of the judge's discretion. *Gleason* v. *Williams*, 27 U. C. C. P. 93.

The judge presiding at the trial of a cause has the necessary discretion for the protection of witnesses under cross-examination, and where it does not appear that he has exercised that discretion improperly, his order ought not to be interfered with on an appeal. Hence, an appellate Court is not justified in ordering a new trial on the ground that counsel has been unduly restricted in cross-examination by a question being disallowed which did not, at the time it was put to the witness, have relevancy to the issues. *Brownell* v. *Brownell*, 42 S. C. R. 368.

*Discovery of Fresh Evidence.*

In *R.* v. *Chubbs*, 14 U. C. C. P. 32, it was held that affidavits of facts which were not shown to have

become known since the trial were not admissible on a motion for a new trial.

In *Rowe* v. *Grand Trunk Rail. Co.*, 16 U. C. C. P. 500, it was held that a new trial would not be granted on the ground of the discovery of new evidence if the evidence was known before, though not before it was too late to make use of it at the trial, and though every reasonable effort was made to produce it after it was so discovered. The reason for this ruling as given by WILSON, J., is that the applicants might have applied to postpone the trial until the arrival of the witnesses, and they did not do so, but proceeded to trial taking chances of a verdict in their favour. They ought, therefore, to be held bound by the election which they had made.

The discovery of new corroborative testimony is no ground for a new trial, nor is the intention to produce a witness in person whose evidence was taken under a commission and read to the jury. *McDermott et al.* v. *Ireson*, 38 U. C. Q. B. 1.

The discovery of new evidence, such as is only cumulative, is no ground for a new trial. *Cox* v. *McMann*, 19 N. B. 121.

It was held in *Inch* v. *Flewellyn et al.*, 30 N. B. 19, that a new trial would not be granted on the ground of the discovery of new evidence, if the newly discovered evidence were only cumulative. It must be apparent that the evidence is of a material and conclusive character, so that if it were brought before a jury there would be a reasonable probability that a verdict would be given for the party producing it.

It was held in *R.* v. *Hamilton*, 16 U. C. C. P. 340, that the discovery of evidence to impeach the testimony of a witness examined at the trial was no ground for a new trial.

In *Preston* v. *Appleby*, 27 N. B. 92, the headnote states that the discovery of a paper material to the case which the defendant had in his possession on the former trial, but the existence of which he had forgotten, was held to be ground for a new trial, but the judgment of the Chief Justice shows that the case had gone to the jury in a confusing manner, and that they did not fully understand the matter.

# APPENDIX.

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# I. STATUTES.

## STATUTE OF FRAUDS, 1677.

(29 CAR. II. c. 3.)

**1.** All leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing (*a*) and signed by the parties so making or creating the same, or their agents 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.** Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at the least of the full improved value of the thing demised.

**3.** No leases, estates or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall at any time be assigned, granted, or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act and operation of law.

**4.** No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon 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 the space of 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.

**7.** All declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved

(*a*) See Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3, *post*, p 712.

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.

**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.

**9.** All grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect.

## STATUTE OF FRAUDS AMENDMENT ACT, 1828.
### (LORD TENTERDEN'S ACT.)

(9 GEO. IV. c. 14.)

**1.** In actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactment (*b*), or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactment so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided always that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: provided also that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by . . . the said Act or this Act, as to one or more of such joint contractors or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff (*c*).

(*b*) 21 Jac. I. c. 16.

(*c*) And see Mercantile Law Amendment Act, 1856, s. 14, *post*, p. 721.

**6.** No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods [there]upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith.

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## REAL PROPERTY LIMITATION ACT, 1833.

(3 & 4 WILL. IV. c. 27.)

**14.** When any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

**42.** No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent.

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## CIVIL PROCEDURE ACT, 1833.

(3 & 4 WILL. IV. c. 42.)

**5.** If any acknowledgment shall have been made either by writing signed by the party liable by virtue of such indenture, specialty, or recognisance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid.

## WILLS ACT, 1837.

(7 WILL. IV. & 1 VICT. c. 26.)

**9.** No will shall be valid unless it shall be in writing and . . . signed at the foot or end thereof (*d*) by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

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## EVIDENCE BY COMMISSION ACT, 1843.

(6 & 7 VICT. c. 82.)

**5.** Whereas 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: Be it therefore enacted, 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 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 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.

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(*d*) Explained by the Wills Act, 1852 (15 Vict. c. 24), s. 1.

## COMPANIES CLAUSES CONSOLIDATION ACT, 1845.

(8 & 9 VICT. c. 16.)

**97.** The power which may be granted to any such committee to make contracts, as well as the power of the directors to make contracts, on behalf of the company, may lawfully be exercised as follows; (that is to say,)

With respect to any contract which, if made between private persons, would be by law required to be in writing, and under seal, such committee or the directors may make such contract 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 between 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 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.

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## REAL PROPERTY ACT, 1845.

(8 & 9 VICT. c. 106.)

**3.** A feoffment made after the said first day of October, one thousand eight hundred and forty-five, other than a feoffment made under a custom by an infant, shall be void at law, unless

evidenced by deed; and a partition and an exchange of any tenements or hereditaments, not being copyhold, and a lease, required by law to be in writing, . . . made after the said first day of October, one thousand eight hundred and forty-five, shall also be void at law, unless made by deed. . . .

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## EVIDENCE ACT, 1845.

(8 & 9 VICT. c. 113.)

**1.** Whenever by any Act now in force or hereafter to be in force any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, byelaw, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence.

**2.** All courts, judges, justices, masters in Chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document.

**3.** All copies of private and local and personal Acts of Parliament not public Acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either House of Parliament, and of royal proclamations, purporting to be printed by the printers to the Crown or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others without any proof being given that such copies were so printed.

**4.** Provided always, that if any person shall forge the seal, stamp, or signature of any such certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or of any certified copy of any document, byelaw, entry, in any register or other book, or other proceeding as aforesaid, or shall tender in evidence any such certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document,

byelaw, entry in any register or other book, or of any other proceeding, with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, whether such seal, stamp, or signature be those of or relating to any corporation or company already established, or to any corporation or company to be hereafter established, or if any person shall forge the signature of any such judge as aforesaid to any order, decree, certificate, or other judicial or official document, or shall tender in evidence any order, decree, certificate, or other judicial or official document, with a false or counterfeit signature of any such judge as aforesaid thereto, knowing the same to be false or counterfeit, or if any person shall print any copy of any private Act or of the journals of either House of Parliament, which copy shall falsely purport to have been printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, or if any person shall tender in evidence any such copy, knowing that the same was not printed by the person or persons by whom it so purports to have been printed, every such person shall be guilty of felony, and shall upon conviction be liable to transportation for seven years: . . . . Provided also, that whenever any such document as before mentioned shall have been received in evidence by virtue of this Act, the court, judge, commissioner, or other person officiating judicially who shall have admitted the same, shall, on the request of any party against whom the same is so received, be authorised, at its or at his own discretion, to direct that the same shall be impounded, and be kept in the custody of some officer of the court or other proper person, until further order touching the same shall be given, either by such court, or the court to which such master or other officer belonged, or by the persons or person who constituted such court, or by some one of the equity or common law judges of the superior courts at Westminster on application being made for that purpose.

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## INDICTABLE OFFENCES ACT, 1848.

### (JERVIS'S ACT.)

(11 & 12 VICT. c. 42.)

**17.** Where any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by

the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.

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## EVIDENCE ACT, 1851.

### (LORD BROUGHAM'S ACT.)

(14 & 15 VICT. c. 99.)

**2.** On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the 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 *viva 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.

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

**5.** Nothing herein contained shall repeal any provision contained in [the Wills Act, 1837].

**6.** Whenever any action or other legal proceeding shall hereafter be pending in any of the superior courts of common law at

Westminster or Dublin . . . such court . . . may, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which previous to the passing of this Act a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity at the instance of the party so making application as aforesaid to the said court.

7. All proclamations, treaties, and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court; and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

8. Every certificate of the qualification of an apothecary which shall purport to be under the common seal of the society of the art and mystery of apothecaries of the city of London shall be received in evidence in any court of justice, and before any person having by law or by consent of parties authority to hear, receive, and examine evidence, without any proof of the said seal or of the authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has been from the date of the said certificate duly qualified to practise as an apothecary in any part of England or Wales.

**9.** 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 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.

**10.** 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.

**11.** 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.

**13.** . . . whenever in any proceeding whatever 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 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.

**14.** 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 any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

**15.** If any officer authorised or required by this Act to furnish any certified copies or extracts shall wilfully certify any document as being a true copy or extract, knowing that the same is not a true copy or extract, as the case may be, he shall be guilty of a misdemeanour, and be liable, upon conviction, to imprisonment for any term not exceeding eighteen months.

**16.** 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.

**17.** If any person shall forge the seal, stamp, or signature of any document in this Act mentioned or referred to, or shall tender in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall upon conviction be liable to transportation for seven years . . . and whenever any such document shall have been admitted in evidence by virtue of this Act, the court or the person who shall have admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the court or other proper person for such period and subject to such conditions as to the said court or person shall seem meet; and every person who shall be charged with committing any felony under this Act, or under the Act of the eighth and ninth years of her present Majesty, chapter one hundred and thirteen, may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed, in the county, district, or place in which he shall be apprehended or be in custody; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence laid and charged to have been committed, in any county, district, or place in which the principal offender may be tried.

**18.** This Act shall not extend to Scotland.

**19.** The words "British Colony" as used in this Act shall apply to the islands of Guernsey, Jersey, Alderney, Sark, and Man, and to all other possessions of the British Crown, wheresoever and whatsoever.

## CRIMINAL PROCEDURE ACT, 1851.

(14 & 15 VICT. c. 100.)

1. Whenever on the trial of any indictment for any felony or misdemeanour there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence, or in the christian name or surname, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea, and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer; and in all other cases the order for the amendment shall either be indorsed on the indictment, or shall be engrossed on parchment, and filed, together with the indictment, among the records of the court: Provided that in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly; in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their

recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: Provided also, that where any such trial shall be to be had before another jury, the Crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn.

2. Every verdict and judgment, which shall be given after the making of any amendment under the provisions of this Act, shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made.

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## EVIDENCE AMENDMENT ACT, 1853.

(16 & 17 VICT. c. 83.)

1. 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 *viva 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.

2. Nothing herein 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 [*or in any proceeding instituted in consequence of adultery*].

3. 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.

5. In citing this Act in other Acts of Parliament, or in any instrument, document, or proceeding, it shall be sufficient to use the expression the Evidence Amendment Act, 1853.

N.B.—The portion of s. 2 printed in *italics* was repealed by 32 & 33 Vict. c. 68, s. 1.

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## MERCANTILE LAW AMENDMENT ACT, 1856.

(19 & 20 VICT. c. 97.)

**14.** . . . when there shall be two or more co-contractors (*e*) or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator shall lose the benefit of the said enactments (*f*) or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

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## CRIMINAL PROCEDURE ACT, 1865.

(28 & 29 VICT. c. 18.)

**1.** That . . . the provisions of sections from 3 to 8, inclusive, of this Act shall apply 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.

**3.** A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

**4.** 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.

**5.** 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

(*e*) See Statute of Frauds Admendment Act (Lord Tenterden's Act) (9 Geo. IV. c. 14), s. 1, *ante*, p. 709.

(*f*) 21 Jac. I. c. 16, s. 3; 3 & 4 Will. IV. c. 42, s. 3; and 16 & 17 Vict. c. 113, s. 20.

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.

**6.** A witness may be questioned as to whether he has been convicted of any felony or misdemeanour, 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; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.

**7.** 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.

**8.** 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.

**9.** The word "counsel" in this Act shall be construed to apply to attorneys in all cases where attorneys are allowed by law or by the practice of any court to appear as advocates.

**10.** This Act shall not apply to Scotland.

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## CRIMINAL LAW AMENDMENT ACT, 1867.

### (RUSSELL GURNEY'S ACT.)

(30 & 31 VICT. c. 35.)

**6.** Whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and in the opinion of some registered medical practitioner not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in

accordance with the provisions of the said Act [*i.e.* 11 & 12 Vict. c. 42, s. 17] of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof, and, if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same with the said addition to the proper officer of the court for trial at which such accused person shall have been so committed or bailed; and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough in which he shall have taken the same, who is hereby required to preserve the same, and file it of record; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give evidence, it shall be lawful to read such statement in evidence, *either for or against the accused*, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person (*whether prosecutor or accused*) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same.

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## DOCUMENTARY EVIDENCE ACT, 1868.

(31 & 32 VICT. c. 37.)

**2.** *Primâ facie* evidence of any proclamation, order or regulation issued before or after the passing of this Act by Her Majesty, or by the Privy Council, also of any proclamation, order, or regulation issued before or after the passing of this Act by or under the authority of any such department of the Government or officer as is mentioned in the first column of the schedule hereto, may be given in all courts of justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned; that is to say:

(1.) By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation.

(2.) By the production of a copy of such proclamation, order, or regulation, purporting to be printed by the Government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession.

(3.) By the production, in the case of any proclamation, order, or regulation issued by Her Majesty or by the Privy Council,

of a copy or extract purporting to be certified to be true by the clerk of the Privy Council, or by any one of the lords or others of the Privy Council; and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connection with such department or officer.

Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing. No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, or regulation.

**3.** Subject to any law that may be from time to time made by the legislature of any British colony or possession, this Act shall be in force in every such colony and possession.

**6.** The provisions of this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing statute, or existing at common law.

SCHEDULE (*g*).

| COLUMN 1. *Name of Department or Officer.* | COLUMN 2. *Names of Certifying Officers.* |
|---|---|
| The Commissioners of the Treasury. | Any Commissioner, Secretary, or Assistant Secretary of the Treasury. |
| The Commissioners for executing the office of Lord High Admiral. | Any of the Commissioners for executing the office of Lord High Admiral, or either of the Secretaries to the said Commissioners. |
| Secretaries of State. | Any Secretary or Under Secretary of State. |
| Committee of Privy Council for Trade. | Any Member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Committee. |
| The Poor Law Board. | Any Commissioner of the Poor Law Board, or any Secretary or Assistant Secretary of the said Board. |

(*g*) The Board of Agriculture has been in effect added to the schedule by the Documentary Evidence Act, 1895 (58 Vict. c. 9).

## DEBTORS ACT, 1869.

(32 & 33 VICT. c. 62.)

**24.** A warrant of attorney to confess judgment in any personal action or *cognovit actionem* given by any person shall not be of any force unless there is present some attorney (*h*) of one of the superior courts on behalf of such person expressly named by him and attending at his request to inform him of the nature and effect of such warrant or *cognovit* before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney.

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## EVIDENCE FURTHER AMENDMENT ACT, 1869.

(32 & 33 VICT. c. 68).

**2.** The parties to any action for breach of promise of marriage shall be competent to give evidence in such action: Provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise.

**3.** The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

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## NATURALIZATION ACT, 1870.

(33 & 34 VICT. c. 14.)

**11.** One of Her Majesty's Principal Secretaries of State (*i*) may by regulation provide for the following matters:—

(1.) The form and registration of declarations of British nationality:

(2.) The form and registration of certificates of naturalization in the United Kingdom:

(*h*) For attorney in this section, read solicitor of the Supreme Court of Judicature.

(*i*) *I.e.*, the Home Secretary.

(3.) The form and registration of certificates of re-admission to British nationality:

(4.) The form and registration of declarations of alienage:

(5.) The registration, by officers in the diplomatic or consular service of Her Majesty, of the births and deaths of British subjects who may be born or die out of Her Majesty's dominions, and of the marriages of persons married at any of Her Majesty's embassies or legations:

(6.) The transmission to the United Kingdom for the purposes of registration or safe keeping, or of being produced as evidence of any declarations or certificates . . . also of copies of entries contained in any register kept out of the United Kingdom in pursuance of or for the purpose of carrying into effect the provisions of this Act:

. . . . . .

The said Secretary of State, by a further regulation, may repeal, alter or add to any regulation previously made by him in pursuance of this section.

Any regulation made by the said Secretary of State in pursuance of this section shall be deemed to be within the powers conferred by this Act, and shall be of the same force as if it had been enacted in this Act (*k*).

**12.** The following regulations shall be made with respect to evidence under this Act:—

(1.) Any declaration authorized to be made under this Act may be proved in any legal proceeding by the production of the original declaration, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal Secretaries of State, or by any person authorized by regulations of one of Her Majesty's Principal Secretaries of State to give certified copies of such declaration, and the production of such declaration or copy shall be evidence of the person therein named as declarant having made the same at the date in the said declaration mentioned:

(2.) A certificate of naturalization may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal Secretaries of State, or by any person authorized by regulations of one of Her Majesty's Principal Secretaries of State to give certified copies of such certificate:

(3.) A certificate of re-admission to British nationality may be proved . . . [in the same way as a certificate under sub-sect. (2) of the section]:

(4.) Entries in any register authorized to be made in pursuance of this Act shall be proved by such copies and certified in such manner as may be directed by one of Her Majesty's Principal Secretaries of State, and the copies of such entries

(*k*) The Secretary of State is also empowered by 33 & 34 Vict. c. 102 to make regulations as to the persons by whom the oath of allegiance may be administered, as to the manner of taking such oaths, and as to the proof of the same in legal proceedings.

shall be evidence of any matters by this Act or by any regulation of the said Secretary of State authorized to be inserted in the register:

(5.) The Documentary Evidence Act, 1868 (*l*), shall apply to any regulation made by a Secretary of State in pursuance of or for the purpose of carrying into effect any of the provisions of this Act.

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## EXTRADITION ACT, 1870.

(33 & 34 VICT. c. 52.)

**14.** (For this section see *ante*, p. 337.)

**15.** 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

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 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.

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## PREVENTION OF CRIMES ACT, 1871.

(34 & 35 VICT. c. 112.)

**18.** A previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the

(*l*) 31 & 32 Vict. c. 37; see *ante*, p. 723.

person appearing in the record or extract of conviction to have been convicted.

A record or extract of a conviction shall in the case of an indictable offence consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction), and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and in the case of a summary conviction shall consist of a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned.

A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same.

A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom; and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof.

A fee not exceeding five shillings may be charged for a record of a conviction given in pursuance of this section.

The mode of proving a previous conviction authorized by this section shall be in addition to and not in exclusion of any other authorized mode of proving such conviction.

**19.** Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him.

Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen; provided that not less than seven days' notice in writing shall have been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused.

## EXTRADITION ACT, 1873.

(36 & 37 VICT. c. 60.)

**4.** The provisions of the principal Act relating to depositions and statements on oath taken in a foreign state, and copies of such original depositions and statements, do and shall extend to affirmations taken in a foreign state, and copies of such affirmations.

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## REAL PROPERTY LIMITATION ACT, 1874.

(37 & 38 VICT. c. 57.)

**7.** When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been 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; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or

rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

**8.** 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 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 some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

**10.** No action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.

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## BANKERS' BOOKS EVIDENCE ACT, 1879.

(42 VICT. c. 11.)

**3.** Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *primâ facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded.

**4.** A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.

Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.

**5.** A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct.

Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.

**6.** 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 the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a judge made for special cause.

**7.** On the application of any party to a legal proceeding a court or judge may order 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. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs.

**8.** The costs of any application to a court or judge under or for the purposes of this Act, and the costs of anything done or to be done under an order of a court or judge made under or for the purposes of this Act shall be in the discretion of the court or judge who may order the same or any part thereof to be paid to any party by the bank where the same have been occasioned by any default or delay on the part of the bank. Any such order against a bank may be enforced as if the bank was a party to the proceeding.

**9.** 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 affidavit 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 certificate; 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.

Expressions in this Act relating to "bankers' books" include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank.

**10.** In this Act—

The expression "legal proceeding" means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration;

The expression "the court" means the court, judge, arbitrator, persons or person before whom a legal proceeding is held or taken;

The expression "a judge" means with respect to England a judge of the High Court of Justice, and with respect to Scotland a lord ordinary of the Outer House of the Court of Session, and with respect to Ireland a judge of the High Court of Justice in Ireland;

The judge of a county court may with respect to any action in such court exercise the powers of a judge under this Act.

**11.** Sunday, Christmas Day, Good Friday, and any bank holiday shall be excluded from the computation of time under this Act.

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## FUGITIVE OFFENDERS ACT, 1881.

(44 & 45 VICT. c. 69.)

**29.** A magistrate may take depositions for the purposes of this Act, in the absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him.

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 this Act.

Provided that nothing in this Act shall authorise the reception of any such depositions, copies, certificates, or documents in evidence against a person upon his trial for an offence.

Warrants and depositions, and copies thereof, and official certificates of or judicial documents stating facts, shall be deemed duly authenticated for the purposes of this Act if they are authenticated in manner provided for the time being by law, or if they purport to be signed by or authenticated by the signature of a judge, magistrate, or officer of the part of Her Majesty's dominions in which the same are issued, taken, or made; and are authenticated either by the oath of some witness, or by being sealed with the official seal of a Secretary of State, or with the public seal of a British possession, or with the official seal of a governor of a British possession, or of a colonial secretary, or of some secretary or minister administering a department of the government of a British possession.

And all courts and magistrates shall take judicial notice of every such seal as is in this section mentioned, and shall admit in evidence, without further proof, the documents authenticated by it.

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## DOCUMENTARY EVIDENCE ACT, 1882.

(45 & 46 VICT. c. 9.)

**2.** Where any enactment, whether passed before or after the passing of this Act, provides that a copy of any Act of Parliament, proclamation, order, regulation, rule, warrant, circular, list, gazette, or document shall be conclusive evidence, or be evidence, or have any other effect, when purporting to be printed by the government printer, or the Queen's printer, or a printer authorised by Her Majesty, or otherwise under Her Majesty's authority, whatever may be the precise expression used, such copy shall also be conclusive evidence, or evidence, or have the said effect (as the case may be) if it purports to be printed under the superintendence or authority of Her Majesty's stationery office.

**3.** If any person prints any copy of any Act, proclamation, order, regulation, royal warrant, circular, list, gazette, or document which falsely purports to have been printed under the superintendence or authority of Her Majesty's stationery office, or tenders in evidence any copy which falsely purports to have been printed as aforesaid, knowing that the same was not so printed, he shall be guilty of felony, and shall, on conviction, be liable to penal servitude for a term not exceeding seven years, or to be imprisoned for a term not exceeding two years, with or without hard labour.

**4.** The Documentary Evidence Act, 1868, as amended by this Act, shall apply to proclamations, orders, and regulations issued by the Lord Lieutenant . . . either alone or acting with the advice of the Privy Council in Ireland, as fully as it applies to proclamations, orders, and regulations issued by Her Majesty.

In the same Act, the term "the Privy Council" shall include the Privy Council in Ireland, or any committee thereof.

In the same Act, and in this Act, the term "the Government Printer" shall include any printer to Her Majesty in Ireland and any printer printing in Ireland under the superintendence or authority of Her Majesty's stationery office.

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## REVENUE, FRIENDLY SOCIETIES, AND NATIONAL DEBT ACT, 1882.

(45 & 46 VICT. c. 72.)

**11.**—(2.) The expressions "bank" and "bankers" in the Bankers' Books Evidence Act, 1879, shall include any company carrying on the business of bankers to which the provisions of the Companies Acts, 1862 to 1880, are applicable, and having duly furnished to the registrar of joint stock companies a list and

summary with the addition specified by this Act, and the fact of such list and summary having been duly furnished may be proved in any legal proceedings by the certificate of the registrar or any assistant registrar for the time being of joint stock companies.

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## BANKRUPTCY ACT, 1883.

(46 & 47 VICT. c. 52.)

**17.**—(1.) Where the court makes a receiving order it shall hold a public sitting, on a day to be appointed by the court, for the examination of the debtor, and the debtor shall attend thereat, and shall be examined as to his conduct, dealings, and property.

(2.) The examination shall be held as soon as conveniently may be after the expiration of the time for the submission of the debtor's statement of affairs.

(3.) The court may adjourn the examination from time to time.

(4.) Any creditor who has tendered a proof, or his representative authorised in writing, may question the debtor concerning his affairs and the causes of his failure.

(5.) The official receiver shall take part in the examination of the debtor; and for the purpose thereof, if especially authorised by the Board of Trade, may employ a solicitor with or without counsel.

(6.) If a trustee is appointed before the conclusion of the examination he may take part therein.

(7.) The court may put such questions to the debtor as it may think expedient.

(8.) The debtor shall be examined upon oath, and it shall be his duty to 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.

(9.) When the court is of opinion that the affairs of the debtor have been sufficiently investigated, it shall, by order, declare that his examination is concluded, but such order shall not be made until after the day appointed for the first meeting of creditors (*m*).

(*m*) By s. 2 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), it is enacted—"(1.) The notes taken of a debtor's public examination in pursuance of section seventeen of the principal Act shall be read over either to or by the debtor.

"(2.) Where the debtor is a lunatic or suffers from any such mental or physical affliction or disability as in the opinion of the court makes him unfit to attend his public examination, the court may make an order dispensing with such examination, or directing that the debtor be examined on such terms, in such manner, and at such place as to the court seems expedient."

**27.** (For this section see *ante*, pp. 654, 655.)

**105.**—(5.) Subject to general rules, the court may in any matter take the whole or any part of the evidence, either *viva voce* or by interrogatories, or upon affidavit, or by commission abroad.

**132.**—(1.) A copy of the London Gazette containing any notice inserted therein in pursuance of this Act shall be evidence of the facts stated in the notice.

(2.) 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.

**133.**—(1.) A minute of proceedings at a meeting of creditors under this Act, 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.

(2.) 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.

**134.** Any petition or copy of a petition in bankruptcy, any order 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.

**135.** 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).

**136.** In the case of the death of the debtor or his wife, or of a witness whose evidence has been received by any court in any proceeding under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a copy thereof

purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to.

**137.** Every court having jurisdiction in bankruptcy under this Act shall have a seal describing the court in such manner as may be directed by order of the Lord Chancellor, and judicial notice shall be taken of the seal, and of the signature of the judge or registrar of any such court, in all legal proceedings.

**138.** A certificate of the Board of Trade that a person has been appointed trustee under this Act shall be conclusive evidence of his appointment.

**140.**—(1.) 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 certificates without further proof unless the contrary is shown.

(2.) 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.

**142.** All notices and other documents for the service of which no special mode is directed may be sent by prepaid post letter to the last known address of the person to be served therewith.

**143.**—(1.) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court.

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## CORONERS ACT, 1887.

(50 & 51 VICT. c. 71.)

**4.**—(1.) The coroner and jury shall at the first sitting of the inquest view the body, and the coroner shall examine on oath touching the death all persons who tender their evidence respecting the facts and all persons having knowledge of the facts whom he thinks it expedient to examine.

(2.) It shall be the duty of the coroner in a case of murder or manslaughter to put into writing (*n*) the statement on oath of those who know the facts and circumstances of the case, or so much of such statement as is material, and any such deposition shall be signed by the witness and also by the coroner.

(*n*) This Act contains no provision as to the admissibility of such depositions in evidence.

5.—(3.) The coroner shall deliver the inquisition, deposition, and recognizances, with a certificate under his hand that the same have been taken before him, to the proper officer of the court in which the trial is to be, before or at the opening of the court.

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## OATHS ACT, 1888.

(51 & 52 VICT. c. 46.)

1. 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 any matter or thing 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.

2. Every such affirmation shall be as follows:
"I, A.B., do solemnly, sincerely, and truly declare and affirm," and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.

3. 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.

4. Every affirmation in writing shall commence "I, , of , do solemnly and sincerely affirm," and the form in lieu of jurat shall be "Affirmed at this day of , 18 . Before me."

5. If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question.

7. This Act may be cited as the Oaths Act, 1888.

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# STAMP ACT, 1891.

(54 & 55 VICT. c. 39.)

**14.**—(1.) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds.

(2.) The officer, or arbitrator, or referee receiving the duty and penalty shall give a receipt for the same, and make an entry in a book kept for that purpose of the payment and of the amount thereof, and shall communicate to the commissioners the name or title of the proceeding in which, and of the party from whom, he received the duty and penalty, and the date and description of the instrument, and shall pay over to such person as the commissioners may appoint the money received by him for the duty and penalty.

(3.) On production to the commissioners of any instrument in respect of which any duty or penalty has been paid, together with the receipt, the payment of the duty and penalty shall be denoted on the instrument.

(4.) Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

**15.**—(1.) Save where other express provision is in this Act made, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of ten pounds, and also by way of further penalty, where the unpaid duty exceeds ten pounds, of interest on such duty, at the rate of five pounds per centum per annum, from the day upon which the instrument was first executed up to the time when the amount of interest is equal to the unpaid duty.

(2.) In the case of such instruments hereinafter mentioned as are chargeable with ad valorem duty, the following provisions shall have effect:

(a) The instrument, unless it is written upon duly stamped material, shall be duly stamped with the proper ad valorem duty before the expiration of thirty days after it is first executed, or after it has been first received in the United Kingdom in case it is first executed at any

place out of the United Kingdom, unless the opinion of the commissioners with respect to the amount of duty with which the instrument is chargeable, has, before such expiration, been required under the provisions of this Act:

(b) If the opinion of the commissioners with respect to any such instrument has been required, the instrument shall be stamped in accordance with the assessment of the commissioners within fourteen days after notice of the assessment:

(c) If any such instrument executed after the sixteenth day of May one thousand eight hundred and eighty-eight has not been or is not duly stamped in conformity with the foregoing provisions of this sub-section, the person in that behalf hereinafter specified shall incur a fine of ten pounds, and in addition to the penalty payable on stamping the instrument there shall be paid a further penalty equivalent to the stamp duty thereon, unless a reasonable excuse for the delay in stamping, or the omission to stamp, or the insufficiency of stamp, be afforded to the satisfaction of the commissioners, or of the court, judge, arbitrator, or referee before whom it is produced:

(d) The instruments and persons to which the provisions of this sub-section are to apply are as follows:—

| Title of Instrument as described in the First Schedule to this Act. | Person liable to Penalty. |
|---|---|
| Bond, covenant, or instrument of any kind whatsoever. | The obligee, covenantee, or other person taking the security. |
| Conveyance on sale . . . | The vendee or transferee. |
| Lease or tack . . . . . | The lessee. |
| Mortgage, bond, debenture, covenant, and warrant of attorney to confess and enter up judgment . | The mortgagee or obligee; in the case of a transfer or reconveyance, the transferee, assignee, or disponee, or the person redeeming the security. |
| Settlement . . . . . | The settlor. |

(3.) Provided that, save where other express provision is made by this Act in relation to any particular instrument:

(a) Any unstamped or insufficiently stamped instrument which has been first executed at any place out of the United Kingdom, may be stamped, at any time within thirty days after it has been first received in the United Kingdom, on payment of the unpaid duty only: and

(b) The commissioners may, if they think fit, [*at any time within three months*] (*o*), after the first execution of any instrument, mitigate or remit any penalty payable on stamping.

(*o*) The words in italics are now repealed by 58 Vict. c. 16, s. 15.

(4.) The payment of any penalty payable on stamping is to be denoted on the instrument by a particular stamp.

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## BETTING AND LOANS (INFANTS) ACT, 1892.

(55 VICT. c. 4.)

**1.**—(1.) If anyone, for the purpose of earning commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to make any bet or wager, or to enter into or take any share or interest in any betting or wagering transaction, or to apply to any person or at any place, with a view to obtaining information or advice for the purpose of any bet or wager, or for information as to any race, fight, game, sport, or other contingency upon which betting or wagering is generally carried on, he shall be guilty of a misdemeanour, and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

(2.) If any such circular, notice, advertisement, letter, telegram, or other document as in this section mentioned, names or refers to anyone as a person to whom any payment may be made, or from whom information may be obtained, for the purpose of or in relation to betting or wagering, the person so named or referred to shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he had not consented to be so named, and that he was not in any way a party to, and was wholly ignorant of, the sending of such document.

**2.**—(1.) If anyone, for the purpose of earning interest, commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to borrow money, or to enter into any transaction involving the borrowing of money, or to apply to any person or at any place with a view to obtaining information or advice as to borrowing money, he shall be guilty of a misdemeanour, and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

(2.) If any such document as above in this section mentioned sent to an infant purports to issue from any address named

therein, or indicates any address as the place at which application is to be made with reference to the subject-matter of the document, and at that place there is carried on any business connected with loans, whether making or procuring loans or otherwise, every person who attends at such place for the purpose of taking part in or who takes part in or assists in the carrying on of such business shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he was not in any way a party to and was wholly ignorant of the sending of such document.

**3.** If any such circular, notice, advertisement, letter, telegram, or other document as in the preceding sections or either of them mentioned is sent to any person at any university, college, school, or other place of education, and such person is an infant, the person sending or causing the same to be sent shall be deemed to have known that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age.

**6.** In any proceeding against any person for an offence under this Act such person and his wife or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case.

**7.** In the application of this Act to Scotland:
The word "infant" means and includes any minor or pupil:
The word "indictment" has the same meaning as in the Criminal Procedure (Scotland) Act, 1887:
The expression "summary conviction" means a conviction under the Summary Jurisdiction (Scotland) Acts.

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## COLONIAL PROBATES ACT, 1892.

(55 VICT. c. 6.)

**1.** Her Majesty the Queen may, on being satisfied that the legislature of any British possession has made adequate provision for the recognition in that possession of probates and letters of administration granted by the courts of the United Kingdom, direct by Order in Council that this Act shall, subject to any exceptions and modifications specified in the Order, apply to that possession, and thereupon, while the Order is in force, this Act shall apply accordingly.

**2.**—(1.) Where a court of probate in a British possession to which this Act applies has granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with, a court of probate in the United Kingdom, be sealed with the seal of that court, and, thereupon, shall be of the like

force and effect, and have the same operation in the United Kingdom, as if granted by that court.

**6.** In this Act—

The expression "court of probate" means any court or authority by whatever name designated, having jurisdiction in matters of probate, and in Scotland means the sheriff court of the county of Edinburgh:

The expressions "probate" and "letters of administration" include confirmation in Scotland, and any instrument having in a British possession the same effect which under English law is given to probate and letters of administration respectively:

The expression "probate duty" includes any duty payable on the value of the estate and effects for which probate or letters of administration is or are granted:

The expression "British court in a foreign country" means any British court having jurisdiction out of the Queen's dominions in pursuance of an Order in Council, whether made under any Act or otherwise.

**7.** This Act may be cited as the Colonial Probates Act, 1892.

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## WITNESSES (PUBLIC INQUIRIES) PROTECTION ACT, 1892.

(55 & 56 VICT. c. 64.)

**1.** In this Act the word "inquiry" shall mean any inquiry held under the authority of any Royal Commission or by any committee of either House of Parliament, or pursuant to any statutory authority, whether the evidence at such inquiry is or is not given on oath, but shall not include any inquiry by any court of justice.

**2.** Every person who commits any of the following acts, that is to say, who threatens, or in any way punishes, damnifies, or injures or attempts to punish, damnify, or injure, any person for having given evidence upon any inquiry, or on account of the evidence which he has given upon any such inquiry, shall, unless such evidence was given in bad faith, be guilty of a misdemeanour, and be liable upon conviction thereof to a maximum penalty of one hundred pounds, or to a maximum imprisonment of three months.

**4.** It shall be lawful for any court before which any person may be convicted of any offence under this Act, if it thinks fit, in addition to sentence or punishment by way of fine or imprisonment, to condemn such person to pay the whole or any part of the costs and expenses incurred in and about the prosecution and conviction for the offence of which he shall be convicted, and, upon the application of the complainant, and immediately after such conviction, to award to complainant any sum of money which it may think

reasonable, having regard to all the circumstances of the case, by way of satisfaction or compensation for any loss of situation, wager, status, or other damnification or injury suffered by the complainant through or by means of the offence of which such person shall be so convicted, provided that where the case is tried before a jury, such jury shall determine what amount, if any, is to be paid by way of satisfaction or compensation.

**5.** The amount awarded for such satisfaction or compensation, together with such costs, to be taxed by the proper officer of the court, shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and be recoverable accordingly.

**7.** Nothing in this Act contained shall in any way lessen or affect any power or privilege possessed by either House of Parliament, or any power given by statute in the premises.

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## INDUSTRIAL AND PROVIDENT SOCIETIES ACT, 1893.

(56 & 57 VICT. c. 39.)

**34.** Any register or list of members or shares kept by any society shall be *primâ facie* evidence of any of the following particulars entered therein :

(a) The names, addresses, and occupations of the members, the number of shares held by them respectively, the numbers of such shares, if they are distinguished by numbers, and the amount paid or agreed to be considered as paid on any such shares ;

(b) The date at which the name of any person, company, or society was entered in such register or list as a member ;

(c) The date at which any such person, company, or society ceased to be a member.

**75.** Every copy of rules or other 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 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.

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## SALE OF GOODS ACT, 1893.

(56 & 57 VICT. c. 71.)

**4.**—(1.) A contract for the sale of any goods of the value 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 to be charged or his agent in that behalf.

(2.) The provisions of this section apply 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.

(3.) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.

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## MERCHANT SHIPPING ACT, 1894.

(57 & 58 VICT. c. 60.)

**24.** A registered ship or a share therein (when disposed of to a person qualified to own a British ship) shall be transferred by bill of sale. 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 schedule], 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.

**64.**—(1.) A person, on payment of a fee not exceeding one shilling, to be fixed by the Commissioners of Customs, may on application to the registrar at a reasonable time during the hours of his official attendance, inspect any register book.

(2.) The following documents shall be admissible in evidence in manner provided by this Act; namely,—

(a) Any register book under this Part of this Act on its production from the custody of the registrar or other person having the lawful custody thereof;

(b) A certificate of registry under this Act purporting to be signed by the registrar or other proper officer;

(c) An indorsement on a certificate of registry purporting to be signed by the registrar or other proper officer;

(d) Every declaration made in pursuance of this Part of this Act in respect of a British ship.

(3.) A copy or transcript of the register of British ships kept by the registrar-general of shipping and seamen under the direction of the Board of Trade shall be admissible in evidence in manner provided by this Act, and have the same effect to all intents as the original register of which it is a copy or transcript.

**239.**—(6.) Every entry made in an official log-book in manner provided by this Act shall be admissible in evidence.

**256.**—(1.) All superintendents and all officers of customs shall take charge of all documents which are delivered or transmitted to or retained by them in pursuance of this Act, and shall keep them for such time (if any) as may be necessary for the purpose of settling any business arising at the place where the documents come into their hands, or for any other proper purpose, and shall, if required, produce them for any of those purposes, and shall then transmit them to the registrar-general of shipping and seamen, and he shall record and preserve them, and they shall be admissible in evidence in manner provided by this Act, and they shall, on payment of a moderate fee fixed by the Board of Trade, or without payment if the Board so direct, be open to the inspection of any person.

(2.) The documents aforesaid shall be public records and documents within the meaning of the Public Record Offices Acts, 1838 and 1877, and those Acts shall, where applicable, apply to those documents in all respects, as if specifically referred to therein.

**695.**—(1.) Where a document is by this Act declared to be admissible in evidence, such document shall, on its production from the proper custody, be admissible in evidence in any court or before any person having by law or consent of parties authority to receive evidence, and, subject to all just exceptions, shall be evidence of the matters stated therein in pursuance of this Act or by any officer in pursuance of his duties as such officer.

(2.) A copy of any such document or extract therefrom shall also be so admissible in evidence if 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 to whose custody the original document was entrusted, and that officer shall furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words, but a person shall be entitled to have—

(a) a certified copy of the particulars entered by the registrar in the register book on the registry of the ship, together with a certified statement showing the ownership of the ship at the time being; and

(b) a certified copy of any declaration, or document, a copy of which is made evidence by this Act, on payment of one shilling for each copy.

(3.) If any such officer wilfully certifies any document as being a true copy or extract knowing the same not to be a true copy or extract, he shall for each offence be guilty of a misdemeanour, and be liable on conviction to imprisonment for any term not exceeding eighteen months.

(4.) If any person forges the seal, stamp, or signature of any document to which this section applies, or tenders in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall for each offence be guilty of felony, and be liable to penal servitude for a term not exceeding seven years, or to imprisonment for a term not exceeding two years, with or without hard labour, and whenever any such document has been admitted in evidence, the

court or the person who admitted the same may on request direct that the same shall be impounded, and be kept in the custody of some officer of the court or other proper person, for such period or subject to such conditions as the court or person thinks fit.

**696.**—(1.) Where for the purposes of this Act any document is to be served on any person, that document may be served—

(a) in any case by delivering a copy thereof personally to the person to be served, or by leaving the same at his last place of abode; and

(b) if the document is to be served on the master of a ship, where there is one, or on a person belonging to a ship, by leaving the same for him on board that ship with the person being or appearing to be in command or charge of the ship; and

(c) if the document is to be served on the master of a ship, where there is no master, and the ship is in the United Kingdom, on the managing owner of the ship, or, if there is no managing owner, on some agent of the owner residing in the United Kingdom, or where no such agent is known or can be found, by affixing a copy thereof to the mast of the ship.

(2.) If any person obstructs the service on the master of a ship of any document under the provisions of this Act relating to the detention of ships as unseaworthy, that person shall for each offence be liable to a fine not exceeding ten pounds, and, if the owner or master of the ship is party or privy to the obstruction, he shall in respect of each offence be guilty of a misdemeanour.

**719.** 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.

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## FRIENDLY SOCIETIES ACT, 1896.

(59 & 60 VICT. c. 25.)

**100.** Every document bearing the seal or stamp of the central office shall be received in evidence without further proof; and every document purporting to be signed by the chief or any assistant registrar, or any inspector or public auditor or valuer under this Act, shall, in the absence of any evidence to the contrary, be received in evidence without proof of the signature.

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## COLLECTING SOCIETIES AND INDUSTRIAL ASSURANCE COMPANIES ACT, 1896.

(59 & 60 VICT. c. 26.)

**14.**—(2.) The provisions of the Friendly Societies Act, 1896, with respect to offences under that Act and the procedure relating thereto, shall apply in the case of offences under this Act, and as so applied shall extend to unregistered collecting societies and industrial assurance companies as if they were registered societies.

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## CRIMINAL EVIDENCE ACT, 1898.

(61 & 62 VICT. c. 36.)

**1.** Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:

(a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:

(b) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution:

(c) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged:

(d) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage:

(e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:

(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i.) the proof that he has committed or been convicted of

such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii.) he has given evidence against any other person charged with the same offence:

(g) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the Court, give his evidence from the witness box or other place from which the other witnesses give their evidence:

(h) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn.

**2.** Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.

**3.** In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

**4.**—(1.) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.

(2.) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

**5.** In Scotland, in a case where a list of witnesses is required, the husband or wife of a person charged shall not be called as a witness for the defence, unless notice be given in the terms prescribed by section thirty-six of the Criminal Procedure (Scotland) Act, 1887.

**6.**—(1.) This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act, except that nothing in this Act shall affect the Evidence Act, 1877.

(2.) But this Act shall not apply to proceedings in courts martial unless so applied—

(a) as to courts martial under the Naval Discipline Act, by general orders made in pursuance of section sixty-five of that Act; and

(b) as to courts martial under the Army Act by rules made in pursuance of section seventy of that Act.

7.—(1.) This Act shall not extend to Ireland.
(2.) This Act shall come into operation on the expiration of two months from the passing thereof.
(3.) This Act may be cited as the Criminal Evidence Act, 1898.

## SCHEDULE.

ENACTMENTS REFERRED TO.

| Session and Chapter. | Short Title. | Enactments referred to. |
|---|---|---|
| 5 Geo. IV. c. 83 . | The Vagrancy Act, 1824 . | The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family. |
| 8 & 9 Vict. c. 83 . | The Poor Law (Scotland) Act, 1845. | Section eighty. |
| 24 & 25 Vict. c. 100 | The Offences against the Person Act, 1861. | Sections forty-eight to fifty-five. |
| 45 & 46 Vict. c. 75 . | The Married Women's Property Act, 1882. | Section twelve and section sixteen. |
| 48 & 49 Vict. c. 69 . | The Criminal Law Amendment Act, 1885. | The whole Act. |
| 57 & 58 Vict. c. 41 . | The Prevention of Cruelty to Children Act, 1894. | The whole Act. |

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## MONEY-LENDERS ACT, 1900.

(63 & 64 VICT. c. 51.)

5. Where in any proceedings under section two of the Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), it is proved that the person to whom the document was sent is an infant, the person charged shall be deemed to have known that the person to whom the document was sent was an infant, unless he proves that he had reasonable ground for believing the infant to be of full age.

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## MOTOR CAR ACT, 1903.

(3 EDW. VII. c. 36.)

**9.**—(1.) Section four of the principal Act (which relates to the speed of motor cars) is hereby repealed, but a person shall not, under any circumstances, drive a motor car on a public highway at a speed exceeding twenty miles per hour, and within any limits or place referred to in regulations made by the Local Government Board with a view to the safety of the public on the application of the local authority of the area in which the limits or place are situate, a person shall not drive a motor car at a speed exceeding ten miles per hour.

If any person acts in contravention of this provision he shall be liable, on summary conviction, in respect of the first offence to a fine not exceeding ten pounds, and in respect of the second offence to a fine not exceeding twenty pounds, and in respect of any subsequent offence to a fine not exceeding fifty pounds, but a person shall not be convicted under this provision for exceeding the limit of speed of twenty miles merely on the opinion of one witness as to the rate of speed.

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## PREVENTION OF CRUELTY TO CHILDREN ACT, 1904.

(4 EDW. VII. c. 15.)

**12.** In any proceeding against any person for an offence under this Act, . . . such person shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent but not compellable to give evidence.

**15.**—(1.) Where, in any proceeding against any person for an offence under this Act, . . . the child 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 understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and the evidence of such child, though not given on oath, but otherwise taken and reduced into writing in accordance with the provisions of section seventeen of the Indictable Offences Act, 1848, or of section fourteen of the Petty Sessions (Ireland) Act, 1851, or of section thirteen of this Act, shall be deemed to be a deposition within the meaning of those sections respectively:

Provided that—

(a) A person shall not be liable to be convicted of the offence

unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused; and

(b) Any child whose evidence is received as aforesaid and who shall wilfully give false evidence shall be liable to be indicted and tried for such offence, and on conviction thereof may be adjudged such punishment as is provided for by section eleven of the Summary Jurisdiction Act, 1879, in the case of juvenile offenders, or in Ireland by section four of the Summary Jurisdiction over Children (Ireland) Act, 1884, in the case of children.

(2.) This section shall not apply to Scotland.

**17**. Where a person is charged with an offence under this Act, . . . or any offence under the Employment of Children Act, 1903, in respect of a child who is alleged in the charge or indictment to be under any specified age, and the child appears to the court to be under that age, such child shall for the purposes of this Act, and the Employment of Children Act, 1903, be deemed to be under that age, unless the contrary is proved.

**18**.—(3.) A person shall not be summarily convicted of an offence under this Act, . . . unless the offence was wholly or partly committed within six months before the information was laid; but, subject as aforesaid, evidence may be taken of acts constituting, or contributing to constitute, the offence, and committed at any previous time.

**23**.—(3.) For the purposes of this Act—

Any person who is the parent of a child shall be presumed to have the custody of the child; and

Any person to whose charge a child is committed by its parent shall be presumed to have charge of the child; and

Any other person having actual possession or control of a child shall be presumed to have the care of the child.

**24**. In any proceedings under this Act a copy of an entry in the wages book of any employer of labour, or, if no wages book be kept, a written statement signed by such employer, or by his foreman, shall be *primâ facie* evidence that the wages therein entered, or stated as having been paid to any person, have in fact been so paid: Provided that such copy or statement has been signed by such employer, or his foreman, and that the signature of such employer, or foreman, has been witnessed by the person producing the said copy or statement.

# PREVENTION OF CRIME ACT, 1908.

(8 EDW. VII. c. 59.)

## PART II.

### DETENTION OF HABITUAL CRIMINALS.

**10.**—(1.) Where a person is convicted on indictment of a crime, committed after the passing of this Act, and subsequently the offender admits that he is or is found by the jury to be a habitual criminal, and the court passes a sentence of penal servitude, the court, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence ordering that on the determination of the sentence of penal servitude he be detained for such period not exceeding ten nor less than five years, as the court may determine, and such detention is herein-after referred to as preventive detention, and a person on whom such a sentence is passed shall, whilst undergoing both the sentence of penal servitude and the sentence of preventive detention, be deemed for the purposes of the Forfeiture Act, 1870, and for all other purposes, to be a person convicted of felony.

(2.) A person shall not be found to be a habitual criminal unless the jury finds on evidence—

(a) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime, whether any such previous conviction was before or after the passing of this Act, and that he is leading persistently a dishonest or criminal life; or

(b) that he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention.

(3.) In any indictment under this section it shall be sufficient, after charging the crime, to state that the offender is a habitual criminal.

(4.) In the proceedings on the indictment the offender shall in the first instance be arraigned on so much only of the indictment as charges the crime, and if on arraignment he pleads guilty or is found guilty by the jury, the jury shall, unless he pleads guilty to being a habitual criminal, be charged to inquire whether he is a habitual criminal, and in that case it shall not be necessary to swear the jury again:

Provided that a charge of being a habitual criminal shall not be inserted in an indictment—

(a) without the consent of the Director of Public Prosecutions; and

(b) unless not less than seven days' notice has been given to the proper officer of the court by which the offender is to be tried, and to the offender, that it is intended to insert such a charge;

and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge.

(5.) Without prejudice to any right of the accused to tender evidence as to his character and repute, evidence of character and repute may, if the court thinks fit, be admitted as evidence on the question whether the accused is or is not leading persistently a dishonest or criminal life.

(6.) For the purposes of this section the expression "crime" has the same meaning as in the Prevention of Crimes Act, 1871, and the definition of "crime" in that Act, set out in the schedule to this Act, shall apply accordingly.

**11.** A person sentenced to preventive detention may, notwithstanding anything in the Criminal Appeal Act, 1907, appeal against the sentence without the leave of the Court of Criminal Appeal.

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## CHILDREN ACT, 1908.

(8 EDW. VII. c. 67.)

**12.**—(1.) If any person over the age of sixteen years, who has the custody, charge, or care of any child or young person, wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person, or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child or young person unnecessary suffering or injury to his health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour, and shall be liable—

(a) on conviction on indictment, to a fine not exceeding one hundred pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding two years; and

(b) on summary conviction, to a fine not exceeding twenty-five pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding six months;

and for the purposes of this section a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he fails to provide adequate food, clothing, medical aid, or lodging for the child or young person, or if, being unable otherwise to provide such food, clothing, medical aid, or lodging, he fails to take steps to procure the same to be provided under the Acts relating to the relief of the poor.

(7.) A copy of a policy of insurance, certified by an officer or agent of the insurance company granting the policy, to be a true copy, shall in any proceedings under this section be *primâ facie*

evidence that the child or young person therein stated to be insured has been in fact so insured, and that the person in whose favour the policy has been granted is the person to whom the money thereby insured is legally payable.

**13.** Where it is proved that the death of an infant under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air-passages of the infant) whilst the infant was in bed with some other person over sixteen years of age, and that that other person was at the time of going to bed under the influence of drink, that other person shall be deemed to have neglected the infant in a manner likely to cause injury to its health within the meaning of this Part of this Act.

**14.**—(1.) If any person causes or procures any child or young person, or, having the custody charge or care of a child or young person, allows that child or young person, to be in any street, premises, or place for the purpose of begging or receiving alms, or of inducing the giving of alms, whether or not there is any pretence of singing, playing, performing, offering anything for sale, or otherwise, that person shall, on summary conviction, be liable to a fine not exceeding twenty-five pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding three months.

(2.) If a person having the custody charge or care of a child or young person is charged with an offence under this section, and it is proved that the child or young person was in any street, premises, or place for any such purpose as aforesaid, and that the person charged allowed the child or young person to be in the street, premises, or place, he shall be presumed to have allowed him to be in the street, premises, or place for that purpose unless the contrary is proved.

**17.**—(1.) If any person having the custody, charge, or care of a girl under the age of sixteen years causes or encourages the seduction or prostitution of that girl, he shall be guilty of a misdemeanour and shall be liable to imprisonment, with or without hard labour, for any term not exceeding two years.

(2.) For the purposes of this section a person shall be deemed to have caused or encouraged the seduction or prostitution (as the case may be) of a girl who has been seduced or become a prostitute if he has knowingly allowed the girl to consort with, or to enter or continue in the employment of, any prostitute or person of known immoral character.

**27.** As respects proceedings against any person for an offence under this Part of this Act, or for any of the offences mentioned in the First Schedule to this Act, the Criminal Evidence Act, 1898, shall apply as if in the Schedule to that Act a reference to this Part of this Act and to the First Schedule to this Act were substituted for the reference to the Prevention of Cruelty to Children Act, 1894.

**28.**—(1.) Where a justice is satisfied by the evidence of a duly qualified medical practitioner that the attendance before a court of

any child or young person, in respect of whom an offence under this Part of this Act, or any of the offences mentioned in the First Schedule to this Act, is alleged to have been committed, would involve serious danger to the life or health of the child or young person, the justice may take in writing the deposition of the child or young person on oath, and shall thereupon subscribe the deposition and add thereto a statement of his reason for taking the deposition, and of the day when and place where the deposition was taken, and of the names of the persons (if any) present at the taking thereof.

(2.) The justice taking any such deposition shall transmit it with his statement—

(a) if the deposition relates to an offence for which any accused person is already committed for trial, to the proper officer of the court for trial at which the accused person has been committed; and

(b) in any other case, to the clerk of the peace of the county or borough in which the deposition has been taken;

and the clerk of the peace to whom any such deposition is transmitted shall preserve, file, and record the deposition.

**29.** Where, on the trial of any person on indictment for an offence of cruelty, or any of the offences mentioned in the First Schedule to this Act, the court is satisfied by the evidence of a duly qualified medical practitioner that the attendance before the court of any child or young person in respect of whom the offence is alleged to have been committed would involve serious danger to the life or health of the child or young person, any deposition of the child or young person taken under the Indictable Offences Act, 1848, or this Part of this Act, shall be admissible in evidence either for or against the accused person without further proof thereof—

(a) if it purports to be signed by the justice by or before whom it purports to be taken; and

(b) if it is proved that reasonable notice of the intention to take the deposition has been served upon the person against whom it is proposed to use it as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child or young person making the deposition.

**30.** Where, in any proceeding against any person for an offence under this Part of this Act, or for any of the offences mentioned in the First Schedule to this Act, the child 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 understand the nature of an oath, the evidence of that child may be received, though not given upon oath, if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and the evidence of the child, though not given on oath, but otherwise taken and reduced into writing in accordance with the provisions of section seventeen of the Indictable Offences Act, 1848, or of this Part of this Act, shall be deemed to be a deposition within the meaning of that section and that Part respectively:

Provided that—

(a) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused; and

(b) Any child, whose evidence is received as aforesaid and who wilfully gives false evidence under such circumstances that, if the evidence had been given on oath, he would have been guilty of perjury, shall, subject to the provisions of this Act, be liable on summary conviction to be adjudged such punishment as might have been awarded had he been charged with perjury and the case dealt with summarily under section ten of the Summary Jurisdiction Act, 1879.

**31.** Where in any proceedings with relation to an offence under this Part of this Act, or any of the offences mentioned in the First Schedule to this Act, the court is satisfied that the attendance before the court of any child or young person in respect of whom the offence is alleged to have been committed is not essential to the just hearing of the case, the case may be proceeded with and determined in the absence of the child or young person.

**32.**—(3.) A person shall not be summarily convicted of an offence under this Part of this Act, or of an offence mentioned in the First Schedule to this Act, unless the offence was wholly or partly committed within six months before the information was laid; but, subject as aforesaid, evidence may be taken of acts constituting, or contributing to constitute, the offence, and committed at any previous time.

**38.**—(1.) In this Part of this Act, unless the context otherwise requires, the expression "fit person," in relation to the care of any child or young person, includes any society or body corporate established for the reception or protection of poor children or the prevention of cruelty to children.

(2.) For the purposes of this Part of this Act—

Any person who is the parent or legal guardian of a child or young person or who is legally liable to maintain a child or young person shall be presumed to have the custody of the child or young person, and as between father and mother the father shall not be deemed to have ceased to have the custody of the child or young person by reason only that he has deserted, or otherwise does not reside with, the mother and child or young person; and

Any person to whose charge a child or young person is committed by any person who has the custody of the child or young person shall be presumed to have charge of the child or young person; and

Any other person having actual possession or control of a child or young person shall be presumed to have the care of the child or young person.

**44.**—(2.) The persons for the time being having the management or control of a school shall be deemed the managers thereof for the purposes of this Part of this Act.

**120.**—(3.) If a child is found in the bar of any licensed premises except during the hours of closing, the holder of the licence shall be deemed to have committed an offence under this section unless he shows that he has used due diligence to prevent the child being admitted to the bar or that the child was apparently a person over the age of fourteen.

**123.**—(1.) Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that he is a child or young person, the court shall make due inquiry as to the age of that person, and for that purpose shall take such evidence as may be forthcoming at the hearing of the case, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age of that person, and, where it appears to the court that the person so brought before it is of the age of sixteen years or upwards, that person shall for the purposes of this Act be deemed not to be a child or young person.

(2.) Where in a charge or indictment for an offence under this Act, or any of the offences mentioned in the First Schedule to this Act, except an offence under the Criminal Law Amendment Act, 1885, it is alleged that the person by or in respect of whom the offence was committed was a child or young person or was under or above any specified age, and he appears to the court to have been at the date of the commission of the alleged offence a child or young person, or to have been under or above the specified age, as the case may be, he shall for the purposes of this Act be presumed at that date to have been a child or young person or to have been under or above that age, as the case may be, unless the contrary is proved.

(3.) Where in any charge or indictment for an offence under this Act or any of the offences mentioned in the First Schedule to this Act it is alleged that the person in respect of whom the offence was committed was a child or was a young person, it shall not be a defence to prove that the person alleged to have been a child was a young person or the person alleged to have been a young person was a child in any case where the acts constituting the alleged offence would equally have been an offence if committed in respect of a young person or child respectively.

(4.) Where a person is charged with an offence under this Act in respect of a person apparently under a specified age it shall be a defence to prove that the person was actually of or over that age.

## FIRST SCHEDULE.

Any offence under sections twenty-seven, fifty-five, or fifty-six of the Offences against the Person Act, 1861, and any offence against a child or young person under sections five, forty-two, forty-three, fifty-two, or sixty-two of that Act, or under the Criminal Law Amendment Act, 1885.

Any offence under the Dangerous Performances Acts, 1879 and 1897.

Any other offence involving bodily injury to a child or young person.

## COMPANIES (CONSOLIDATION) ACT, 1908.

(8 EDW. VII. c. 69.)

**17.**—(1.) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under this Act.

(2.) A statutory declaration by a solicitor of the High Court, and in Scotland by an enrolled law agent, engaged in the formation of the company, or by a person named in the articles as a director or secretary of the company, of compliance with all or any of the said requirements shall be produced to the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance.

**22.**—(1.) The shares or other interest of any member in a company shall be personal estate, transferable in manner provided by the articles of the company. . . .

**23.** A certificate, under the common seal of the company, specifying any shares or stock held by any member, shall be *primâ facie* evidence of the title of the member to the shares or stock.

**33.** The register of members shall be *primâ facie* evidence of any matters by this Act directed or authorised to be inserted therein.

**71.**—(1.) Every company shall cause minutes of all proceedings of general meetings and (where there are directors or managers) of its directors or managers to be entered in books kept for that purpose.

(2.) Any such minute if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

(3.) Until the contrary is proved, every general meeting of the company or meeting of directors or managers in respect of the proceedings whereof minutes have been so made shall be deemed to have been duly held and convened, and all proceedings had thereat to have been duly had, and all appointments of directors, managers, or liquidators, shall be deemed to be valid.

**76.**—(1.) Contracts on behalf of a company may be made as follows (that is to say):—

(i.) 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 may in the same manner be varied or discharged:

(ii.) Any contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged:

(iii.) Any contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged:

(2.) All contracts made according to this section shall be effectual in law, and shall bind the company and its successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be.

**111.** A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company whose affairs they have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report.

**148.**—(1.) Where the court in England has made a winding-up order, the official receiver shall, as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the court –

(a) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities; and

(b) if the company has failed, as to the causes of the failure; and

(c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

(2.) The official receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the court.

**168.**—(1.) An order made by the court on a contributory shall (subject to any right of appeal) be conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due.

(2.) All other pertinent matters stated in the order shall be taken to be truly stated as against all persons, and in all proceedings, except proceedings against the real estate of a deceased

contributory, in which case the order shall only be *primâ facie* evidence for the purpose of charging his real estate, unless his heirs or devisees were on the list of contributories at the time of the order being made.

**174.**—(1.) The court may, after it has made a winding-up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the court deems capable of giving information concerning the trade, dealings, affairs, or property of the company.

(2.) The court may examine him on oath concerning the same, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(3.) The court may require him to produce any books and papers in his custody or power relating to the company; but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to that lien, and the court shall have jurisdiction in the winding up to determine all questions relating to that lien.

(4.) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the court at the time appointed, not having a lawful impediment (made known to the court at the time of its sitting, and allowed by it), the court may cause him to be apprehended, and brought before the court for examination.

**175.**—(1.) When an order has been made in England for winding up a company by the court, and the official receiver has made a further report under this Act stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since its formation, the court may, after consideration of the report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director, or officer of the company, shall attend before the court on a day appointed by the court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director or officer thereof.

(2.) The official receiver shall take part in the examination, and for that purpose may, if specially authorised by the Board of Trade in that behalf, employ a solicitor with or without counsel.

(3.) The liquidator, where the official receiver is not the liquidator, and any creditor or contributory, may also take part in the examination either personally or by solicitor or counsel.

(4.) The court may put such questions to the person examined as the court thinks fit.

(5.) The person examined shall be examined on oath, and shall answer all such questions as the court may put or allow to be put to him.

(6.) A person ordered to be examined under this section shall at his own cost, before his examination, be furnished with a copy of the official receiver's report, and may at his own cost employ a solicitor with or without counsel, who shall be at liberty to put to

him such questions as the court may deem just for the purpose of enabling him to explain or qualify any answers given by him: provided that if he is, in the opinion of the court, exculpated from any charges made or suggested against him, the court may allow him such costs as in its discretion it may think fit.

(7.) Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him, and shall be open to the inspection of any creditor or contributory at all reasonable times.

(8.) The court may, if it thinks fit, adjourn the examination from time to time.

(9.) An examination under this section may, if the court so directs, and subject to general rules, be held before any judge of county courts, or before any officer of the Supreme Court, being an official referee, master, or registrar in bankruptcy, or before any district registrar of the High Court named for the purpose by the Lord Chancellor, or, in the case of companies being wound up by a palatine court, before a registrar of that court, and the powers of the court under this section as to the conduct of the examination, but not as to costs, may be exercised by the person before whom the examination is held.

**220**. Where any company is being wound up, all books and papers of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded (*p*).

**243**.—(7.) A copy of or extract from any document kept and registered at any of the offices for the registration of companies in England, Scotland, or Ireland, certified to be a true copy under the hand of the registrar or an assistant registrar (whose official position it shall not be necessary to prove) shall in all legal proceedings be admissible in evidence as of equal validity with the original document.

## FIRST SCHEDULE.

### TABLE A.

**19**. Shares in the company shall be transferred in the following form, or in any usual or common form which the directors shall approve:

I, *A.B.*, of in consideration of the sum of £ paid to me by *C.D.* of (hereinafter called "the said transferee") do hereby transfer to the said transferee the share [*or* shares] numbered in the undertaking called the company limited, to hold unto the said transferee, his executors, administrators, and assigns, subject to the several conditions on which I held the same at the time of the execution thereof: and I, the said transferee, do hereby agree to take the said share [*or* shares] subject to the conditions aforesaid.

As witness our hands the day of .

Witness to the signatures of, etc. .

(*p*) *In re Great Northern Salt, &c., Works*, 44 Ch. D. 472.

## POST OFFICE ACT, 1908.

(8 EDW. VII. c. 48.)

**36.** The Documentary Evidence Act, 1868, as extended by the Documentary Evidence Act, 1882, shall have effect—

(a) as if the Postmaster General were mentioned in the first column, and any secretary or assistant secretary of the Post Office were mentioned in the second column, of the schedule to the second Act, and

(b) as if a warrant of the Treasury under this Act were mentioned in the second section of the former Act as well as an order.

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## OATHS ACT, 1909.

(9 EDW. VII. c. 39.)

**2.**—(1.) Any oath may be administered and taken in the form and manner following:—

The person taking the oath shall hold the New Testament, or, in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words "I swear by Almighty God that . . . ," followed by the words of the oath prescribed by law.

(2.) The officer shall (unless the person about to take the oath voluntarily objects thereto, or is physically incapable of so taking the oath) administer the oath in the form and manner aforesaid without question:

Provided that, in the case of a person who is neither a Christian nor a Jew, the oath shall be administered in any manner which is now lawful.

**3.** In this Act the word "officer" shall mean and include any and every person duly authorised to administer oaths.

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## ASSURANCE COMPANIES ACT, 1909.

(9 EDW. VII. c. 49.)

**21.**—(1.) Every document deposited under this Act with the Board of Trade, and certified by the registrar or by any person appointed in that behalf by the President of the Board of Trade to be a document so deposited, shall be deemed to be a document so deposited.

(2.) Every document purporting to be certified by the registrar, or by any person appointed in that behalf by the President of the Board of Trade, to be a copy of a document so deposited shall be deemed to be a copy of that document, and shall be received in evidence as if it were the original document, unless some variation between it and the original document be proved.

# II. RULES OF COURT.

## (i.) RULES OF THE SUPREME COURT, 1883.

### ORDER XXVIII., RR. 1—6.

#### AMENDMENT.

1. The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

2. The plaintiff may, without any leave, amend his statement of claim, whether indorsed on the writ or not, once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared, or where defence is delivered but no order for reply is made within ten days from delivery of the defence or the last of the defences.

3. A defendant who has set up any counterclaim or set-off may, without any leave, amend such counterclaim or set-off at any time before the expiration of the time allowed him for answering the reply, and before such answer, or in case there be no reply, then at any time before the expiration of twenty-eight days from defence.

4. Where any party has amended his pleading under either of the last two preceding rules, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the court or a judge to disallow the amendment, or any part thereof, and the court or judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may be just.

5. Where any party has amended his pleading under rule 2 or 3, the opposite party shall plead to the amended pleading, or amend his pleading, within the time he then has to plead or within eight days from the delivery of the amendment, whichever shall last expire; and in case the opposite party has pleaded before the delivery of the amendment, and does not plead again or amend within the time above mentioned, he shall be deemed to rely on his original pleading in answer to such amendment.

6. In all cases not provided for by the preceding rules of this order, application for leave to amend may be made by either party to the court or a judge, or to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may be just.

## ORDER XXX., RR. 1 (a) (b), 7.

### SUMMONS FOR DIRECTIONS.

1.—(a) Except in the cases mentioned in paragraph (d) the plaintiff in every action shall take out a summons for directions returnable in not less than four days.

(b) Such summons shall be taken out after appearance and before the plaintiff takes any fresh step in the action other than application for an injunction, or for a receiver, or the entering of judgment in default of defence under Order XXVII.

7. On the hearing of the summons, the court or a judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the court or judge may direct (*a*).

## ORDER XXXI., RR. 1, 2, 5—8, 10—15, 17, 18, 19A, 20.

### DISCOVERY AND INSPECTION.

1. In any cause or matter the plaintiff or defendant by leave of the court or a judge may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

2. On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the court or judge. In deciding upon such application, the court or judge shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matter in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the court or judge shall consider necessary either for disposing fairly of the cause or matter or for saving costs.

5. If any party to a cause or matter be a body corporate or a joint-stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver

(*a*) The object of this rule is to dispense, to a certain limited extent, with the technical rules of evidence (*Baerlein* v. *Chartered Mercantile Bank*, [1895] 2 Ch. 488).

interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

6. Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

7. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

8. Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as a judge may allow.

10. No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the court or a judge on motion or summons.

11. If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the court or a judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the judge may direct.

12. Any party may, without filing any affidavit, apply to the 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 not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may in their or his discretion be thought fit. Provided that discovery shall not be ordered when and so far as the court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

13. The affidavit, to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which, if any, of the documents therein mentioned he objects to produce. . . .

14. 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 documents, when produced, in such manner as shall appear just.

15. Every party to a cause or matter shall be entitled, at any time, by notice in writing to give notice to any other party in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not

afterwards be at liberty to put any such document in evidence on his behalf in such 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.

17. The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of bankers' books or other books of account, or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. . . .

18.—(1.) If the party served with notice under rule 17 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the court or judge may, on the application of the party desiring it, make an order for inspection in such place and in such manner as he may think fit: Provided that the order shall not be made when and so far as the court or a judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

(2.) Any application to inspect documents, except such as are referred to in the pleadings, particulars, or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The court or judge shall not make such order for inspection of such documents when and so far as the court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

19A.—(1.) Where inspection of any business books is applied for, the court or a judge may, if they or he shall think fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations, or alterations. Provided that notwithstanding that such copy has been supplied, the court or a judge may order inspection of the book from which the copy was made.

(2.) Where, on an application for an order for inspection, privilege is claimed for any document, it shall be lawful for the court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3.) The court or a judge may, on the application of any party

to a cause or matter at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been in his possession or power; and, if not then in his possession, when he parted with the same, and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the cause or matter, or to some of them.

20. 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, or that for any other 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.

## ORDER XXXVII., RR. 1—5, 6A—25, 35—38.

### I. EVIDENCE GENERALLY.

1. In the absence of any agreement in writing between the solicitors of all parties, and subject to these rules, the witnesses at the trial of any action or at any assessment of damages shall be examined *viva voce* and in open court, but the court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the court or judge may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with be examined by interrogatories or otherwise before a commissioner or examiner; provided that, where it appears to the court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit (*b*).

2. In default actions *in rem*, and in references in Admiralty actions, evidence may be given by affidavit.

3. An order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the court or a judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence.

4. Office copies of all writs, records, pleadings, and documents

(*b*) See sect. 20 of the Judicature Act, 1875 (38 & 39 Vict. c. 77).

filed in the High Court of Justice shall be admissible in evidence in all causes and matters and between all persons or parties, to the same extent as theo riginal would be admissible.

II. EXAMINATION OF WITNESSES.

5. The court or a judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the court or judge or any officer of the court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court or a judge may direct.

6. [*Provides the form of an order for a commission to examine witnesses.*]

6A. If in any case the court or a judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission. . . .

7. The court or a judge may in any cause or 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 or judge 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 hearing or trial.

8. Any person wilfully disobeying any order requiring his attendance for the purpose of being examined or producing any document shall be deemed guilty of contempt of court, and may be dealt with accordingly.

9. Any person required to attend for the purpose of being examined or of producing any document, shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court.

10. Where any witness or person is ordered to be examined before any officer of the court, or before any person appointed for the purpose, the person taking the examination shall be furnished by the party on whose application the order was made with a copy of the writ and pleadings, if any, or with a copy of the documents necessary to inform the person taking the examination of the questions at issue between the parties.

11. The examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses shall be subject to cross-examination and re-examination.

12. The depositions taken before an officer of the court, or before any other person appointed to take the examination, shall be 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, and when completed shall be read over to the witness and signed by him in the presence of the parties, or such of them as may think fit to attend. If the witness shall refuse to sign the depositions, the examiner shall sign the same. The examiner may put down any particular question or answer if there should appear any special reason for doing so, and may put any question to the witness as to the meaning of any answer, or as to any matter arising in the course of the

examination. Any questions which may be objected to shall be taken down by the examiner in the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question.

13. If any person duly summoned by *subpœna* to attend for examination shall refuse to attend, or if, having attended, he shall refuse to be sworn or to answer any lawful question, a certificate of such refusal, signed by the examiner, shall be filed at the central office, and thereupon the party requiring the attendance of the witness may apply to the court or a judge *ex parte* or on notice for an order directing the witness to attend, or to be sworn, or to answer any question, as the case may be.

14. If any witness shall object to any question which may be put to him before an examiner, the question so put, and the objection of the witness thereto, shall be taken down by the examiner and transmitted by him to the central office to be there filed, and the validity of the objection shall be decided by the court or a judge.

15. In any case under the two last preceding rules, the court or a judge shall have power to order the witness to pay any costs occasioned by his refusal or objection.

16. When the examination of any witness before any examiner shall have been concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the central office, and there filed.

17. The person taking the examination of a witness under these rules 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.

18. Except where by this order otherwise provided, or directed by the court or a judge, no deposition shall be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the court or judge is satisfied that the deponent is dead, or beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence saving all just exceptions without proof of the signature to such certificate.

19. Any officer of the court, or other person directed to take the examination of any witness or person, may administer oaths.

20. Any party in any cause or matter may by *subpœna ad testificandum* or *duces tecum* require the attendance of any witness before an officer of the court, or other person appointed to take the examination, for the purpose of using his evidence upon any proceeding in the cause or matter in like manner as such witness would be bound to attend and be examined at the hearing or trial; and any party or witness having made an affidavit to be used or which shall be used on any proceeding in the cause or matter shall be bound on being served with such *subpœna* to attend before such officer or person for cross-examination.

21. Evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial.

22. The practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial shall extend and be applicable to evidence taken in any cause or matter at any stage.

23. The practice of the court with respect to evidence at a trial, when applied to evidence to be taken before an officer of the court or other person in any cause or matter after the hearing or trial, shall be subject to any special directions which may be given in any case.

24. No affidavit or deposition filed or made before issue joined in any cause or matter shall without special leave of the court or a judge be received at the hearing or trial thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the court or a judge, notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf.

25. All evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter.

### III. SUBPŒNA.

26 to 34. [*Deal with the issuing, form, and service, of a subpœna.*]

### IV. PERPETUATING TESTIMONY.

35. Any person who would under the circumstances alleged by him to exist become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing such right or claim.

36. In all actions to perpetuate testimony touching any honour, title, dignity, or office, or any other matter or thing in which the Crown may have any estate or interest, the Attorney-General may be made a defendant, and in all proceedings in which the depositions taken in any such action, in which the Attorney-General was so made a defendant, may be offered in evidence, such depositions shall be admissible notwithstanding any objection to such depositions upon the ground that the Crown was not a party to the action in which such depositions were taken.

37. Witnesses shall not be examined to perpetuate testimony unless an action has been commenced for the purpose.

38. No action to perpetuate the testimony of witnesses shall be set down for trial.

## ORDER XXXVIII., RR. 1—30.

### I. AFFIDAVITS AND DEPOSITIONS.

1. Upon any motion, petition, or summons, evidence may be given by affidavit; but the court or a judge may, on the application

of either party, order the attendance for cross-examination of the person making any such affidavit.

2. Every affidavit shall be intituled in the cause or matter in which it is sworn; but in every case in which there are more than one plaintiff or defendant, it shall be sufficient to state the full name of the first plaintiff or defendant respectively, and that there are other plaintiffs or defendants, as the case may be; and the costs occasioned by any unnecessary prolixity in any such title shall be disallowed by the taxing officer.

3. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same (*c*).

4. Affidavits sworn in England shall be sworn before a judge, district registrar, commissioner to administer oaths, or officer empowered under these rules to administer oaths.

5. Every commissioner to administer oaths shall express the time when and the place where he shall take any affidavit, or the acknowledgment of any deed, or recognizance; 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; and every such commissioner shall express the time when, and the place where, he shall do any other act incident to his office.

6. All examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court, and also acknowledgments required for the purpose of enrolling any deed in the central office, may be sworn and taken in Scotland or Ireland or the Channel Islands, or in any colony, island, plantation, or place under the dominion of Her Majesty in foreign parts, before any judge, court, notary public, or person lawfully authorised to administer oaths in such country, colony, island, plantation, or place respectively, or before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions; and the judges and other officers of the High Court shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, person, consul, or vice-consul, attached, appended, or subscribed to any such examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or to any other deed or document.

7. Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. Every affidavit shall be written or printed bookwise. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule.

8. Every affidavit shall state the description and true place of abode of the deponent.

9. In every affidavit made by two or more deponents the names of the several persons making the affidavit shall be inserted in the

(*c*) See *ante*, p. 697.

jurat, except that if the affidavit of all the deponents is taken at one time by the same officer it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents.

10. Every affidavit or other proof used in Admiralty actions shall be filed in the Admiralty registry: every affidavit used in Probate actions shall be filed in the Probate registry: every affidavit used on the Crown side of the Queen's Bench Division shall be filed in the Crown Office Department: every affidavit used in a cause or matter proceeding in a district registry shall be filed there: and every other affidavit used shall be filed in the central office. There shall be indorsed on every affidavit a note showing on whose behalf it is filed, and no affidavit shall be filed or used without such note, unless the court or a judge shall otherwise direct.

11. 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.

12. 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 to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it.

13. 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.

14. The court or a judge may receive any affidavit sworn for the purpose of being used in any cause or matter, notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received.

15. In cases in which by the present practice an original affidavit is allowed to be used, it shall before it is used be stamped with a proper filing stamp, and shall at the time when it is used be delivered to and left with the proper officer in court or in chambers, who shall send it to be filed. An office copy of an affidavit may in all cases be used, the original affidavit having been previously filed, and the copy duly authenticated with the seal of the office.

16. No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself (*d*).

(*d*) See Commissioners for Oaths Act, 1889 (52 Vict. c. 10), s. 1.

17. Any affidavit which would be insufficient if sworn before the solicitor himself shall be insufficient if sworn before his clerk or partner.

18. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used, unless by leave of the court or a judge.

19. Except by leave of the court or a judge no order made *ex parte* in court founded on any affidavit shall be of any force unless the affidavit on which the application was made was actually made before the order was applied for, and produced or filed at the time of making the motion.

19A. The consent of a new trustee to act shall be sufficiently evidenced by a written consent signed by him and verified by the signature of his solicitor. . . .

## II. AFFIDAVITS AND EVIDENCE IN CHAMBERS.

20. The party intending to use any affidavit in support of any application made by him in chambers in the Chancery Division shall give notice to the other parties concerned of his intention in that behalf.

21. All affidavits which have been previously made and read in court upon any proceeding in a cause or matter may be used before the judge in chambers.

22. Every alteration in an account verified by affidavit to be left at chambers shall be marked with the initials of the commissioner or officer before whom the affidavit is sworn, and such alterations shall not be made by erasure.

23. Accounts, extracts from parish registers, particulars of creditors' debts, and other documents referred to by affidavit, shall not be annexed to the affidavit, or referred to in the affidavit as annexed, but shall be referred to as exhibits.

24. Every certificate on an exhibit referred to in an affidavit signed by the commissioner or officer before whom the affidavit is sworn shall be marked with the short title of the cause or matter.

## III. TRIAL ON AFFIDAVIT.

25. Within fourteen days after a consent for taking evidence by affidavit as between the parties has been given, or within such times as the parties may agree upon, or the court or judge may allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof.

26. The defendant, within fourteen days after delivery of such list, or within such time as the parties may agree upon, or the court or a judge may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof.

27. Within seven days after the expiration of the last-mentioned fourteen days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof.

28. 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 acordingly, his affidavit shall not be used as evidence unless by the special leave of the court or a judge. 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.

29. The party to whom such notice as is mentioned in the last preceding rule is given shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined.

30. When the evidence under this order is taken by affidavit, such evidence shall be printed, and the notice of trial shall be given at the same time after the close of the evidence as in other cases is by these rules provided after the close of the pleadings: provided that other affidavits may be printed if all the parties interested consent thereto, or the court or a judge so order: provided also that this rule shall not apply in the Probate, Divorce and Admiralty Division to default actions *in rem*, or references in actions, or actions for limitation of liability, unless the court or a judge shall otherwise order.

## ORDER LVIII., RR. 11—13.

### APPEALS TO THE COURT OF APPEAL.

11. When any question of fact is involved in an appeal, the evidence taken in the court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows:

(a) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed:

(b) As to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the court may deem expedient.

12. Where evidence has not been printed in the court below, the court below or a judge thereof, or the Court of Appeal or a judge thereof, may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court of Appeal or a judge thereof shall otherwise order.

13. If, upon the hearing of an appeal, a question arise as to the ruling or direction of the judge to a jury or assessors, the court shall have regard to verified notes or other evidence, and to such other materials as the court may deem expedient.

## (ii.) THE BANKRUPTCY RULES, 1886 AND 1890.

17.—(1.) In the High Court the senior bankruptcy registrar, and in a county court the registrar, shall file a copy of each issue of the "London Gazette," and whenever the Gazette contains any advertisement relating to any matter under the Act in such court, he shall at the same time file with the proceedings in the matter a memorandum referring to and giving the date of such advertisement.

(2.) In the case of an advertisement in a local paper, the registrar shall in like manner file a copy of the paper and a memorandum (which shall be in the Form No. 175 in the Appendix) referring to and giving the date of such advertisement.

(3.) For this purpose one copy of each local paper, in which any advertisement relating to any matter under the Act in such court is inserted, shall be left with the registrar by the person inserting the advertisement.

(4.) The memorandum by the registrar shall be *primâ facie* evidence that the advertisement to which it refers was duly inserted in the issue of the Gazette or paper mentioned in it.

17A. Where, in the exercise of their functions under the Acts or Rules, the Board of Trade or the official receiver require to inspect or use the file of proceedings in any matter, the registrar shall (unless the file is at the time required for use in court or by him) on request transmit the file of proceedings to the Board of Trade or official receiver, as the case may be.

61. 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.

66. The court may, in any matter where it shall appear necessary for the purposes of justice, make an order for the examination upon oath before the court or any officer of the court, or any other person, and at any place, of any witness or person, and may empower any party to any such matter to give such deposition in evidence therein on such terms (if any) as the court may direct.

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.

70. Any person wilfully disobeying any subpœna or order requiring his attendance for the purpose of being examined or producing any document shall be deemed guilty of contempt of court, and may be dealt with accordingly.

71. Any witness (other than the debtor) required to attend for the purpose of being examined, or of producing any document, shall be entitled to the like conduct money and payment for expenses and loss of time, as upon attendance at a trial in court.

72. Any party to any proceeding in 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*.

## (iii.) THE COUNTY COURT RULES, 1903.

### ORDER XVI., RR. 1—22.

### DISCOVERY AND INSPECTION.

1. Any party to any action or matter may, without filing an affidavit, by leave of the court (*a*), deliver interrogatories in writing for the examination of any one or more of the opposite parties; and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories each of such parties is to answer: Provided that interrogatories which do not relate to any question in the action or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

2. If leave is granted, an order shall be drawn up by the registrar and served by the applicant on the party against whom the order is made. Such order shall be according to the form in the Appendix, and shall specify the number of days within which the interrogatories are to be delivered by the applicant, and also the time within which the affidavit in answer is to be filed.

3. On an application for leave to deliver interrogatories the particular interrogatories proposed to be delivered shall be submitted to the court. In deciding upon such application, the court shall take into account any offer which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents relating to the subject in question, or any of them; and shall also consider whether the application has been made too early in the proceedings in the action or matter, or too late to allow of the answers being used at the hearing; and leave shall be given as to such only of the interrogatories submitted as the court considers necessary either for disposing fairly of the action or matter, or for saving costs.

4. In adjusting the costs of the action or matter inquiry shall, at the instance of any party, be made into the propriety of exhibiting interrogatories; and if it is the opinion of the registrar on taxation, or of the judge, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

(*a*) By Order LV. "court" includes a judge or registrar exercising the powers of the court in chambers as well as in open court.

5. Interrogatories shall be according to the form in the Appendix, with such variations as circumstances may require.

6. If any party to an action or matter be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

7. Any objection to answer any one or more of several interrogatories, on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purpose of the action or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

8. Interrogatories shall be answered by affidavit according to the form in the Appendix, with such variations as circumstances may require. Such affidavit shall be filed and a copy thereof delivered to the party interrogating within the time named in the order giving leave to interrogate.

9. If any person interrogated omits to answer, or answers insufficiently, the party interrogating, after giving to such person two clear days' notice of the time and place at which he intends to apply, may apply to the court for an order requiring him to answer or to answer further, as the case may be. And an order may be made requiring him to answer, or to answer further, either by affidavit or *vivâ voce* examination before the court, as the court may direct.

10. Any party to any action or matter may, without filing any affidavit, apply to the court for an order directing any other party to the action or matter to make discovery on oath of the documents which are or have been in his possession or power relating to any question therein. On the hearing of such application the court may either refuse or adjourn the same, if satisfied that such discovery is not necessary or not necessary at that stage of the action or matter, or make such order, either generally or limited to certain classes of documents, as the court may, in its discretion, think fit. Provided that discovery shall not be ordered when and so far as the court is of opinion that it is not necessary either for disposing fairly of the action or matter, or for saving costs. If an order is made it shall be drawn up by the registrar and served by the applicant on the party against whom the order is made. Such order shall be according to the form in the Appendix, and shall specify the time within which the affidavit in answer is to be filed.

11. The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made shall specify which, if any, of the documents therein mentioned he objects to produce, and on what grounds, and it shall be according to the form in the Appendix, with such variations as circumstances may require. Such affidavit shall be filed, and a copy thereof delivered to the party who obtains the order within the time named in the order.

12. The court may, at any time during the pendency of any action or matter, order the production upon oath, by any party

thereto, of such of the documents in his possession or power relating to any question in such action or matter as the court may direct; and the court may deal with such documents, when produced, in such manner as may be just.

13. Any party to an action or matter may at any time give notice in writing to any other party in whose particulars, notices, or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, and to permit him to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or matter, unless he satisfies the court that such document relates only to his own title, he being a defendant to the action or matter, or that he had some other cause or excuse which the court deems sufficient for not complying with such notice; in which case the court may allow the same to be put in evidence on such terms as to costs and otherwise as the court may think fit.

14. Notice to any party to produce any documents under the last preceding rule shall be according to the form in the Appendix, with such variations as circumstances may require.

15. The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in rule 11 of this order, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of bankers' books or other books of account, or books in constant use for the purposes of any trade or business, or in case the party is not acting by a solicitor, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what grounds. Such notice shall be according to the form in the Appendix, with such variations as circumstances may require.

16.—(1.) If any party served with notice under rule 13 of this order omits to give such notice of a time for inspection, or objects to give inspection, or offers inspection elsewhere than is provided by rule 15, the court may, on the application of the party desiring it, make an order for inspection at such place and in such manner as the court may think fit: Provided that the order shall not be made when and so far as the court is of opinion that it is not necessary either for disposing fairly of the action or matter, or for saving costs.

(2.) Any application to inspect documents, except such as are referred to in the particulars, notices, or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The court shall not make an order for inspection of such documents when and so far as the court is of opinion that it is not necessary either for disposing fairly of the action or matter, or for saving costs.

17. In any pending action or matter 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.

18. In any action against or by a sheriff or high bailiff or other officer discharging the like functions, in respect of any matters connected with the execution of his office, the court may, on the application of either party, order that the affidavit to be made in answer either to interrogatories or to an order for discovery shall be made by the officer actually concerned.

19.—(1.) Where inspection of any business books is applied for, the court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations, or alterations. Provided that, notwithstanding that such copy has been supplied, the court may order inspection of the book from which the copy was made.

(2.) Where on an application for an order for inspection privilege is claimed for any document, the court may inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3.) The court may, on the application of any party to an action or matter at any time, and whether an affidavit of documents has or has not been already ordered or made, make an order requiring any other party to state by affidavit whether any specific documents, to be specified in the application, are or have at any time been in his possession or power; and if not then in his possession, when he parted with the same, and what has become thereof. Such application shall be made on affidavit stating that in the belief of the deponent the party against whom the application is made has or has at some time had in his possession or power the documents specified in the application, and that they relate to the matters in question in the action or matter, or to some of them.

20. If a party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action or matter, or that for any other reason it is desirable that any issue or question in dispute in the action 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.

21. If any party fails to comply with an order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment.

22. In every action or matter the costs of discovery, by interrogatories or otherwise, shall, unless otherwise ordered by the court, be secured in the first instance as provided by rule 23 of this order, by the party seeking such discovery, and shall be allowed as part of his costs, where, and only where, such discovery appears to the judge at the trial, or, if there is no trial, to the registrar on taxation, to have been reasonably asked for.

23 and 24. [*Are as to amount of security to be paid into court and payment out of amount paid in.*]

## ORDER XVIII., RR. 1, 2, 5—22, 24—32.

### EVIDENCE.

1. 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 court, on any application before or at the trial or hearing, so directs.

2. The judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the trial or hearing, on such conditions as he may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with be examined by interrogatories or otherwise before an examiner: Provided that, where it appears to the 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.

3 and 4. [*Deal with the issue and service of summonses to witnesses.*]

5. Where a witness served with a summons containing a direction for the production of any documents at the trial does not produce the same, the judge may, upon admission or proof that the summons was served within a reasonable time, and that such documents are in the possession or power or under the control of the party so served, and that they relate to the matter then pending before him, make an order for their production by the witness, and may deal with them, when produced, and with all costs occasioned by their non-production, as may be just: Provided that nothing herein shall prevent the receiving of secondary evidence where admissible.

6. Where a party desires to give in evidence any document, he may, not less than five clear days before the trial, give notice to any other party in the action or matter who is competent to make admissions requiring him to inspect and admit such document; and if such other party does not within three days after receiving such notice make such admission, any expense of proving the same at the trial shall be paid by him, whatever may be the result, unless the court otherwise orders; and no costs of proving any document shall be allowed unless such notice has been given, except in cases where, in the opinion of the judge at the trial, or the registrar on taxation, the omission to give such notice has been a saving of expense.

7. Notices to admit or to produce documents shall be according to the forms in the Appendix, with such variations as circumstances may require.

An affidavit of the party, or his solicitor, or of some person in the permanent and exclusive employ of either of them, of the service of any notice to admit or to produce, and of the time when it was served, with a copy of the notice to admit or to produce,

shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

8. If a notice to admit or produce comprises documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

9. 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 court they appear genuine, and if no objection is taken thereto; and if the admission of any documents so produced is objected to, the court 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 court otherwise orders.

10. Where an instrument which may be legally stamped after its execution is produced as evidence, and the same is unstamped or insufficiently stamped, it shall not be received in evidence until the party desirous of giving the instrument in evidence produces to the court the receipt of the registrar for the amount of the unpaid duty, and the penalty payable by law on stamping the same, and the sum of one pound.

11. Where a party desires to use at the trial an affidavit by any particular witness, or an affidavit as to particular facts as to which no order has been made under rule 2 of this order, 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 two clear days at least 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 use thereof, unless the judge otherwise orders; and the judge may make such order as he may think fit as to the costs of or incidental to any such objection.

12. All evidence taken at the trial of any action or matter may be used in any subsequent proceedings in the same action or matter.

13. Evidence taken subsequently to the trial or hearing of any action or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial or hearing.

14. The practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial shall extend and be applicable to evidence taken in any action or matter at any stage.

15. The practice of the court with respect to evidence at a trial, when applied to evidence to be taken before an officer of the court or other person in any action or matter after the trial or hearing, shall be subject to any special directions which may be given in any case.

16. Any party may, at the trial of an action or matter, use in evidence any one or more of the answers, or any part of an answer, of the opposite party to interrogatories, without putting in the others, or the whole of such answer: Provided that in such case the judge may look at the whole of the answers, and if he is of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in.

17. Affidavits and depositions shall be read as the evidence of the person by whom they are used.

EXAMINATIONS.

18. The court may in any action or matter, where it appears necessary for the purposes of justice, make an order for the examination upon oath before the court or any officer of the court, or any other person, and at any place in England or Wales, of any witness or person, and may empower any party to any such action or matter to give such deposition in evidence therein on such terms, if any, as the court may direct.

19. Where any witness or person mentioned in the last preceding rule resides out of the district of the court, the judge may appoint the registrar of the court in the district of which such witness or person resides to take the examination.

20. 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 writings or other documents which the court may think fit to be produced, and any person served with any such order shall be bound to attend accordingly: 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. [*The rule goes on to provide the method of service.*]

21. Any person wilfully disobeying any order requiring his attendance for the purpose of being examined or producing any document to or before an examiner shall be deemed guilty of contempt of court, and may be dealt with accordingly.

22. Any person required to attend before an examiner for the purpose of being examined or of producing any document shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court.

23. [*Provides that the examiner is to be furnished with certain documents.*]

24. The examination shall take place in the presence of the parties, or their counsel or solicitors, or the agents of such solicitors, and the witnesses shall be subject to cross-examination and re-examination.

25. The depositions taken before an officer of a county court, or before any other person appointed to take the examination, shall be 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 statements of the witness, and when completed shall be read over to the witness and signed by him in the presence of the parties, or such of them as may think fit to attend. If the witness refuses to sign the depositions, the examiner shall sign the same. The examiner may put down any particular question or answer if there appears to be any special reason for doing so, and may put any question to the witness as to the meaning of any answer, or as to any matter arising in the course of the examination. Any questions which are objected to shall be taken down by the examiner in the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such

statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question.

26. If any person duly summoned to attend for examination or to produce any document refuses to attend, or if having attended, he refuses to be sworn or to answer any lawful question, or to produce any document, a certificate of such refusal, signed by the examiner, shall be filed with the registrar, and thereupon the party requiring the attendance of the witness may apply to the judge for an order directing the witness to attend, or to be sworn, or to answer any question, or to produce such document, as the case may be.

27. If any witness objects to any question which may be put to him before an examiner, the question so put, and the objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the registrar to be filed, and the validity of the objection shall be decided by the judge.

28. In any case under the two last preceding rules, the judge may order the witness to pay any costs occasioned by his refusal or objection.

29. When the examination of any witness before any examiner has been concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the registrar to be filed.

30. The person taking the examination of a witness under these rules 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 judge may direct such proceedings and make such order as upon the report he may think just.

31. Except where otherwise provided by this order, or directed by the judge, no deposition shall be given in evidence at the trial of the action or matter without the consent of the party against whom the same may be offered, unless the judge is satisfied that the deponent is dead, or out of England and Wales, or unable from sickness or other infirmity to attend the trial, in any of which cases the depositions certified under the hand of the examiner shall be admissible in evidence, saving all just exceptions, without proof of the signature to such certificate.

32. Any officer of the court, or other person directed to take the examination of any witness or person, may administer oaths.

## ORDER XIX., RR. 1, 2, 4, 5, 7, 9, 10.

### AFFIDAVITS.

1. All affidavits shall be expressed in the first person and shall be drawn up in paragraphs and numbered.

2. All affidavits, other than those for which forms are given in the Appendix, shall state the deponent's occupation, quality, and place of residence, and also what facts or circumstances deposed to are within the deponent's own knowledge, and his means of knowledge, and what facts or circumstances deposed to are known to or believed by him by reason of information derived from other sources than his own knowledge, and what such sources are. The costs of every affidavit which unnecessarily sets forth matters of

hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same.

3. [*States how affidavits are to be intituled.*]

4. It shall be stated in a note at the foot of every affidavit filed on whose behalf it is so filed, and such note shall be copied on every office or other copy furnished to a party.

5. The costs of affidavits not in conformity with the preceding rules of this order shall be disallowed on taxation, unless the court otherwise directs.

6. [*Makes provision as to the jurat where an affidavit is made by two or more deponents.*]

7. Before any affidavit is used it shall be filed in the office of the registrar; but this rule shall not hinder a judge from making an order in an urgent case upon the undertaking of the applicant to file any affidavit sworn before the making of such order, provided that such order shall not be issued until such affidavit has been filed.

8. [*Provides that an affidavit shall not be filed if sworn before the party tendering the same or his solicitor, &c.*]

9. No affidavit or other document shall be filed or used in any action or matter, unless the court otherwise orders, which is blotted so as to obliterate any word, or which is illegibly written, or so altered as to cause it to be illegible, or in the body or jurat of which there is any interlineation, alteration, or erasure, unless the person before whom the same is sworn has duly initialled such interlineation or alteration, and in the case of an erasure has re-written and signed in the margin of the affidavit or document the words or figures appearing to be written on the erasure, or which is so imperfect upon the face thereof by reason of having blanks thereon or otherwise that it cannot easily be read or understood.

10. 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 is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent.

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