RUSSELL

ON

CRIMES AND MISDEMEANORS

VOL. III.

SEVENTH EDITION

A TREATISE

ON

CRIMES AND MISDEMEANORS

BY

SIR WM. OLDNALL RUSSELL, KNT.

Late Chief Justice of Bengal

IN THREE VOLUMES

VOL III.

SEVENTH EDITION

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WITH

CANADIAN NOTES

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BOOK THE THIRTEENTH.

OF EVIDENCE.

CHAPTER THE FIRST.

OF THE NATURE AND KINDS OF EVIDENCE.

Preliminary.—The law relating to evidence deals (1) with the facts which must be proved to warrant the legal result sought by conviction or acquittal; (2) with the party on whom the proof of such facts devolves, *i.e.* the burden of proof; and (3) the nature of the proof required by law of the facts to be proved (*a*).

There is in general no difference as to the rules of evidence, or modes of proof, between criminal and civil cases. What may be received in the one case may be received in the other, and what is rejected in the one ought to be rejected in the other (*b*). A fact must be established by the same evidence, whether it is to be followed by criminal or civil consequences (*c*). But in a criminal case 'it is very important to conform to the rules of law which protect the accused from evidence of a doubtful or uncertain character when certain evidence can be obtained' (*d*).

Remedy for Misreception of Evidence.—Until 1908 the only remedy in case of reception of inadmissible evidence against a person accused and convicted of felony or misdemeanor before a court of oyer and terminer gaol delivery or quarter sessions was by case stated by the judge (in his discretion) for the consideration of the Court for Crown Cases Reserved (*e*). If the latter Court held the evidence inadmissible the conviction was of necessity quashed, even though without it there was sufficient legal evidence upon which to convict (*f*).

In the case of misdemeanors, tried on a record of the King's Bench Division, the remedy was by motion for a new trial, but this remedy is taken away (*g*) by the Criminal Appeal Act, 1907 (7 Edw. VII. c. 23). Misreception of evidence against a person tried and convicted on indictment is ground of appeal to the Court of Criminal Appeal (*h*): but the procedure by case stated under the Act of 1848 is also available (*i*). Where

(*a*) See Stephen Dig. Ev. pref. Taylor, Evidence (10th ed.), s. 1. Phipson, Ev. (4th ed.) p. 1. Wills, Ev. (2nd ed.), p. 1.

(*b*) R. *v.* Watson, 2 Stark. (N. P.) 155; 32 St. Tr. 1, Abbott, J. R. *v.* Burdett, 3 B. & Ald. 717; 1 St. Tr. (N. S.) 1.

(*c*) Lord Melville's case, 29 St. Tr. 763.

(*d*) R. *v.* Elworthy, L. R. 1 C. C. R. 103, 107, Kelly, C.B.

(*e*) 11 & 12 Vict. c. 78, *ante*, p. 2007.

(*f*) R. *v.* Gibson, 18 Q.B.D. 537. R. *v.* Saunders [1899], 1 Q.B. 490. Cf. Makin *v.* Att.-Gen. [1894], A. C. 57. Connor *v.* Kent [1891], 2 Q.B. 547.

(*g*) 7 Edw. VII. c. 23, s. 20 (*ante*, pp. 2005, 2037).

(*h*) S. 3, *ante*, p. 2010. This does not apply to common law indictments for obstruction or non-repair of highways, &c., s. 20 (3), *ante*, p. 2011, in which cases the appeal is as in a civil action tried at the assizes.

(*i*) 7 Edw. VII. c. 23, s. 20 (4), *ante*, p. 2007.

an acquittal is due to misreception of evidence there is no remedy by writ of error (*j*), appeal, or motion for a new trial. Under the Act of 1907, misreception of evidence against a person indicted would seem not to be ground for allowing an appeal if the appellate Court considers that no substantial miscarriage of justice has actually occurred (*k*), and this power seems to apply whether the appeal is under the Act of 1907 or by case stated under the Act of 1848 (*l*). As to Criminal Appeal generally, see *ante*, pp. 2009 *et seq.*

Sect. I.—Direct and Circumstantial Evidence.

Best Evidence.—It is a general rule that you must give the best evidence that the nature of the case permits of (*m*). It seems that this rule applies only to the proof of the crime or of some fact material to the crime (*n*), and the rule is subject to the exceptions stated *post*, pp. 2080 *et seq.* The true meaning of the rule is said by Chief Baron Gilbert not to be that in every matter there must be all that force and attestation that by any possibility might have been gathered to prove it, and that nothing under the highest assurance possible shall be given in evidence, but that no such evidence shall be brought as *ex naturâ rei* supposes still greater evidence behind in the party's possession or power (*o*); for such evidence is altogether insufficient, and proves nothing, as it carries a presumption with it contrary to the intention for which it is produced. For if the other greater evidence did not make against the party, why did he not produce it to the Court? The best proof of an act or of words is the evidence of a person who did the act or saw it done, or spoke the words or heard then spoken. The best proof of a writing is the original writing itself (*p*).

This rule or maxim applies alike to oral and documentary evidence. In Williams *v.* East India Co. (*q*) the question was whether the agent of the defendants, who were the freighters of the plaintiff's ship, had apprised the plaintiff or his officers of the inflammable and dangerous nature of a quantity of roghan which had been stored in the ship, and which ultimately occasioned its destruction. It was the duty of the conductor of military stores to convey goods on board the ship, and of the chief mate to receive them; the chief mate was dead, and no evidence was given of what had passed between him and the conductor of stores; but the captain and second mate proved that no communication had been made to them. Upon this evidence, the plaintiff who, it was held, was bound to prove the negative, was nonsuited, and on motion for a new trial the non-suit was affirmed. Ellenborough, C.J., in delivering the opinion of the Court said: 'The best evidence should have been given of which the nature of the case was capable. The best evidence was to have been had by calling, in the first instance, upon the persons

(*j*) Abolished by 7 Edw. VII. c. 23, s. 20 (1) (*ante*, p. 2037).

(*k*) 7 Edw. VII. c. 23, s. 4 (1), *ante*, p. 2012. See R. *v.* Meyer [1908], 1 Cr. App. R. 10. *Cf.* R. *v.* Dyson [1908], 2 K.B. 454, citing Makin *v.* Att.-Gen. for N. S. W. [1894], A. C. 57, 70.

(*l*) *Ante*, p. 2007.

(*m*) Williams *v.* East India Co., 3 East, 192. Bull. (N. P.) 293. Taylor, Ev. (10th ed.) s. 391.

(*n*) Henman *v.* Lester, 13 C. B. N. S. 776. Phill. Ev. (7th ed.), 301.

(*o*) Gilb. Ev. (1st ed.), 4.

(*p*) *Vide post*, pp. 2065 *et seq.*

(*q*) 3 East, 192.

immediately and officially employed in the delivering, and in the receiving of the goods on board, who appear in this case to have been the first mate on the one side, and the military conductor, the defendant's officer, on the other; and though the one of these persons, the mate, was dead, that did not warrant the plaintiff in resorting to an inferior and secondary species of testimony (namely, the presumption and inference arising from a non-communication to the other persons on board), as long as the military conductor, the other living witness, immediately, and primarily concerned in the transaction of shipping the goods on board could be resorted to; and no impossibility of resorting to this evidence, the proper and primary evidence on the subject, is suggested to exist in this case.'

As to documentary evidence, *vide post*, pp. 2068 *et seq.*

The rule as to best evidence is now construed less strictly, and with more admitted exceptions, than when it was first adopted: and in truth the explanations and exceptions have whittled away the rule and made it apply rather to the weight than to the admissibility of evidence (*r*). In applying the rule the question is, whether (1) direct or circumstantial evidence, or (2) oral or documentary evidence, is the best evidence available in the particular case.

Circumstantial Evidence.—When a fact itself cannot be directly proved by an eye witness or an ear witness, or an authentic and probative document, that which comes nearest to the proof of the fact is the proof of the circumstances which necessarily or usually attend such facts. Proof of the existence of such circumstances creates a presumption (*s*), *i.e.* entitles the Court or jury to infer that the fact itself existed or did not exist, unless and until the presumption or inference is rebutted by other evidence, for they stand instead of the proofs till the contrary be proved (*t*). In criminal cases it is often impossible to produce a witness who saw the act committed; and recourse must necessarily be had to circumstantial evidence, *i.e.* to proof of circumstances, from which the commission of the act may be inferred by the jury (*u*).

(*r*) Phipson, Ev. (4th ed.), 35-37.

(*s*) Gilb. Ev. 142. As if a man be found suddenly dead in a room, and another be found running out in haste with a bloody sword; this is a violent presumption that he is the murderer; for the blood, the weapon, and the hasty flight, are all the necessary concomitants to such horrid facts; and the next proof to the sight of the fact itself is the proof of those circumstances that do necessarily attend such fact. Ibid. Co. Litt. 6; Starkie Ev. (4th ed.), 843 *n.* Unless the wound was in such a part of the body that the deceased could not have inflicted it himself, and it was shewn that no other person had been in the room, it is conceived that such a presumption ought not to be considered as conclusive. In Ashford *v.* Thornton, 1 B. & Ald. 428, where the subject of presumption in cases of murder was much discussed, Abbott, J., said: 'A case might be put where a person should come up and find another lying wounded with a dagger in his body, and should draw it out, or should, in assisting the wounded man, wrench the knife out of the murderer's hand; then, if the murderer escaped, leaving him with the body, according to this law [Bracton] he would be considered guilty of the murder, and be immediately hanged without trial.' And, 'in the history of the law, several presumptions which were at one time deemed conclusive by the courts, have, by the opinions of later judges, acting upon more enlarged principles, become conclusive only in the absence of proof to the contrary, or have been treated as wholly within the discretion of juries.' C. S. G.

(*t*) *Vide* Steph. Dig. Ev. Art 1. Taylor, Ev. (10th ed.), ss. 63-69. Wills, Ev. (2nd ed.), 62. This is also called presumptive proof. Roscoe, 'Nisi Prius' (18th ed), 33.

(*u*) 1 Phill. Ev. (7th ed.), 166. Wills Ev. (2nd ed.), 62. Cf. Taylor, Ev. (10th ed), s. 65. The rules as to the admission of circumstantial evidence are the same in criminal as in civil cases, subject to the need of greater particularity in the former. Perhaps strong circumstantial evidence in

Thus where an indictment for murder was supported entirely by circumstantial evidence, and there was no fact which, taken alone, amounted to a presumption of guilt; Alderson, B., told the jury that before they could find the prisoner guilty, they must be satisfied 'not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person'; and he then pointed out to them the proneness of the human mind to look for, and often slightly to distort the facts, in order to establish such a proposition, forgetting that a single circumstance, which is inconsistent with such a conclusion, is of more importance that all the rest, inasmuch as it destroys the hypothesis of guilt (*v*).

Presumptions.—The terms presumption or presumptive are often applied to circumstantial evidence. Presumption is an ambiguous term, and is used in more than one sense with reference to legal proceedings.

There are three classes of presumption:—

(1) Absolute presumptions of law (*præsumptiones juris et de jure*), which cannot be rebutted by any evidence (*w*), and are really rules of substantive law (*x*); (2) presumptions of law (*præsumptiones juris*) which may be rebutted by evidence; (3) presumptions of fact or of mixed law and fact, which may be rebutted by evidence.

1. It is an absolute presumption of law that a child under seven cannot be guilty of a criminal offence (*y*), and that a boy under fourteen cannot be guilty of rape as a principal in the first degree (*z*).

It is also presumed that every person knows the law (*ignoratio juris excusat neminem*) (*a*).

2. *Rebuttable presumptions of Law.*—It is presumed that a child of seven and under fourteen cannot commit felony; but the presumption may be rebutted by evidence that he is *doli capax* (*b*).

A person accused of crime is presumed to be innocent until the presumption is rebutted by legal evidence, whether direct or circumstantial, excluding all reasonable doubt of his guilt (*c*). This is but an instance of the general rule that illegality is never to be presumed (*d*). This presumption only means that the burden of proof lies upon the prosecution until shifted by sufficient evidence.

All persons are presumed to be of sound mind till the contrary is

cases of crimes, committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusion of guilt; for men may be seduced to perjury by many base motives, to which the secret nature of the offence may sometimes afford a temptation; but it can scarcely happen that many circumstances, especially if they be such over which the accuser could have no control, forming altogether the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous. 1 East, P. C. 223.

(*v*) R. *v.* Hodge, 2 Lew. 227. See the remarks on this subject in Starkie, Ev. (4th ed.), 839.

(*w*) See Phipson, Ev. (4th ed.), 625. Taylor, Ev. (10th ed.), c. 5. Wills, Ev. (2nd ed.), 43.

(*x*) Wills, Ev. (2nd ed.), 43, 44.

(*y*) 1 Hale, 27. *Vide ante*, Vol. i. p. 58.

(*z*) 1 Hale, 630. R. *v.* Groombridge, 7 C. & P. 582. R. *v.* Eldershaw, 3 C. & P. 396. *Vide ante*, Vol. i. p. 60.

(*a*) Taylor, Ev. (10th ed.), s. 80.

(*b*) R. *v.* Owen, 4 C. & P. 236. Wills Ev. (2nd ed.), 47. *Vide ante*, Vol. i. p. 59.

(*c*) See R. *v.* Twyning, 2 B. & Ald. 386. But see R. *v.* Harborne, 2 A. & E. 540. Williams *v.* H. E. I. C. 3 East, 192.

(*d*) See Sissons *v.* Dixon, 5 B. & C. 758. Bennett *v.* Clough, 1 B. & Ald. 461. Rodwell *v.* Redge, 1 C. & P. 220. Wills, Ev. (2nd ed.), 47.

proved; but if imbecility or derangement of mind be admitted or proved to have existed at any particular time, it is presumed to continue unless its continuance is disproved (*e*).

A married woman proved to have committed certain kinds of crime in the presence of her husband is presumed to have committed the crime by his coercion (*f*).

When a man is charged with doing an act, of which the probable consequences may be highly injurious, the intention is an inference of law resulting from the doing of the act (*g*). In R. *v.* Sheppard (*h*), uttering a forged stock receipt to a person who employed the prisoner to buy stock to that amount, and advanced the money, was held sufficient evidence of an intent to defraud that person; and it was further held, that the oath of the person to whom the receipt was uttered that he believed the prisoner had no such intent, would not repel the presumption of an intention to defraud. So where the prisoner was indicted for setting fire to a mill, with intent to injure the occupiers, it was held, that an injury to the mill being the necessary consequence of setting fire to it, the intent to injure might be inferred; for a man must be supposed to intend the necessary consequence of his own act (*i*). So in prosecutions for forgery, a jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him, and although the object was general to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation (*j*).

On an indictment for murder, on proof that the accused killed the deceased person, he is presumed to have done so with malice aforethought; and must in defence prove any circumstances on which he relies by way of justification, excuse, or alleviation, unless they appear in the evidence adduced against him (*k*).

On an indictment for defamatory libel on proof of publication, malice is presumed, and it is for the defendant to displace the presumption by proving privilege, &c., or by specially pleading and proving justification (*l*).

It is a legal maxim, that '*omnia præsumuntur esse rite et solemniter acta donec probetur in contrarium*'; (*m*) and, therefore, it is a general presumption of law, even in cases of murder (*n*), that a person acting in a public capacity, as a peace officer, justice of the peace, constable,

(*e*) Att.-Gen. *v.* Parnther, 3 Bro. Parl. Cas. 443; 29 E. R. 632. Banks *v.* Goodfellow, L. R. 5 Q.B. 557. *Vide* Taylor, Ev. (10th ed.), s. 197, and *ante*, Vol. i. pp. 62 *et seq.*

(*f*) *Ante*, Vol. i. pp. 91 *et seq.*

(*g*) R. *v.* Dixon, 3 M. & S. 11, 15, Ellenborough, C.J.

(*h*) R. & R. 169.

(*i*) R. *v.* Farrington, R. & R. 207.

(*j*) R. *v.* Mazagora, R. & R. 291. *Ante*, p. 1649. See also R. *v.* Hill, 2 Mood. 30. Proof of particular intent to defraud is not now necessary in most cases of forgery, *ante*, p. 1642.

(*k*) Fost. 255; 1 East, P. C. 340. *Ante*, Vol. i. p. 656

(*l*) *Ante*, Vol. i. pp. 1039 *et seq.*

(*m*) Roscoe, 'Nisi Prius' (18th ed.), 42. As that a marriage was lawfully celebrated. See R. *v.* Manwaring, D. & B. 132: and *ante*, Vol. i. p. 986.

(*n*) Berryman *v.* Wise, 4 T. R. 366, Buller, J. See also R. *v.* Rees, 6 C. & P. 606. R. *v.* Borrett, 6 C. & P. 124. Butler *v.* Ford, 1 Cr. M. & R. 662; 3 Tyrw. 677. R. *v.* Murphy, 8 C. P. 297

&c., is duly authorized to do so (*o*). This rule of evidence runs through all offices from that of a judge to that of a vestry clerk (*p*). It is an exception from the rule as to producing the best possible evidence, and makes it unnecessary to produce the appointment of such officers and sufficient to prove that they acted as such, leaving the other party to rebut the presumption.

As a general rule that is to be presumed which reasonably accounts for the existing state of things (*q*). Thus the relations of landlord and tenant, of partnership, and of marriage, are frequently presumed from the conduct of the parties being consistent with that state of things, and more consistent with that state than any other (*r*).

It may be proper here to mention the well-known caution of Hale respecting presumptive evidence: that a person should never be convicted of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead (*s*).

3. *Presumption of Fact or of mixed Law and Fact.*—Proof of certain facts and circumstances is held to justify the inference based on human experience and the probabilities of life that certain other facts occurred which cannot be proved by direct evidence (*t*).

Where a letter, fully and properly directed to a person at his place of business or usual residence, is proved to have been posted, this creates a presumption that it was delivered in due course of post (*u*). This rule is recognized by many statutes as to service of notices, &c., by post (*v*), and applies to letters delivered by private hands, as well as through the post office (*w*).

Execution of Documents.—Ordinarily an instrument is written at the time it bears date, and the date is presumptive evidence that the

(*o*) R. *v.* Verelst, 3 Camp. 432. R. *v.* Gordon, 1 Leach, 515; 1 East, P. C. 312, 315.

(*p*) Marshall *v.* Lamb, 5 Q.B. 115, Patteson, J. Doe *d.* Bowley *v.* Barnes, 8 Q.B. 1037. Wolton *v.* Gavin, 16 Q.B. 48; where a soldier had been enlisted more than three weeks, and had been employed to enlist recruits, and had done so, and it was held that it might be presumed that he had been attested. In this case Erle, J., mentioned an anonymous case where, in support of a marriage, the only proof that the party who performed the ceremony was a priest, was the fact that he performed it; and this was held enough. See also Plumer *v.* Briscoe, 11 Q.B. 46. Bunbury *v.* Matthews, 1 C. & K. 380.

(*q*) R. *v.* St. Marylebone, 4 Dowl. & Ry. 475, Bayley, J.

(*r*) Per Erle, J., in R. *v.* Fordingbridge, E. B. & E. 678, where a witness proved that more than sixty years before he lived with the same master as the pauper, and believed him to be an apprentice, and that he was instructed by a journeyman, and lodged and boarded in the house, with two others, who were instructed in the art of a tailor, and, after proof of due search for the indentures without success, it was held that this state of things could only be accounted for by the existence of an indenture of apprenticeship.

(*s*) 2 Hale, 290; 11 St. Tr. 964 *n.* See Upington *v.* Solomon, 9 Buchanan, Cape. Sup. Ct. 240, 276, De Villiers, C.J. R. *v.* King, 9 Canada, Cr. Cas. 436, and *ante*, Vol. i. p. 822.

(*t*) Such presumptions are often divided into three sorts—violent, probable, and light. Co. Litt. 6 *b.* 3 Bl. Com. 371. Taylor, Ev. (10th ed.), ss. 68, 69. But such a classification seems altogether useless, and the distinction to amount to nothing more than that in one case the presumptive evidence may be very strong, in another less so, and in another very weak. See Wills, Circumstantial Evidence, c. 3, s. 7; Wills, Ev. (2nd ed.), 49; Taylor Ev. (10th ed.) ss. 214-216.

(*u*) Walter *v.* Haynes, Ry. & M. 149. Tenterden, C.J.

(*v*) Collected in Taylor, Ev. (10th ed.), ss. 179, 180. The production of a post-office receipt or certificate of posting is evidence of posting and address, but proof may be given by the person who posted the letter.

(*w*) Taylor, Ev. (10th ed.), s. 182.

instrument was made on that date (*x*). So the date of a bill of exchange is *primâ facie* evidence that it was drawn at that date (*y*), and as a bill of exchange is usually accepted within a few days after it is drawn, the date of the bill, though not evidence of the very date of the acceptance, is reasonable evidence that the acceptance took place within a short time after that day, regard being had to the distance the bill would have to travel from the one party to the other (*z*).

Conduct.—Most important presumptions are derivable from the conduct of the parties. Where the circumstances induce a strong suspicion of guilt, and the accused might, if innocent, explain those circumstances consistently with his own innocence, and yet does not offer such explanation, a strong natural presumption arises that he is guilty. And in general, where a party has the means of rebutting and explaining the evidence adduced against him, if it is untrue or creates an erroneous impression as to his criminality, his silence or acquiescence furnishes a forcible inference against him (*a*).

Presumptions from conduct operate as admissions; for, as against himself, it is to be presumed that a man's actions and representations correspond with the truth (*b*).

Where a person is proved to have suppressed any species of evidence, or to have defaced or destroyed any written instrument, a presumption will arise that, if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance (*c*).

So the fabrication of evidence is calculated to raise a presumption against the party who has recourse to such a practice, not less than when evidence has been suppressed or withheld. Legal experience, however, has shewn that false evidence has sometimes been resorted to for proving facts that are true (*d*).

Continuance of Life or Conditions.—When a state of things is once established by proof, the law in general presumes that the state of things continues to exist as before, till the contrary is shewn, or till a different presumption is raised from the nature of the subject in question (*e*).

So where an indictment alleged that the defendant made his warrant of attorney directed to A. and B., 'then and still being attorneys of the King's Bench,' it was held that as the defendant, by executing the warrant, admitted them to be attorneys at that time, it must be presumed that

(*x*) Roberts *v.* Bethell, 12 C. B. 778. Taylor, Ev. (10th ed.) s. 169. Steph. Dig. Ev. Art, 85.

(*y*) Ibid. As to the date of letters, see Reed *v.* Norman, 8 C. & P. 65, *ante*, Vol i. p. 1007.

(*z*) Ibid., Maule, J.

(*a*) Taylor, Ev. (10th ed.), s. 809, and *post*, pp. 2155 *et seq.* 'Admissions.'

(*b*) See Pickard *v.* Sears, 6 A. & E. 469.

(*c*) See Armory *v.* Delamirie, 1 Str. 505. Taylor, Ev. (10th ed.), s. 116.

(*d*) 1 Phill. Ev. 448, referring to 3 Co. Inst. 232, where a case is mentioned of an uncle, who was hanged for the murder of his niece, and who produced on the trial a child as like unto her, both in person and in years, as he could find, but which upon examination was found not to be the true child; and it afterwards appeared that the niece had run away, and was alive. And see also the Douglas Peerage claim, Appendix to Evans' Pothier. 'The mere fabrication of evidence does not, however, furnish of itself any presumption of law against the innocence of the party, but is a matter to be dealt with by the jury. Innocent persons, under the influence of terrror from the danger of their situation, have been sometimes led to the simulation of exculpatory facts.' Taylor, Ev. (10th ed.), s. 117.

(*e*) Taylor, Ev. (10th ed.), s. 196.

they continued to be so at the time when the indictment was found (*f*).

So a party once elected to an office must be presumed to continue in it until the contrary be shewn. Thus a return made to the stamp-office by a banking co-partnership in March, 1841, stating a person to be a public officer of the company, being proof that he was an officer at that time, the presumption is that he continued such officer until November, 1842 (*g*). But if the office had been annual, the presumption would have been otherwise (*h*).

So where a building is shewn to have been properly registered for the celebration of marriages, the presumption is that it continued to be so registered (*i*).

In R. *v.* Lumley (*j*), a trial for bigamy, the Court said: 'The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way. After the lapse of seven years, without intelligence concerning a person, his death may be presumed 'unless the circumstances of the case account for his not being heard of without assuming his death' (*k*). But there is no legal presumption as to the time of the death within the seven years, and the fact of the party having been alive or dead at any particular period during the seven years must be proved by the party relying on it (*l*).

So where a thing is proved to have been in a particular state at one time, it is presumed to have been in that state at a former time, unless there be evidence that at some previous time it was in a different state (*m*).

Particular Offences.—Certain presumptions arise as to particular crimes.

Larceny.—In cases of larceny or receiving, on proof that the goods were stolen and that the stolen property was found in the possession

(*f*) R. *v.* Cooke, 7 C. & P. 559, Patteson, J.

(*g*) Steward *v.* Dunn, 12 M. & W. 655.

(*h*) Per Parke, B., ibid.

(*i*) R. *v.* Manwaring, D. & B. 132. Cf. R. *v.* Cresswell, 1 Q.B.D. 446; 45 L. J. M. C. 77.

(*j*) L. R. 1 C. C. R. 196; *ante*, Vol. i. p. 1007. See R. *v.* Twyning, 2 B. & Ald. 386, commented on in Stark. Ev. (4th ed.), 755 *n.* R. *v.* Harborne, 2 A. & E. 540. Upon an issue of the life or death of a party, the jury may find the fact of death from the lapse of a shorter period than seven years, if other circumstances concur: as if the party sailed on a voyage, which should long since have been accomplished, and the vessel has not been heard of. Taylor, Ev. (10th ed.), ss. 196, 201.

(*k*) Steph. Dig. Ev. Art 99. Taylor, Ev. (10th ed.), ss. 198-201. Hopewell *v.* De Pinna, 2 Camp. 113. Doe *v.* Jesson, 6 East, 80, 85. Doe *v.* Deakin, 4 B. & Ald. 433. Watson *v.* King, 1 Stark (N.P.), 121.

(*l*) Doe *v.* Nepean, 5 B. & Ald. 86; 2 M. & W. 894. *Re* Rhodes, 36 Ch. D. 586. *Re* Matthews [1898], P. 17. As to *commorientes*, *vide re* Benyon [1901], P. 141. Taylor, Ev. (10th ed.), s. 203.

(*m*) R. *v.* Burdett, 4 B. & Ald. 124; 1 St. Tr. (N. S.), 1 per Best, J. In this case a letter was delivered to a person, unsealed, in Middlesex, and it was held that it must be presumed that it was sent in that state from Leicestershire, there being no evidence to the contrary.

of the accused shortly after the theft, it is presumed that he stole it unless he can prove how he came by it (*n*).

Where two prisoners were indicted for stealing two horses, and the case against them consisted entirely of evidence to shew that both the horses were found soon after the robbery, in the joint possession of the prisoners, and it appeared that the horses had been stolen on different days, and at different places, Littledale, J., compelled the prosecutor to elect on which of the two stealings he would proceed; and his lordship observed that the possession of the stolen property soon after the robbery is not in itself a felony, though it raises a presumption that the possessor is the thief; it refers to the original taking, with all its circumstances (*o*).

Where the only evidence against the prisoner was that three sheets were found upon his bed in his house three calendar months after they had been stolen, and it was urged that this was too long a time after the larceny to call on the prisoner to give any account how he had become possessed of them; and R. *v.* Adams (3 C. & P. 340) was relied upon, Wightman, J., held that the case must go to the jury, as it seemed to him that it was impossible to lay down any definite rule as to the precise time, which was too great to call upon the prisoner to give an account of the possession, and that in this case there was *some* evidence, although *very slight*, for the jury to consider (*p*).

According to Hale (*q*), a person should not be convicted of stealing the goods 'of a person to the jurors unknown,' because he cannot give an account how he came by them, unless there be due proof that a felony was committed of these goods.

The true principle is perhaps better stated in a recent Australian decision (*r*) that on an indictment for larceny or receiving, no presumption adverse to the accused may be drawn from the fact that the goods alleged to have been stolen or feloniously received were found in his possession, unless there is (1) evidence of ownership in some person other than the accused, and (2) evidence from which the jury may reasonably infer that the goods were taken by some one *invito domino*.

Buying goods at an undervalue is said to raise a presumption that the buyer knew the goods to be stolen (*s*).

(*n*) Cf. Archb. Cr. Pl. (23rd ed.), 340. *Vide ante*, p. 1308.

(*o*) R. *v.* Smith, Ry. & M. 295.

(*p*) R. *v.* Hewlett, Salop Spring Ass. 1843, MS. C. S. G. See R. *v.* Knight, L. & C. 378, and R. *v.* Langmead, L. & C. 427; 9 Cox, 464, *ante*, p. 1483. In 'Starkie on Evidence' (vol. ii. p. 684), it is observed that 'the recent possession of stolen goods is recognised by the law as affording a presumption of guilt, and therefore, in one sense, is a presumption of law, but it is still in effect a mere natural presumption; for although the circumstance may weigh greatly with the jury, it is to operate solely by its natural force, for a jury are not to convict unless they be actually convinced in their consciences of the truth of the fact. Such a presumption is, therefore, essentially different from the legal presumptions in fact where a jury are to infer that a bond has or has not been satisfied, as a few days or even hours, more or less, have elapsed, when the twenty years are expiring.'

(*q*) 2 Hale, P. C. 290. *Vide* 11 St. Tr. 464 *n.*

(*r*) R. *v.* Trainer [1906], 4 Australian Commonwealth L. R. 126, the indictment was for stealing and receiving lambs belonging to a person unknown. The defendant gave a false account of how he came by them, but there was no evidence except the defendant's as to who owned the lambs. The English authorities cited were, for the accused, 1 Hale, 510. R. *v.* Campbell, 1 C. & K. 82. R. *v.* Stroud, 1 C. & K. 187; and for the Crown, 1 Hale, 3; 2 do. 180; 2 East, P. C. 651; Anon. Dyer, 99; R. *v.* Mockford, 11 Cox, 16; R. *v.* Ritson, 15 Cox, 478.

(*s*) *Ante*, p. 1483.

Arson and other Felonies.—On an indictment for arson, proof that property taken out of the house at the time of the firing was afterwards found secreted in the possession of the prisoner, raises a presumption that the prisoner was present, and concerned in the arson (*t*). Proof that clothes, weapons, or implements, shewn to have been previously in the possession of the prisoner, were found at or near to the spot where a felony was committed, is frequently adduced in order to raise a presumption that the prisoner was present at the time when the felony was committed (*u*).

Coining.—In R. *v.* Fuller (*v*), it was held that having in possession a large amount of counterfeit coin unaccounted for, though without any circumstance to induce the belief that the defendants were the makers, was evidence of having procured the coin with intent to utter it.

Perjury.—Upon an indictment for perjury, in falsely taking the freeholders' oath at the election of a knight of the shire, in the name of J. W., it was proved (1) that the freeholder's oath was administered to a person who polled on the second day of the election, by the name of J. W., and who swore to his freehold and place of abode; (2) that there was in fact no such person, and that (3) the defendant voted on the second day, and was no freeholder, and some time afterwards boasted that he had done the trick, and was not paid enough for the job, and was afraid he should be pulled for his bad vote; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or in any other than the name of J. W. It was held that this was sufficient evidence for the jury to infer that the defendant voted in the name of J. W. (*w*).

Absence of Consent.—Where it is necessary to prove the non-consent of the owner of property which is the subject of the charge in the indictment, the testimony of the owner himself is not the best or only evidence of non-consent; but it may be inferred from the conduct of the prisoner, and the circumstances under which the act was done. Where the prisoners were indicted on 6 Geo. III. c. 36 (*x*), for lopping and topping an ash timber-tree, 'without

(*t*) R. *v.* Rickman, 2 East, P. C. 1035.

(*u*) In R. *v.* Stonyer and others, Stafford Spr. Ass. 1843, *cor.* Wightman, J., on an indictment for burglary in the house of Keeling, evidence was given of the finding of a crowbar in the house of one Bladon, which was near Keeling's, and was broken into the same night, it being proved that the crowbar had been previously seen in the possession of the prisoners, and a chest of drawers in Keeling's house having been broken open by such an instrument. Such is the inference of guilt drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which by means of such an instrument had been burglariously entered. 1 Stark. Ev. 844. Taylor, Ev. (10th ed.), s. 127A. See R. *v.* Exall, 4 F. & F. 922.

(*v*) R. & R. 308, and see Taylor, Ev. (10th ed.), s. 127 c.

(*w*) R. *v.* Price, 6 East, 323. The following is an example of a case of circumstantial evidence too weak for conviction. Two women were indicted for colouring a shilling and sixpence, and a man (Isaacs) as counselling them, &c. The evidence against him was, that he visited them once or twice a week; that the rattling of copper money was heard whilst he was with them; that once he was counting something just after he came out; that on going to the room just after the apprehension, he resisted being stopped, and jumped over a wall to escape; and that there were then found upon him a bad three-shilling piece, five bad shillings, and five bad sixpences. Upon a case reserved, the judges thought the evidence too slight to convict him. R. *v.* Isaacs, MS. Bayley, J., *ante*, Vol. i. p. 348.

(*x*) Repealed in 1867 (S.L.R.).

the consent of the owner,' who had died before the trial. The offence was committed at eleven o'clock at night on February 18. A., the owner, died on March 1, having given orders for apprehending the prisoners on suspicion. The land steward was called to prove that he himself never gave any consent, and from all he had heard his master say, he believed that he never did. Bayley, J., told the jury that they must be perfectly satisfied that the prisoners had not obtained the consent of the owner of the tree, namely, A., that they might lop and top it; and left it to them to say, whether they thought there was reasonable evidence to shew that in fact he had not given any such permission. He adverted also to the time of night when the offence was committed, and to the circumstance of the prisoners' running away when detected, as evidence to shew that the consent required had not in fact been given (*y*). And in three cases, reserved at once for the opinion of the twelve judges, it was held that, though there must be some evidence to negative the owner's consent, his non-consent might be inferred from the circumstances, or proved by his agents. The first was R. *v.* Allen (*z*), an indictment for killing a fallow deer in the park of the forest of Waltham, without the consent of the owner, the King; the second, R. *v.* Argent (*a*), for entering a yard adjoining and belonging to the dwelling-house of G., and taking fish out of a pond there without the consent of the owner; and the third, R. *v.* Chamberlain (*b*), for taking fish in Claremont Park, belonging to Prince Leopold, without his consent. The offence in each case was committed under circumstances which the learned judge, who tried it, thought quite sufficient to warrant the jury in finding the non-consent of the owner, admitting the onus of proving such non-consent to lie on the prosecutor; but in consequence of R. *v.* Rogers (*c*), further evidence was gone into, by calling the persons engaged in the management of the property, but not the owners. The judges held the conviction in each of the cases right.

Sect. II.—Primary and Secondary Evidence.

There is a possibility of confusion between the terms used to describe 'best' evidence.

'Direct' evidence is employed in distinction to circumstantial evidence, and both terms are oftenest used in reference to oral evidence.

'Primary' evidence is oftenest used in distinction to 'secondary' evidence with regard to the proof of documents.

Primary evidence.—Where a private document is the best evidence of the matters contained therein, it must, as a general rule, be proved by primary evidence (*d*), *i.e.* by the production and verification in Court

(*y*) R. *v.* Hazy, 2 C. & P. 458.

(*z*) 1 Mood. 154.

(*a*) Ibid.

(*b*) Ibid.

(*c*) 2 Camp. 654. In this case, on an indictment on 42 Geo. III. c. 107, s. 1, for feloniously coursing a deer in enclosed ground, *without the consent of the owner of the deer;* Lawrance, J., thought it necessary to call the owner of the deer, for the purpose of disproving his consent, and the owner not being called, the jury were directed to find a verdict of acquittal.

(*d*) The proposition here made is not to be confused with the question whether it is necessary to prove a particular fact by documentary evidence. Certain contracts must be in writing, but parol evidence may in certain cases be given in substitution for, or in explanation of, a written document. See Wills, Ev. (2nd ed.), 102. Taylor, Ev. (10th ed.), ss. 406-415.

of the original document (*e*), if the party who has to prove the document has it in his possession or under his control. This rule does not apply to *public* documents (*f*), which are always in some special custody (*g*), and the production whereof is not in all cases compellable. It does not extend to chattels (*h*), nor to such matters as inscriptions on banners and flags (*i*), or on tombstones (*j*), nor to resolutions passed at public meetings, even if prints of the proposed resolutions are in existence (*k*), nor is it necessary to produce a book to prove that it does not contain entries of which, if the book contained them, it would be the best evidence (*l*).

Offering in evidence the copy of a deed (*m*), when the original is available, raises a presumption with it that there is something in the deed that makes against the party, or he would have produced it; and, therefore, the copy is inadmissible except under the conditions stated *post*, p. 2068.

Oral evidence is in certain cases admissible, although it relates to matters of which there is written evidence. Thus payment of money may be proved orally, though a written receipt exists (*n*): and statements made before a court of summary jurisdiction may be proved orally, even if a written deposition or minute (*o*) exists, and is available (*p*). It seems to be considered that where depositions are required by law to be taken, or the judge is required to take a note, oral evidence of what was said is not admissible if the deposition or the note have been taken (*q*) and can be produced (*r*). Oral evidence is admissible to prove a marriage although the marriage is duly registered in the parish or other register (*s*).

(*e*) Wills, Ev. (2nd ed.), 354. To prove that a house is insured the policy should be produced or its absence explained. Entries in the insurance company's books have been held not equivalent to production of the policy. R. *v.* Doran, 1 Esp. 127. R. *v.* Gilson, R. & R. 138.

(*f*) *Post*, p. 2121.

(*g*) Wills, Ev., (2nd ed.) pp. 235, 421.

(*h*) R. *v.* Francis, L. R. 2 C. C. R. 128: 42 L. J. M. C. 97. False pretence that a ring was a diamond ring.

(*i*) R. *v.* Hunt, 3 B. & Ald. 566; 1 St. Tr. (N. S.) 1, 171. Abbott, C.J., said, 'If we were to hold that what was inscribed on a banner could not be proved without the production of the banner, I do not know upon what reason the witness should be allowed to mention the colour of the banner or even to say he saw the banner displayed; for the banner itself may be said to be the best possible evidence of its existence and of its colour.'

(*j*) *Post*, p. 2067.

(*k*) R. *v.* Hunt, *ubi sup.*

(*l*) Macdonnell *v.* Evans, 11 C. B. 930, where Maule, J., said, 'Suppose a man is asked whether he made an entry in his day-book, and he says, No, it cannot be necessary to produce the book.'

(*m*) In former editions reference was also made to wills, of which the probate is now the best evidence as to personalty, and, if proved in solemn form, also of realty. 20 & 21 Vict. c. 77, ss. 22, 61, 62. As to wills of realty prior to 1858, see Wright *v.* Tatham, 1 A. & E. 3. Doe *v.* Burdett, 4 A. & E. 1. Taylor, Ev. (10th ed.), s. 392.

(*n*) Rambert *v.* Cohen, 4 Esp. 213. Jacob *v.* Lindsay, 1 East, 460.

(*o*) Under the Summary Jurisdiction Act, 1879, a register is kept of the minutes or memoranda of all convictions or orders of courts of summary jurisdiction. The register and a true extract are *primâ facie* evidence of the matters entered, for the information of a court of summary jurisdiction acting for the same county, borough, or place, or the court whose order is registered. 42 & 43 Vict. c. 49, s. 22.

(*p*) In R. *v.* Layer, 16 St. Tr. 93, a case of high treason, an under-secretary of state gave evidence of L.'s confessions, upon his examination before the council, which, though taken in writing, was not produced. 12 Vin. Abr. 96, *tit.* 'Evidence,' A. *b.*: 623, pl. 7.

(*q*) Robinson *v.* Vaughton, 8 C. & P. 252, Alderson, B. Cf. Taylor, Ev. (10th ed.), s. 416. *Vide post*, p. 2212, 'Depositions.'

(*r*) Jeans *v.* Wheedon, 2 M & Rob. 486.

(*s*) Morris *v.* Miller, 1 W. Bl. 632: 4 Burr. 2057.

Admissions by the Party.—Whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some writing (*t*). The reason for this rule is that what the party himself admits to be true may reasonably be presumed to be true: and for this reason such statements, &c. are not open to the objection which attaches to parol evidence from other sources where the written evidence might have been produced, for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld (*u*). Such admissions are legal evidence, not as secondary evidence of the contents of a writing, but as original evidence (*v*). The principle is the same, whether the admission is by words or by acts: and a man may by his acts make an admission as clearly and as much in detail as he possibly could by words (*w*).

Occupation of Land.—The fact of the occupation of land (if that alone be an issue) may be proved by any oral proof, e.g. of payment of rent, even if the terms of occupancy were put into writing, for the writing is only collateral to the fact in question (*x*). But if any of the terms of the tenancy (*y*) are in issue, and there was a written contract, it must be produced or its absence accounted for (*z*). But statements made by a tenant of the terms upon which he is holding are admissible against him to prove the terms of his tenancy, even if the tenancy was created by adopting the terms of a former demise in writing (*a*).

Service.—The fact that a person is employed as a servant under a written agreement may be proved without its production, but not the terms of it (*b*).

Inscriptions.—Inscriptions on walls, and fixed tables, mural monuments, gravestones, surveyors' marks on boundary trees, as they cannot be conveniently produced in court, may be proved by secondary evidence (*c*). But this exceptional rule does not apply to a notice painted on a board, fastened by a string to a nail in a wall, and removable and producible without inconvenience (*d*). On an indictment for murder, Maule, J., ruled that the inscription on a coffin plate could not be given in evidence without producing the plate itself, because the presumption was that it was in existence (*e*).

Photographs.—On an indictment for bigamy, it has been held that

(*t*) Slatterie *v.* Pooley, 6 M. & W. 664, Parke, B. Tupper *v.* Folkes, 9 C. B. (N.S.) 797.

(*u*) Slatterie *v.* Pooley, *ubi sup.* Erle *v.* Picken, 5 C. & P. 542, Parke, B.

(*v*) R. *v.* Basingstoke, 14 Q.B. 611, Patteson, J.

(*w*) Ibid., Coleridge, J. Payment of relief to a pauper whilst resident in one parish by the overseers of another parish, after a threat by the overseers of the former parish to remove the pauper, unless a certificate was obtained, was held an admission that a certificate had been obtained.

(*x*) Taylor, Ev. (10th ed.), s. 405. R. *v.* Holy Trinity, Kingston-upon-Hull, 7 B. & C. 611; 1 Man. & Ry. 444.

(*y*) Augustien *v.* Challis, 1 Ex. 279.

(*z*) R. *v.* Rawden, 8 B. & C. 70. R. *v.* Merthyr Tidvil, 1 B. & Ad. 29. Doe *v.* Harvey, 8 Bing. 239.

(*a*) Howard *v.* Smith, 3 M. & Gr. 255.

(*b*) R. *v.* Duffield, 5 Cox, 404. R. *v.* Rowlands, 5 Cox, 415 (*b*).

(*c*) Taylor, Ev. (10th ed.), s. 438. R. *v.* Fursey, 6 C. & P. 81; 3 St. Tr. (N. S.) 543, 561, Patteson, J. R. *v.* O'Connell, 5 St. Tr. (N. S.) 1, 278. A man is not expected to break up his freehold to bring a notice, &c., into Court.

(*d*) Jones *v.* Tarleton, 1 Dowl. Pr. R. (N. S.) 625; 9 M. & W. 675.

(*e*) Anon. stated by Maule, J., in R. *v.* Hinley, 1 Cox, 12.

a photograph taken from the prisoner, who said it was that of her first husband, might be shewn to a witness, and he might be asked whether it represented the man whom he had seen married (*f*). But in matrimonial causes, except under very special circumstances, the Court will not act upon identification by photographs only (*g*).

When secondary Evidence is Admissible.—If the original of a writing is lost or destroyed, or cannot be produced, or is in the possession or control of the adverse party, then upon proof of the loss or destruction, or of its being in such possession (as the case may require), and of reasonable notice to produce it at the trial having been given to the other party, then, secondary evidence of the contents of the writing is admissible, and becomes the best proof available (*h*). To establish loss or destruction of the primary evidence, it must be shown that proper search has been made for it where it was likely to be. The amount of evidence of loss, &c., necessarily varies much, according to the nature of the document, the custody in which it is, and all the surrounding circumstances. A paper of considerable importance, which is not likely to be permitted to perish, may call for a much more minute and accurate search than that which may be considered as waste paper (*i*). In Kensington *v.* Inglis (*j*), it was incumbent on the plaintiff to prove the loss of a licence to trade in a colony, and a witness, who had been secretary to the governor of the colony, said that it was his practice to destroy or put aside such licences among the waste papers of his office, as not being of further use, and that he supposed he had disposed of the licence in question (which, after having been granted by the governor, was returned to the witness) in the same manner as other licences for ships whose voyages had been performed; but that he was not sure whether it was destroyed. He further stated, that he had been applied to for the licence, and had searched for it; but he did not recollect whether he found it or not; though he did not think that he had found it (*k*). In delivering the judgment of the Court, Ellenborough, C.J.,

(*f*) R. *v.* Tolson, 4 F. & F. 103. Willes, J., said, 'The photograph was admissible, because it is only a visible representation of the image or impression made upon the minds of the witnesses by the sight of the person, or the object it represents; and, therefore, is in reality only another species of the evidence, which persons give of identity when they speak merely from memory.'

(*g*) Frith *v.* Frith [1896], Prob. 74, Barnes, J.

(*h*) See Bull. (N. P.) 293. It would seem that secondary evidence is also admissible, whenever it is apparent that such secondary evidence is the best, which the party, without any default, has it in his power to produce; for then the presumption of a fraudulent suppression of the better evidence, which is the foundation of the rule, must cease. Thus, where an attesting witness to a written instrument after his attestation became incompetent from interest, proof of his handwriting was admissible. Godfrey *v.* Norris, 1 Str. 34. The defendant, in an action of trespass for breaking hatches, offered in evidence articles of agreement, dated in 1745, between persons standing in the respective situations of the plaintiff and defendant. To produce this deed the defendant's attorney was called, who said that he had received it from the son of the owner of the defendant's land. This evidence was objected to as insufficient then the son of the owner was called, who said he had received it from his father that morning; this being also objected to, the father was called; upon which the plaintiff examined him upon the *voire dire*, and objected that he could not be a witness, being interested; whereupon Holroyd, J., held, that as the father was objected to, the next best evidence had been given, and admitted the deed. Card *v.* Jeans, Manning's Dig. 375.

(*i*) Gathercole *v.* Miall, 15 M. & W. 319, Pollock, C.B.

(*j*) 8 East, 273.

(*k*) 8 East, 289. See Taylor. Ev. (10th ed.), ss. 429–434.

said: 'We are of opinion that this evidence satisfies what the law requires in respect of search; and establishes with reasonable certainty the fact of the licence being lost. It was not to be expected that the witness should be able to speak with more confident certainty to a fact, to which his attention would not be particularly drawn at the time, on account of any importance being supposed to belong to it.' The search was neither recent nor made for the purpose of the cause (*l*); and it has since been held that neither was necessary, and a search made nearly three years before action brought, though it did not appear for what purpose, has been sufficient (*m*).

In Brewster *v.* Sewell (*n*), it became necessary to account for the non-production of a policy of insurance. It was proved that the policy had been effected about seven years before, and having become useless on account of a second policy being effected, had probably been returned to the plaintiff; and the clerk of the plaintiff's attorney proved that, a few days before the trial of the action, he had searched for it in the plaintiff's house, not only in every place pointed out by the plaintiff, but in every place which he thought likely to contain a paper of this description. It was held that this was sufficient evidence to entitle the plaintiff to give secondary evidence of the contents of the policy: and Abbott, C.J., said, that where the loss or destruction of an instrument may almost be presumed, very slight evidence of its loss or destruction will be sufficient (*o*). If a person proved that he had searched for an envelope among his papers, and could not find it, that would be sufficient. So with respect to an old newspaper, which had been in a public coffee-room; if the party who kept the coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and said he supposed some one had taken it away, that would be sufficient (*p*).

A tithing-man went to a house to execute a warrant, and read the warrant under the window of the house, where the party who was to be apprehended under the warrant then was. An affray then took place between the tithing-man and the inhabitants of the house. The tithing man swore that during this affray he lost the warrant. His evidence was that he had it in his hand when he read it under the window; but he never saw it afterwards; that he searched his pocket for it after he had gone about a mile and a half from the house, and could not find it; and he directed a boy to look carefully for it, on the road between the house and the place where he first missed it; the boy swore that he had

(*l*) As the witness made the search in the Bahamas, but left them in April, 1801, the search must have been before that time; the decision was in 1807.

(*m*) Fitz *v.* Rabbits, 2 M. & Rob. 60, Patteson, J.

(*n*) 3 B. & Ald. 296.

(*o*) Cf. Freeman *v.* Arkell, 2 B. & C. 494, Bayley, J. And for further examples of sufficient searches, see R. *v.* North Bedburn, Cald. 452. R. *v.* Johnson, 7 East, 65. R. *v.* Morton, 4 M. & S. 48. Bligh *v.* Wellesley, 2 C. & P. 400. R. *v.* East Farleigh, 6 Dowl. & Ry. 147. R. *v.* Stourbridge, 8 B. & C. 96. Pardo *v.* Price, 13 M. & W. 267.

(*p*) Gathercole *v.* Miall, 15 M. & W. 319, Alderson, B. In R. *v.* Rastrick, 2 Cox, 39, Platt, B., held that a label stating the amount of money in a parcel had not been sufficiently searched for, as the search had only been made at the owner's house, and not at his shop, and he could not say whether he saw the label last at his shop or at his house, though he had taken the parcel, as usual, to his house.

made careful search, and could not find it; on a case reserved, it was held that secondary evidence of the warrant was properly received, although notice had not been given to the prisoner to produce it (*q*).

If it is proposed to give secondary evidence of a writing which is traced into the possession of a particular person, the loss cannot be established without calling him as a witness. It is not enough to prove that he was applied to for the instrument, and said that he could not find it, and did not know where it was (*r*). On the same principle if it is proposed to establish the loss of a writing for the purpose of giving secondary evidence of its contents, the person who has the legal custody of it should be called as a witness, or steps should be taken to make evidence of his conduct admissible (*s*). Where the instrument is the appointment to an office, the legal custody is in the officer, appointed under it who requires its production to sanction acts which he may be called upon to do under its authority (*t*). If the person to whose possession the instrument is traced is dead, an inquiry should be made of his executors

(*q*.) R. *v.* Hood, 1 Mood. 281. Cf. R. *v.* Gordon, Dears. 586, a duplicate adjudication in bankruptcy.

(*r*) R. *v.* Castleton, 6 T. R. 236, a case of an indenture of apprenticeship in two parts, one of which was lost and the other in the hands of T., who, when asked for it, had said she could not find it, but had not been subpœnaed. See also Williams *v.* Younghusband, 1 Stark. (N. P.) 139. Parkins *v.* Cobbett, 1 C. & P. 282. R. *v.* Saffron Hill, 1 E. & B. 93. In R. *v.* Denio, 7 B. & C. 620, the pauper, who had served as an apprentice, proved that the indenture was kept by his master, and when the apprenticeship expired, he asked his master for the indenture, who said he had not got it, but that it was with the overseer of the parish by which the pauper was bound apprentice, and proof was given of search among the papers of the parish for the indenture, and that it could not be found; and that all the books and papers about that date were missing; and it was held, that as the master was living, and might have been called as a witness, and his declarations were clearly not admissible in evidence, there was not sufficient evidence to shew that a due search had been made so as to let in parol evidence of the indenture. In R. *v.* Rawden, 2 A. & E. 156, the widow of an apprentice stated that, a short time before her husband died, she asked him what had become of his indentures, and he said that he had got them away from his master after the end of his apprenticeship, and had worn them in his pocket till they were all to pieces; and it was held that evidence of this conversation was inadmissible, there being no further proof either of the indenture having been in the possession of the apprentice, or of other inquiry after it. But where, in order to establish a settlement by apprenticeship, it was proved that the indenture was only of one part, and that upon application to the pauper, who was then ill, and died soon afterwards, to know what had become of it, he declared that when the indenture expired it was given to him, and he had burnt it long since; and it was also proved, that inquiry was made of the executrix of the master, who said that she knew nothing about it; it was held that this proof was sufficient to let in parol evidence of the contents of the indenture. R. *v.* Morton, 4 M. & S. 48. The Court distinguished this case from R. *v.* Castleton, inasmuch as there was no proof that the indenture ever existed in the possession of the pauper, unless his declaration were taken as evidence; and if it was, in the same breath he declared it no longer existed; whereas the evidence in R. *v.* Castleton shewed that a further search was necessary. An indenture of apprenticeship may be useful after the apprenticeship has expired, to entitle a party to the freedom of a corporation, or to exercise a trade, or it may be evidence of his settlement. Brewster *v.* Sewell, 3 B. & Ald. 296, Abbott, C.J. And there is no reason why the master should keep it after the apprenticeship is over, R. *v.* Hinkley, 3 B. & S. 885, Crompton, J. The reasonable presumption, therefore, is that it would be in the custody of the apprentice; and it has been held that a search among his papers after his death was sufficient, without any search elsewhere. R. *v.* Hinkley, *supra*. But as an expired indenture sometimes remains with the master, per Maule, J., Hall *v.* Ball, 3 M. & Gr. 242, it would always be safer to search the master's papers also.

(*s*) R. *v* Stoke Golding, 1 B. & Ald. 173. Search for a settlement by one of the two trustees is insufficient. Doe *v.* Lewis, 11 C. B. 1035.

(*t*) R. *v.* Stoke Golding, *ubi sup.*

or such persons as must be presumed to have it in their possession (*u*). But if the papers of the deceased were searched during his lifetime, it is unnecessary to apply to the executors or other persons to whose possession such papers may have come (*v*). If two or more parts of a deed have been executed, the loss or destruction of all the parts must be proved, in order to lay a ground for admitting secondary evidence of its contents (*w*).

Diligent Search.—Though the Court must be satisfied that due diligence has been used to find the document in question, it is enough to negative every reasonable probability of anything being kept back, without negativing every possibility. Where an officer or a solicitor is applied to for the inspection of documents, the court will assume, until the contrary appears, that the officer or solicitor produces all the documents relating to the subject (*x*). The search should be such as to induce the Court to come to the conclusion that there is no reason to suppose that the omission to produce the document itself arose from any desire to keep it back, and that there has been no reasonable opportunity of producing it which has been omitted, and the proper limit of the search is where a reasonable person would be satisfied that the party had *bonâ fide* endeavoured to produce the document itself (*y*).

Whether there has been due search is determined by the court; and any questions may be put for the purpose of shewing that there has been a reasonable and *bonâ fide* search, though the answers to them may not be evidence in the ultimate question before the Court (*z*). Therefore witnesses may prove what inquiries they have made of persons likely to have a document in their possession, and what answers they received from them, though they are not called as witnesses (*a*).

If in point of law a party who has the custody of a document is not

(*u*) Taylor, Ev. (10th ed.) s. 434.

(*v*) R. *v.* Piddlehinton, 3 B. & Ad. 460. The master of an apprentice took away the indenture after it was executed, and failed in business after the apprentice had served about a year. Upon the failure, an attorney had the custody of *all* the papers and books of the master, and looked over them after the failure, and did not find any indenture, and it was held that this was sufficient to allow the admission of secondary evidence, though the master's widow was living, and no inquiry had been made of her; for after the evidence of the attorney it was useless to inquire as to her possession of the indenture.

(*w*) Bull. (N. P.) 254. Doxon *v.* Haigh, 1 Esp. 409. Alivon *v.* Furnival, 1 Cr. M. & R. 277.

(*x*) M'Gahey *v.* Alston, 2 M. & W. 206. In this case a cheque, drawn on the account of a parish, had been delivered to the paying clerk of the parish, and the bankers of the parish, on the same day, paid a cheque of the same amount, and their custom was to return the cheques when paid to the paying clerk. The cancelled cheques were kept in a room in the workhouse, used by the paying clerk as an office for that purpose, and application was made to the succeeding paying clerk for an inspection of the cheques he had in his office, and the paying clerk handed to the witness several bundles, which the witness looked through without finding the cheque in question, but looked at no other. The paying clerk was not called, and it was held that this was such reasonable search for the cheque as to render parol evidence of it admissible.

(*y*) Gathercole *v.* Miall, 15 M. & W. 319, Alderson, B. City of Bristol *v.* Wait, 6 C. & P. 591.

(*z*) R. *v.* Braintree, 1 E. & E. 51, Campbell, C.J.

(*a*) R. *v.* Braintree, *supra*. In R. *v.* Kenilworth, 7 Q.B. 642, Coleridge, J., said: 'The preliminary proof is given to enable a judicial tribunal to determine whether secondary evidence can be submitted to them. In such a case a looser rule of evidence may prevail. The sessions were to make up their minds, not whether the document was destroyed or not, but whether there had been a *bonâ fide* search, and not mere carelessness and neglect, or fraud, in not producing it.'

compellable to produce it (*b*), there is the same reason for admitting other evidence of its contents as if its production were physically impossible (*c*): for the original is unattainable by the party who offers the secondary evidence (*d*). Where, therefore, a witness proved that he had seen the signature of a person in a parish register, it was held that the witness might prove whose signature it was, although the register was not produced; for the person who had the custody of the register was not by law compellable to produce it, and therefore the identity of the party might be proved by shewing that the signature was in his handwriting (*e*).

This rule applies to public registers in other countries (*f*) and to documents in the possession of persons abroad, for their production cannot be enforced; but it seems that reasonable endeavours should be made to produce such documents if in private custody.

Where a witness proved that, on his arrival at New York, the custom-house authorities took possession of all his papers, under a suspicion that he was the bearer of Confederate despatches, but that ultimately all the papers were returned to him, except an agreement which it was suggested had reference to the supply of goods for the Confederates in America, and that the witness had made repeated applications at New York for the agreement, but was told that it had been sent to Washington, and he had made no inquiry for it at that place; it was held that reasonable efforts had been made to procure the original, and that secondary evidence was admissible (*g*).

Where a Roman Catholic priest, shortly before a trial, went to Paris, and there saw in the possession of the Abbé Cognat a letter, in the handwriting of the defendant, and he asked the Abbé to let him have the letter in order to bring it to England, but the Abbé refused; it was held that the evidence given for the purpose of letting in secondary evidence was insufficient. It was nothing more than proof of a mere demand of the document apparently made by a stranger, who did not even disclose his purpose in making it (*h*).

Secondary evidence of a document is not rendered admissible merely on proof that a person bound and subpœnaed to produce it has failed to attend the Court with the document. Thus where an overseer of a parish was duly subpœnaed to produce a rate-book, but neglected to attend the trial of an appeal between two other parishes, it was held that secondary evidence of the rate-book was inadmissible (*i*).

Documents in the Defendant's Possession.—There is no distinction

(*b*) *e.g.* in the case of documents protected by privilege, where that applies in criminal proceedings, *vide post.*

(*c*) Sayer *v.* Glossop, 2 Ex. 409, Pollock, C.B.

(*d*) See Doe *v.* Ross, 7 M. & W. 102. Newton *v.* Chaplin, 10 C. B. 356.

(*e*) Sayer *v.* Glossop, *supra.* Such entries are usually proved by 'certified' or 'examined' copies.

(*f*) Lyell *v.* Kennedy, 14 App. Cas. 437.

(*g*) Quilter *v.* Jorss, 14 C. B. (N. S.) 747.

(*h*) Boyle *v.* Wiseman, 10 Ex. 647. But Parke, B., said, during the argument: 'If it had been distinctly put to the Abbé Cognat, "It is proposed to read this letter in evidence on the trial of an action for libel; will you allow it to be placed in my hands for that purpose?" and he had refused, perhaps that might have been sufficient to admit secondary evidence.'

(*i*) R. *v.* Llanfaethly, 2 E. & B. 940. The grounds of this decision were, that the overseer might be punished for disobeying the subpœna, and that there would be great liability to abuse, if the production of the evidence was dispensed with by the disobedience of the witness.

between criminal and civil cases with respect to secondary evidence of documents in the possession of the defendant, except such as flows from the fact that the defendant in a criminal case cannot be compelled to give discovery and inspection of documents in his possession or under his control relevant to the matters in issue. Where secondary evidence is sought to be given, on the ground that the primary evidence is in the possession or under the control of the adverse party, in the first place, the fact of such possession must be proved. The degree of evidence, necessary to prove that fact, depends so much on the particular circumstances of each case that it is scarcely possible to lay down a general rule (*j*). Where an original instrument belongs exclusively to a party, or ought to be in his possession according to the regular course of business, slight evidence is sufficient to raise a presumption that it is in his possession (*k*). Where an instrument has been delivered to a third party, between whom and the party to the suit there exists a privity, the possession of the privy is considered the possession of the party, for the purposes of letting in secondary evidence. Thus, notice to a defendant to produce a cheque drawn by him, and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, though the cheque remains in the banker's hands, for the possession of the banker is the possession of his customer (*l*). So where a forged deed was produced by the prisoner's attorney on the trial of an ejectment, in which the prisoner was the lessor of the plaintiff, and after trial it was returned to the prisoner's attorney, it was held that secondary evidence might be given of it, after notice to the prisoner to produce it, without calling the attorney to prove what he had done with the deed (*m*).

Possession or Control.—In order to let in secondary evidence, the instrument need not be in the *actual* possession of the opposite party; it is enough if it is in his power, which it would be if it were in the hands of a person, in whom it would be wrongful not to give up possession to him. But he must have such a right to it, as would entitle him not merely to inspect but to retain it. Where, therefore, a written contract had been deposited in the hands of the common agent of the defendant and the person with whom he had contracted, and notice to produce had been given to the defendant, it was held that secondary evidence was not admissible, because, even if the document were given to the defendant for the purpose of the cause, it must be returned (*n*). And where a paper

(*j*) Taylor, Ev. (10th ed.) s. 440 *et seq.*

(*k*) Henry *v.* Leigh, 3 Camp. 502.

(*l*) Partridge *v.* Coates, Ry. & M. 156, Abbott, C.J. Burton *v.* Payne, 2 C. & P. 520, Bayley, J. See also Sinclair *v.* Stevenson, 1 C. & P. 582, where Best, C.J., held it was enough to trace the primary evidence to the possession of an agent. In R. *v.* Pearce, Peake (3rd ed.) 106, Lord Kenyon held, on the trial of an information for a libel, that proof of the delivery of a paper to the servant of the defendant was not proof of the fact of the paper being in the defendant's possession, so as to let in parol evidence of its contents, upon notice to the defendant to produce it. But see *contra*, Pritchard *v.* Symonds, Bull. (N. P.) 254. Colonel Gordon's case, 1 Leach, 300, note (*a*) to Aickles's case. Baldney *v.* Ritchie, 1 Stark. (N. P.) 388, and Roscoe, 'Nisi Prius' (18th ed.) 9.

(*m*) R. *v.* Hunter, 4 C. & P. 128. Some counts charged that certain persons made the deeds, and that the prisoner fraudulently altered it, and it was objected that previously to the receiving secondary evidence the attesting witness ought to be called, but Vaughan, B., overruled the objection.

(*n*) Parry *v.* May, 1 M. & Rob. 279, Littledale, J.

is in the hands of a person acting in an independent character, and who has a right to the possession of it, notice to the party is insufficient and this is so, although the party justifies under the authority of that person (*o*).

Notice to Produce.—In criminal as in civil cases, where documents are in the possession of the adverse party, before secondary evidence of their contents can be given, the party offering it must prove that sufficient and timely notice to produce the documents has been given (*p*) to the other party (*q*) or his solicitor (*r*) in those cases in which notice is necessary. There are not in criminal (as there are in civil) cases any rules of Court on this subject. The notice may be by parol or by writing (*s*), but should be specific, *i.e.* indicate the document to be produced and the proceeding in which it is required (*t*). A notice served on a prisoner in gaol is sufficient (*u*), and once served holds good even if the prisoner is not tried at the sessions of the Court for which it is given (*v*).

The notice should be given at such time as to afford the party a reasonable opportunity for producing the document at the trial (*w*). In a criminal case, at assizes, where the party is in prison at a distance from his home, the notice ought to be served before the commission day (*x*). And where on a trial at assizes for arson, with intent to defraud an insurance company, a notice to produce the policy had been served on the prisoner about the middle of the day before the trial, and his residence, where the fire happened, was thirty miles from the assize town, the notice was held insufficient (*y*). But no general rule can be laid down, as each case must depend on its particular circumstances. Thus where a document was at the assize town, in the possession of a solicitor, who had

(*o*) Evans *v.* Sweet, Ry. & M. 83, Best, C.J. R. *v.* Pearce, Peake (3rd ed.), 106. Pritchard *v.* Symonds, Bull. (N. P.) 254. Whitford *v.* Tutin, 10 Bing. 395. Documents in Court by order are not regarded as in the possession of the party who had to file it in Court. Williams *v.* Munnings, Ry. & M. 18, but a document lodged with the Inland Revenue authorities for purposes of obtaining return of duties does not cease to be under the control of the person lodging it. Sinclair *v.* Stevenson, 1 C. & P. 582.

(*p*) R. *v.* Elworthy, L. R. 1 C. C. R. 103.

(*q*) In R. *v.* Phillpotts, 5 Cox. 329, Erle, J. Where the defendant, an attorney, was indicted for perjury on the trial of an ejectment, in which he had acted as the attorney of the lessor of the plaintiff, and had produced a document and taken it back again, it was held that a notice to produce that document served on the defendant was sufficient, although he was not the attorney on the record in the ejectment.

(*r*) Att.-Gen. *v.* Le Merchant, 2 T. R. 201. Cf. R. *v.* Boucher, 1 F. & F. 486. In R. *v.* Downham, 1 F. & F. 386, Pollock, C.B., said that in felony cases a prisoner could not appear by attorney. This is true as to arraignment and pleading, but he may be represented and defended by solicitor and counsel.

(*s*) See Smith *v.* Young, 1 Camp. 440. Roscoe, 'Nisi Prius' (18th ed.) 7 *et seq.*

(*t*) See Morris *v.* Hauser, 2 M. & Rob. 392. Jacob *v.* Lee, 2 M. & Rob. 633.

(*u*) R. *v.* Robinson, 5 Cox, 183, Pollock, C.B., and Erle, J.

(*v*) Ibid.

(*w*) Lawrence *v.* Clark, 14 M. & W. 250, Alderson, B. In R. *v.* Haworth, 4 C. & P. 254, Parke, J., held a notice to produce a forged deed served on the prisoner after the commencement of the assizes too late, saying it should have been served a reasonable time before the assizes; but it does not appear whether the prisoner resided in the assize town or not. See R. *v.* Royston, 1 Lew. 267.

(*x*) R. *v.* Ellicombe, 1 M. & Rob. 260, Littledale, J. This was an indictment for setting fire to a house with intent to defraud an insurance company, and notice was served on the prisoner in gaol on Monday, the assizes having commenced on the Friday previous, and the trial being on the Wednesday following. The prisoner's residence was ten miles from the assize town. The notice was held insufficient. See Roscoe, 'Nisi Prius' (18th ed.).

(*y*) R. *v.* Kitson, Dears. 187: 22 L. J. M. C. 118.

acted as solicitor for the prisoner on a trial where the document was given in evidence, a notice served on the commission day was held sufficient (*z*). On a trial for conspiracy, a notice to produce a cheque served at three o'clock in the afternoon of the day before the trial, at the office of the London agents for the country solicitor of the defendants, who lived in Herefordshire, was held sufficient (*a*).

Object of Notice to Produce.—The reason why notice to produce is required, is not to give the opposite party notice that the document will be used, so that he may be enabled to prepare evidence to explain or confirm it (*b*); but merely to exclude the argument that the party desirous of proving the document has not taken all reasonable means to procure the original (*c*).

Notice to Produce, when dispensed with.—If the document is in court in the possession of the opponent, it may be called for, and if it is not produced, secondary evidence of it may be given (*d*). And notice to produce is unnecessary, when, from the nature of the proceedings, the party in possession of the instrument has notice that he is charged with the possession of it (*e*), as in actions of trover, for bonds or bills of exchange (*f*). In other words, the indictment itself may be sufficient notice to produce documents referred to in it, and made the subject of the accusation. Thus, in a prosecution for stealing a promissory note or other writing described in the indictment, parol evidence of the contents will be admissible, without any formal notice to the prisoner to produce the original. On an indictment for stealing a bill of exchange, all the judges held that such evidence had been properly admitted, though it was proved that the bill had been seen, only a few days before the trial, in a state of negotiation, in the hands of a third person, who had been

(*z*) R. *v.* Hankins, 2 C. & K. 823, Coltman, J. In this case, on a trial for perjury, it appeared that about noon on the commission day at Hereford, the trial taking place the following morning, a notice to produce a paper (with reference to which the perjury was alleged to have been committed on a trial in the County Court) was served in Hereford on C., the then attorney of the prisoner. The prisoner lived at Ross, fourteen miles from Hereford, and C. lived at Newent, twenty-five miles from Hereford; but in the notice, further notice was given that the paper was then in Hereford in the possession of M., who was then at the Green Dragon Hotel, and who had been the attorney for the prisoner at the trial in the County Court, and who had previously been called upon under a subpœna *duces tecum* to produce the paper on this trial for perjury, and had been held not bound to produce it, on the ground that he held it as attorney for the prisoner; and Coltman held that this notice was sufficient to let in secondary evidence of the contents of the paper. So where notice to produce certain policies of insurance was served on the attorney of the prisoner, on Tuesday evening, the prisoner being then at Maidstone, but not in custody, and the policies were twenty miles off, and the trial was on Thursday, and on the Wednesday the prisoner's attorney had sent a person to serve a subpœna at a place without four miles of where the policies were; Bramwell, B., held, that as there had been an opportunity of obtaining the policies, the notice was sufficient, and said that no general rule could be laid down, but every case must be governed by its particular circumstances. R. *v.* Barker, 1 F. & F. 326.

(*a*) R. *v.* Hamp, 6 Cox, 167, Campbell, C.J. The sheriff had seized the cheque in question in levying for a forfeited recognisance of one of the defendants, but this was held to make no difference.

(*b*) See 1 Stark. Ev. 404.

(*c*) Dwyer *v.* Collins, 7 Ex. 639, Parke, B.

(*d*) Dwyer *v.* Collins, *supra*. And the solicitor may be called to prove that the document is in Court, ibid.

(*e*) Colling *v.* Treweek, 6 B. & C. 394, 398, 399, Bayley, J.

(*f*) How *v.* Hall, 14 East, 274. Scott *v.* Jones, 4 Taunt, 865. See Taylor, Ev. (10th ed.) s. 452.

served with a *subpœnâ*, and did not appear (*g*); and if it had been proved to have been in the custody of the prisoner, parol evidence might have been given of its contents without notice to produce (*h*). On an indictment containing a count for stealing a post letter, the direction of which is stated in the count, the direction may be proved without any notice to produce; for the count gives sufficient notice (*i*). On an indictment for forging a note, which the prisoner afterwards got possession of and swallowed, Buller, J., permitted parol evidence to be given of the contents of the note, though no notice to produce it had been given (*j*). But there it might be said, that such a notice would be nugatory, as the thing itself was destroyed (*k*). On an indictment for forging a deed of release, it appearing that the prisoner had stated that after he had obtained possession of the deed he had burnt it, it was held that secondary evidence of its contents was admissible (*l*). In R. *v.* Layer (*m*), on an indictment for high treason, where it was proved that the prisoner had shewn a person a paper containing the treasonable matter laid in the indictment, and then immediately put it into his pocket, that person was permitted to give parol evidence of the contents of the paper. So on the trial of an indictment for administering an unlawful oath, it was held that a witness might prove that the prisoner read an oath from a paper, without giving him notice to produce it (*n*). But an indictment for setting fire to a house, with intent to defraud an insurance office, does not convey such a notice that the policy of insurance will be required upon the trial, as to dispense with the necessity of a notice to produce it (*o*). So where on an indictment for stealing iron out of a canal boat, it appeared that the boat had been weighed at a lock, and a ticket of the weight given to the prisoner, and it was proposed to give secondary evidence of its contents, although no notice to produce it had been given; Parke, J., held that this was not allowable, because the rule which requires notice to be given extends to criminal as well as civil cases, except where the nature of the indictment itself expressly shews the prisoner that the deed or paper in question will be wanted at the trial (*p*). Upon an indictment for

(*g*) R. *v.* Aickles, 1 Leach, 294; 2 East, P. C. 675.

(*h*) 1 Leach, 297, Heath, J.

(*i*) In R. *v.* Clube, 3 Jur. (N. S.) 698, Pollock, C.B., said: 'It is very common for a person to have on his garments labels stating his name and the date when the garments were furnished by the tailor; suppose a coat with such a label were stolen, surely it would not be requisite to give a notice to produce the label.' R. *v.* Fenton, *infra*, note (*p*) was cited.

(*j*) R. *v.* Spragge, cited by Ellenborough, C.J., in How *v.* Hall, 14 East, 276.

(*k*) Ibid., Ellenborough, C.J.

(*l*) R. *v.* Haworth, 4 C. & P. 254, Parke, J. See Forster *v.* Pointer, 9 C. & P. 718. Doe *d.* Phillips *v.* Morris, 3 A. & E. 46.

(*m*) R. *v.* De La Motte, 16 St. Tr. 93. Buller and Heath, JJ. 1 East, P. C. 124.

(*n*) R. *v.* Moors, 6 East, 419 *n.* See also R. *v.* Hunt, 3 B. & Ald. 566; 1 St. Tr. (N.S.) 171, *ante*, pp. 430, 2066. The principle of the rule requiring notice to produce does not extend to a case where a party to the suit has fraudulently got possession of a written instrument belonging to a third person; as where a witness was called on the part of the defendant, to produce a letter written to him by the plaintiff, and it appeared that, after the commencement of the action, he had given it to the plaintiff; in this case, though a notice to produce had not been given, parol evidence was admitted, because the paper belonged to the witness, and had been secreted in fraud of the subpœna. Leeds *v.* Cook, 4 Esp. 256.

(*o*) R. *v.* Kitson, Dears. 187. R. *v.* Ellicombe, 5 C. & P. 522; 1 M. & Rob. 260, Littledale, J.

(*p*) R. *v.* Humphries, Stafford Spr. Ass. 1829, MSS. C. S. G. See R. *v.* Fenton, cited 3 C. B. 760. On an indictment for larceny of a coat contained in a paper

perjury in falsely swearing on a former trial that there was no draft of a statutory declaration, the materiality of the existence of such draft turned upon its contents, and the fact of certain alterations having been made in it. Parol evidence was admitted, not only of the fact of the existence of the draft, but of its contents and of alterations made in it, which were not in the declaration itself, without any notice to produce the draft having been given to the prisoner. It was held that such parol evidence of the draft and its contents was inadmissible, and that the nature of the indictment was not such as of itself to operate as a notice to produce, and the conviction upon such indictment was quashed (*q*). The rule as to notice to produce does not apply to examination of a witness on the *voire dire* (*r*), nor to his cross-examination as to the contents of a writing, and does not extend to notices to produce the notice itself (*rr*).

Compelling Production.—Production of documents by the prisoner cannot be compelled, but if a witness, other than the prisoner, is sworn and has a document in his possession, he may be compelled to produce it, although he has not been served with a *subpœna duces tecum* (*s*). If a witness is sworn, and declines on any lawful ground to produce a document which he has in Court, secondary evidence may be given of its contents, though he has not been served with a *subpœna duces tecum* (*t*).

Time for Production.—A party called upon to produce a paper, must either produce it when called upon, or not at all: he cannot avail himself of it in a subsequent stage of the case (*u*).

The regular time of calling for the production of papers and books is not until the party who requires them has entered into his case; till that period arrives, the other party may refuse to produce them, and there can be no cross-examination as to their contents, although the notice to produce them is admitted (*v*).

Identifying the Document called for.—Where a document is produced in consequence of a notice to produce, and it is alleged that the document

parcel, Parke, B., held that evidence of the direction of the parcel could not be given without notice to produce it. *Sed quære*, and see the cases, *ante*, p. 2075. On an indictment against a son for stealing and a father for receiving boots and shoes, it appeared that a hamper which was alleged to have contained some of the articles had been sent by the son to the father, and it was proposed to prove how it was directed; but Maule, J., doubted whether the evidence was admissible, and thereupon it was withdrawn. R. *v.* Hinley, 2 Cox, 12, Maule, J., said: 'The ground upon which the evidence may be admissible is the presumption that the direction does not exist; whereas there may not be the same reason for presuming that it is in existence. Therefore, unless you can shew that it exists, it would appear that the evidence should be admitted.' 'Suppose an inscription on a bale marked "XX," would it be necessary to produce the bale?' R. *v.* Fenton is reported on another point, 2 M. & Rob. 524, where it is stated that the hamper had passed backwards and forwards between the son and father for several months. No authority was referred to in this case.

(*q*) R. *v.* Elworthy, L. R. 1 C. C. R. 103; 37 L. J. M. C. 3.

(*r*) Howell *v.* Locke, 2 Camp. 15. 'An examination on the *voire dire* is for the purpose of establishing something of which the Court is to be the judge and not the jury; it may well be, therefore, that the rule there is not so exclusive as in the case of an examination going to a jury.' Macdonnell *v.* Evans, 11 C. B. 930, Maule, J.

(*rr*) Stephen, Dig. Ev. (8th ed.) 82.

(*s*) Snelgrove *v.* Stevens, C. & M. 508, Cresswell, J.

(*t*) Doe *d.* Loscombe *v.* Clifford, 2 C. & K. 448, Alderson, B. See Doe *d.* Gilbert *v.* Ross, 7 M. & W. 102.

(*u*) Doe *d.* Higgs *v.* Cockell, 6 C. & P. 525. Jackson *v.* Allen, 3 Stark. (N. P.) 74. Lewis *v.* Hartley, 7 C. & P. 405. Doe *d.* Thompson *v.* Hodgson, 12 A. & E. 135; 2 M. & Rob. 282.

(*v*) Graham *v.* Dyster, 2 Stark. (N. P.) 23. Sideways *v.* Dyson, ibid. 49.

is not the document in question, it is for the Court to decide whether it is so or not (*w*). And where a document is called for after notice to produce, and some evidence is given to shew that it is in the possession of one party, the other side is entitled at once to give evidence to prove that it is not in the possession or under the control of such party, and it is for the judge to decide this question (*x*).

Effect of Non-production.—If upon a notice to the adverse party to produce primary evidence in his possession, he refuses to produce the instrument required, the other party who has done all in his power to supply the best evidence will be allowed to go into secondary evidence (*y*). If the party after giving due notice, declines to use the papers when produced, this, though matter of observation, will not make them evidence for the adverse party (*z*). Secondary evidence of papers, to produce which notice has been given, cannot be entered into till the party calling for them has opened his case, before which time there can be no cross-examination as to their contents (*a*). Where a party, after notice, refuses to produce an agreement, it is to be presumed as against him that it is properly stamped (*b*).

Secondary Evidence. It remains to be considered what is good secondary evidence (*c*). Secondary evidence of the contents of a deed is not admissible until after proof that the deed was duly executed (*d*). So where an original note of hand is lost, a copy cannot be read in evidence unless the note is first proved to be genuine (*e*). Where the sessions found that B., who was dead, was the attesting witness to a lost indenture of apprenticeship, it was held that evidence of his handwriting was unnecessary; for the proof of handwriting could only be required to establish the identity between the deceased and the attesting witness (*f*). In secondary evidence there are no degrees, that is, no precedence or superiority in point of admissibility. An attested copy of a written instrument is not of a superior value in proof to an examined copy, nor is an examined copy superior to a parol evidence of the contents (*g*). As soon, therefore, as a party proved that the original document had

(*w*) Harvey *v.* Mitchell, 2 M. & Rob. 366. In Froude *v.* Hobbs, 1 F. & F. 612, Byles, J., with the consent of the parties, left the question to the jury whether a book produced was the book in which the terms of a contract had been entered. But this was only to assist him in deciding the question.

(*x*) Harvey *v.* Mitchell, *ubi sup.* Parke, B. If a defendant interposes such evidence, it does not give any right to the plaintiff to reply, as it is given merely for the purpose of enabling the judge to decide the question.

(*y*) Cooper *v.* Gibbons, 3 Camp. 363.

(*z*) Sayer *v.* Kitchen, 1 Esp. 210. Wharam *v.* Routledge, 5 Esp. 235. Roscoe, 'Nisi Prius' (18th ed.) 13. Wilson *v.* Bowie, 1 C. & P. 10. Calvert *v.* Flower, 7 C. & P. 386. Smith *v.* Brown, 2 Cox, 278.

(*a*) Graham *v.* Dyster, 2 Stark. (N. P.) 23. Roscoe, 'Nisi Prius' (18th ed.) 13.

(*b*) Crisp *v.* Anderson, 1 Stark. (N. P.) 35: but the party refusing is at liberty to prove the contrary, ibid.

(*c*) Fisher *v.* Samuda, 1 Camp. 193.

(*d*) Bull. (N. P.) 254. R. *v.* Culpepper, Skin. 673.

(*e*) By Lord Hardwicke, C.J., in Goodier *v.* Lake, 1 Atk. 446.

(*f*) R. *v.* St. Giles, 1 E. & B. 642, 22 L. J. M. C. 54. Erle, J., said: 'In no case whatever when the instrument is lost, and the attesting witness is dead, can it be necessary to prove his handwriting.' But Wightman, J., thought it not necessary to determine whether proof of such handwriting was indispensable; and Crompton, J., thought there might be cases where it might be necessary to prove such handwriting.

(*g*) 2 Phill. Ev. 236. Bull. (N. P.) 254, Munn *v.* Godbold, 3 Bing. 292. Rhind *v.* Wilkinson, 2 Taunt. 237. Eyre *v.* Palsgrave, 2 Camp. 605.

existed and has satisfactorily accounted for its absence, he is at liberty to give any kind of secondary evidence (*h*). A copy of a document taken by a machine worked by the witness who produces the copy, is good secondary evidence, though it was not compared with the original (*i*). So a document sent by the plaintiff to the defendant with a letter stating it to be a copy of a deed, is evidence against the plaintiff, though notice to produce the deed has been given, and the deed is not called for (*j*). But a paper delivered as a copy of a deed from the office of an attorney, but which he states he is unable of his own knowledge to vouch to be a copy, is insufficient (*k*). The evidence of any one who recollects the contents of a letter is good secondary evidence of such contents (*l*), although it is in the party's power to produce the clerk who wrote the letter (*m*).

Sect. III.—Hearsay.

Rule.—There is no rule of evidence more important or more frequently applied than the rule that hearsay evidence of a fact is not admissible (*n*).

By hearsay evidence is meant 'evidence which does not derive its credibility solely from the credit due to the witness himself but rests also in part on the veracity and competency of some other person from whom the witness may have received his information (*o*).' The principle of the rule against hearsay is that it involves giving credit to the statement of a person who is not subjected to the ordinary tests required by law for testing the truth of testimony (*p*), *i.e.* that the author of the statement is *ex hypothesi* not under oath, and that the person who is to be affected by the evidence has no opportunity of interrogating the author as to his means of knowledge, and concerning all the particulars of his statement. Under this rule a police officer is precluded from giving in evidence the result of inquiries made by him from other persons relating to matters affecting the accused (*q*).

And the rule applies equally to oral and written statements whether

(*h*) Doe *d.* Gilbert *v.* Ross, 7 M. & W. 102, Parke, B. In that case on the trial of an ejectment by the same lessors of the plaintiff against a different defendant, a deed was given in evidence on the part of the defendant, and it was held that the shorthand writer's notes of the contents of the deed were admissible in evidence, although there was an attested copy, which, being unstamped, was rejected. In Brown *v.* Woodman, 6 C. & P. 206, Parke, J., held that parol evidence of the contents of a letter was admissible, although a copy of the letter existed. See Doe *d.* Morse *v.* Williams, C. & M. 615. In Hall *v.* Ball, 3 M. & Gr. 242, in trover for an expired lease by the lessor, the lease or counterpart executed by the lessor not being produced by the defendant upon notice, it was held that the lessor might give parol evidence of the contents without producing the counterpart executed by the lessee. And see Newton *v.* Chaplin, 10 C. B. 356.

(*i*) Simpson *v.* Thornton, 2 M. & Rob. 433, Maule, J.

(*j*) Ansell *v.* Baker, 3 C. & K. 145. This decision, perhaps, rather rests on the ground that the plaintiff had admitted the existence of such a deed, and that such admission was evidence against him independently of the notice to produce; still it was an admission of the correctness of the copy.

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

(*l*) Liebman *v.* Pooley, 1 Stark. (N. P.) 167, Ellenborough, C.J. But a copy of the original copy of a letter is not good secondary evidence, ibid.

(*m*) R. *v.* Chadwick, 6 C. & P. 181, Tindal, C.J.

(*n*) R. *v.* Gunnell, 16 Cox, 154 (C. C. R.), where the Court refused to admit a rumour as evidence of the knowledge of a particular individual, or as admissible within any of the exceptions to the rule against hearsay.

(*o*) 1 Phill. Ev. (10th ed.) 143. Taylor, Ev. (10th ed.) s. 567.

(*p*) 1 Phill. Ev. 165. Cf. Roscoe, 'Nisi Prius' (18th ed.) 44.

(*q*) R. *v.* Saunders [1899], 1 Q.B. 490 (C. C. R.).

made by living or deceased persons, other than the parties. Statements made by the parties may be proved as admissions by the person to whom they were made. Where, after the death of one S., a tin case containing papers was delivered by a servant to his master; and one of these papers was endorsed in S.'s handwriting, 'My own private affairs,' and it contained a paper purporting to be a certificate of the minister and elders of the kirk session at C. in Edinburgh, and given by them to S. It was usual for the minister and elders of the kirk session, when a person left the congregation, to give a certificate to enable him to be admitted into any other congregation. A book containing the minutes of the kirk session of their transactions was also produced, and the session clerk of C. was called to prove that he had learnt the handwriting of the parties who had signed the certificate by looking at the minutes in the book. It was objected that 1st, the witness could not be permitted to look at the book in order to become acquainted with the handwriting therein; 2nd, that the book itself was not evidence, and could not be used for any purpose; 3rd, that the certificate itself would not be evidence even if the signatures to it were proved; 4th, that as the servant who delivered the papers to the master was not called, there was no proof that the certificate had ever been in S.'s possession; 5th, that the endorsement on the paper containing it was inadmissible, and that all it shewed was that one paper had once been in his presence; and it was held that the certificate was inadmissible (*r*).

Exceptions.—In certain instances, however, now to be stated, hearsay evidence is admissible, because the objection does not apply, or because from the necessity of the case the rule is relaxed. Many things which pass in words only are really acts, and are therefore admissible. Such are all contracts by parol, and claims to land or goods (*s*), and directions given by words (*t*).

'Res gestæ.'—Hearsay is admissible when it is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, one of the 'incidents of the event under consideration' (*u*); for to exclude it might be to exclude the only evidence of which the nature of the case is capable (*v*). Thus in R. *v.* Lord George Gordon, on a prosecution for high treason, it was held that the cry of the mob might be received in evidence as part of the transaction (*w*). And, generally speaking,

(*r*) R. v. Barber, 1 C. & K. 434, Gurney, B., Williams and Maule, JJ. The statement in the text is more accurate than that in C. & K. The judges did not intimate the ground on which the certificate was inadmissible.

(*s*) Ford *v.* Elliott, 4 Ex. 78. Rolfe, B., said: 'A claim may be manifested by words as well as acts. Whether it be by words or otherwise seems to me to be perfectly immaterial.' Alderson, B. said: 'If I were to say "Take these goods away," and put them into your hand, that would clearly be an act.'

(*t*) R. *v.* Wilkins, 4 Cox, 92, where Erle, J., held that a witness might prove that he made enquiries, and in consequence of directions given him in answer to those enquiries he followed the prisoners until he apprehended them. But see R. *v.* Saunders [1899], 1 Q.B. 490, as to the limitations on evidence as to result of enquiries. The witness is usually limited to saying that in consequence of information received he did certain things.

(*u*) Taylor, Ev. (10th ed.) s. 583.

(*v*) Roscoe, 'Nisi Prius' (18th ed.) 51.

(*w*) 21 St. Tr. 485, 535. To the same effect are R. *v.* Hunt, 3 B. & Ald. 566; Redford *v.* Birley, 1 St. Tr. (N. S.) 1071; 3 Stark. (N. P.) 76.

declarations accompanying acts are admissible in evidence as shewing the nature, character, and object of such acts (*x*). Thus, where a person enters into land in order to take advantage of a forfeiture, to foreclose a mortgage, or the like (*y*); or changes his actual residence, or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself, or does any other act material to be understood; his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as 'verbal acts indicating a present purpose and intention,' and are therefore admitted in proof like any other material facts. They are part of the *res gestæ* (*z*). Thus, where a constable, who was indicted for a forcible entry into a house, had searched the house, having a warrant in his hand, Tenterden, C.J., held that what he said at the time as to whom he was searching for, was admissible, although the question was asked by his counsel, and the answer might be in his favour (*a*). There has been some divergence of opinion as to whether statements of the person, injured by a crime, at the time of the injury are part of the *res gestæ*. On an indictment for murder of a wife by her husband, it was proved that a week before the death of the wife she bought a carving knife and a large axe to the house of a neighbour. The judge ruled that the statement made by the wife to the neighbour was admissible (*b*). Where the prisoner, who was indicted for burning a Bible, had employed some boys to take books to a place where they were burnt by his direction, it was held that what another person, who first appeared when the burning was going on, said at the time he tore up a book and threw it into the fire was not admissible, as there was no concerted common purpose proved between him and the prisoner (*c*).

Upon an indictment for the murder of L. a witness named E. W. was called. The witness was the person who had last seen L. on the afternoon of September 11, 1874, when the latter left her lodgings at Mile End. After that date L. was not seen again alive, and that was the date fixed upon by the prosecution as the time when the murder was perpetrated. The witness, having described what occurred at the parting between her and L. on that afternoon was asked whether L., at the time of her departure from the house made a statement to her. In answer to an objection made by the prisoner's counsel to a question which he anticipated would

(*x*) Roscoe, 'Nisi Prius' (18th ed.) 51.

(*y*) Co. Litt. 49*b*, 245*b*. Taylor, Ev. (10th ed.) s. 584, 3 Bl. Com. 174, 175.

(*z*) Taylor, Ev. (10th ed.) s. 584. Bateman *v.* Bailey, 5 T. R. 512. Rawson *v.* Haigh, 2 Bing. 99. Newman *v.* Stretch, M. & M. 338. Ridley *v.* Gyde, 9 Bing. 349. Smith *v.* Cramer, 1 Bing. (N. C.) 585. Fellowes *v.* Williamson, M. & M. 306. Vacher *v.* Cocks, M. & M. 353; 1 B. & Ad. 145.

(*a*) R. *v.* Smyth, 5 C. & P. 201. Walters *v.* Lewis, 7 C. & P. 344. Where an agent paid money into a bank, Littledale, J., held that what he said about the money at the time he paid the money into the bank was admissible. R. *v.* Hall, 8 C. & P. 358. 'The learned judge admitted the evidence, on the ground that it was a declaration by an agent acting within the scope of his authority; but it seems equally admissible, as a declaration accompanying the act of payment, and explanatory of the purpose of the payment.' C. S. G.

(*b*) R. *v.* Edwards, 12 Cox, 230, Quain, J. The statement was 'my husband always threatens me with these, and when they are away I feel safer.' This case is queried in Taylor, Ev. (10th ed.), Vol. ii. p. 413 (*n.*).

(*c*) R. *v.* Petcherini, 7 Cox, 78, (Ir.): 8 St. Tr. (N. S.) 1086, Crompton, J., and Greene, B. It seems clear that the acts of the person were inadmissible on the same ground.

follow upon this, Cockburn, C.J., said: 'All that is proposed to ask now is the question, "When going away did she make a statement?" That question can be put, but not the question, "What statement did she make?" The question at present only goes to the extent of ascertaining whether a statement was made, and there it stops; but I agree that if it went further, to the extent of inquiring what was the statement, it would be inadmissible. You are constantly meeting with such a question, "Did so-and-so made a statement to you, and, in consequence of that communication, did you do anything?" The fact that some statement was made is undoubtedly admissible.' The Attorney-General, who appeared for the prosecution, then said: 'The woman is leaving her house when she makes a statement, which is a declaration of intention, and it is submitted that that is a statement accompanying an act. It is part of the act of leaving, and on that ground it is proposed to ask the question to which objection has been made.' Cockburn, C.J., said: 'It was no part of the act of leaving, but only an incidental remark. It was only a statement of intention, which might or might not have been carried out. She would have gone away under any circumstances. You may get the fact that on leaving she made a statement, but you must not go beyond it' (*d*).

On an indictment for murder it was proved that the deceased with her throat cut came suddenly out of a room in which was the prisoner with his throat also cut and speechless, and that the deceased made a statement immediately after coming out of the room a few minutes before she died. All acts by the prisoner had ceased before the statement was made, and the deceased was not fleeing from him. Cockburn, C.J., refused to admit the statement either as part of the *res gestæ* or as a dying declaration (*e*), and questioned the correctness of R. *v.* Foster (*f*) in which it was ruled that statements by a man immediately after he was knocked down by a cab were part of the *res gestæ* and admissible on an indictment for manslaughter against the driver of the cab for running over the deceased. The latter ruling would seem to be perfectly correct, and in

(*d*) R. *v.* Wainewright, 13 Cox, 171. A similar objection to the above was taken to certain evidence of a like kind preferred on behalf of the prosecution in R. *v.* Pook in 1871 (74 Cent. Cr. Ct. Sess. Pap. 245, 250). There the prisoner was charged with the wilful murder of C. The murder was committed on the night of the 25th or the morning of the 26th of April, 1871, at Eltham. The deceased was discovered in a a dying state at Kidbrooke Lane. She had lived in the prisoner's family, and suspicion attached to him. One of the witnesses, F. H., who was called by the prosecution, proved that for ten days prior to the 25th of April the deceased had lodged in her house, that on the evening of that day she went out in her company, and that after walking about for some time they parted, when the deceased told her where she was going. It was proposed by the counsel for the prosecution to ask the question, 'What did she say to you?' To this the counsel for the prisoner objected, on the ground that whatever was said was said in the prisoner's absence, and he had no means of cross-examining upon it. It was thereupon contended by the counsel for the prosecution that it was a declaration so far accompanying the act itself as to render it part of the *res gestæ*, and he cited in support of his contention the case of Hardley *v.* Carter, 1835, 8 New Hampshire Reports 40. Bovill, C.J., refused to permit the question to be put. See 13 Cox, 172 *n.*

(*e*) R. *v.* Bedingfield, 14 Cox, 341. This ruling led to a controversy between Cockburn, C.J., and Mr. Pitt Taylor. See 1 Taylor, Ev. (10th ed.) 412 (*n.*) and Gilbert *v.* R., 38 Canada Supr. Ct. 284.

(*f*) 6 C. & P. 325; Park and Patteson, JJ., and Gurney, B. The statement was an answer to a question by a person who did not see the act, which caused the death, but came up afterwards.

R. *v.* Murray (*g*) an indictment for murder, statements made by the deceased to the first person who came up after he had been wounded were admissible. The statement was that he had been robbed by the man who had walked with him from the cross roads.

In Gilbert *v.* R. (*h*) on an indictment for murder, the Supreme Court of Canada, after consideration of the English authorities, held admissible as part of the *res gestæ* evidence of statements made by the deceased immediately after an assault on him and while fleeing from his assailant, while under apprehension of further danger. The accused was not within hearing, but the statements requested assistance or protection against further attacks by him.

This decision was given in reliance on Aveson *v.* Kinnaird (*i*), where Ellenborough, C.J., referred to a ruling by Holt, C.J., in an action by a husband and wife for wounding the wife; allowing what the wife said immediately upon the hurt received, and before she had time to devise anything for her own advantage, to be given in evidence as part of the *res gestæ* (*j*). Ellenborough, C.J., also said if she (the wife) declared at the time that she fled in immediate terror of personal violence from her husband, I should admit the evidence, though not if it were a collateral declaration of some matter which happened at some other time' (*k*).

Statements as to Bodily or Mental Condition.—In Aveson *v.* Kinnaird, (*l*) Lawrence, J., said that 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 shew what he suffered by the assault. Inquiries of patients by medical men, with the answers to them, are evidence of the state of health of the patients at the time; and what were the symptoms, what the conduct of the party themselves at the time, are always received in evidence upon such enquiries, and must be resorted to from the very nature of the thing (*m*). So a conversation as to the state of health of a deceased person, between him and a witness, is admissible to prove that he was in good health at the time (*n*). In R. *v.* Wink (*o*), on a prosecution for robbery, it was held, that the fact of the party robbed making a complaint to a constable shortly after the robbery, and mentioning the name of a person, as the name of one of the persons who had robbed him was admissible, but not the name so mentioned.

Complaints made by females of rape or offences against their chasity have been dealt with *ante*, Vol. i. pp. 942 *et seq.* The fact of the prosecutrix having made such a complaint is only admissible for the purpose of

(*g*) 6 Cox, 477 (Ir.), Monahan, C.J. In R. *v.* Goddard, 15 Cox, 7, Hawkins, J., is reported to have followed R. *v.* Bedingfield, but the statement challenged was ultimately admitted as a dying declaration.

(*h*) 38 Canada Supr. Ct. 284.

(*i*) 6 East, 188, 193.

(*j*) Thompson *v.* Trevanion, Skin. 402.

(*k*) 6 East, 188, 193.

(*l*) *Ubi supra.* Taylor, Ev. (10th ed.), s. 580.

(*m*) 6 East, 195. Ellenborough, C.J., said: 'When a patient enters into a history of his complaint, and relates some earlier symptoms experienced at a former period, he is giving a narrative from memory rather than yielding to the impressions forced upon him by his situation; and it would seem, upon principle, that what he (*so*) says ought not to be received in evidence.' See Roscoe, 'Nisi Prius,' (18th ed.) 52; R. *v.* Guttridge, 9 C. & P. 471.

(*n*) R. *v.* Johnson, 2 C. & K. 354. In R. *v.* Conde, 10 Cox, 547, a complaint by a deceased child of being hungry, made in the absence of the prisoners, was admitted in evidence on an indictment for withholding necessary food from the child.

(*o*) 6 C. & P. 397.

confirming her testimony; in case, therefore, of her death, or absence from any cause, neither the fact of such complaint having been made nor the particulars are admissible in evidence (*p*).

On a charge of larceny, where the proof against the prisoner is, that the stolen property was found in his possession, it may be proved, on behalf of the prisoner, that a third person left the property in his care, saying he would call for it again afterwards; for it is material in such a case to inquire under what circumstances the prisoner first had possession of the property (*q*).

Where a witness had had a conversation with a prisoner about arsenic, but could not fix the time when this happened, it was held that an observation respecting this conversation made by the witness, after the prisoner left, to a person in the shop at the time, might be proved by that person, in order to fix the time when the conversation took place (*r*). Where a prosecutor had for three days concealed a burglary committed in his house, fearing the vengeance of the prisoners, Erle, J., held that his wife might prove that 'he told me not to tell of it; he said he was out late at night with his horses, and should not be safe;' for conversations that explain a man's conduct are admissible in evidence (*s*).

Hearsay evidence of oral testimony given in another judicial proceeding is in certain cases admissible when direct or primary evidence cannot be given by reason of the death of the witness or his absence abroad (*t*). Such evidence is very rarely admitted in criminal cases, and it is in no case admitted unless the person against whom it is tendered had the opportunity of testing the evidence by cross-examination in the former proceeding (*u*). Under the present practice in indictable cases there are depositions taken before the justices (*v*), and a shorthand note taken before the court of trial (*w*).

Sect. IV.—Dying Declarations.

On a prosecution for murder or manslaughter (*x*) the declarations made by the person killed, after receiving the mortal injury, as to the fact itself and the person by whom it was done, *i.e.* the circumstances attending the injury, are under certain conditions admissible in evidence (*y*). The admission of such declarations is 'a strong exception to the rule of law

(*p*) R. *v.* Megson [1840], 9 C. & P. 420, Rolfe, B. R. *v.* Guttridge, 9 C. & P. 471, Parke, B. These cases appear to be still good law on this point, see R. *v.* Lillyman [1896], 2 Q.B. 167, 174.

(*q*) 1 Phill. Ev. 234 (7th ed.).

(*r*) R. *v.* Richardson, 1 Cox, 361. Denman, C.J., and Alderson, B.

(*s*) R. *v.* Glandfield, 2 Cox, 43.

(*t*) See Taylor, Ev. (10th ed.), ss. 464, 465.

(*u*) The doctrine is distinctly affirmed as to civil cases. R. *v.* Jolliffe, 4 T. R. 285, 290, Kenyon, C.J. In Ennis *v.* Donisthorne, MS. 1 Phill. Ev. 231 (7th ed.), Lord Kenyon, C.J., is reported to have said: 'He ought to recollect the very words, for the jury alone can judge of the effect of words.' By this it is conceived his lordship meant, not that the witnesses' testimony would go for nothing, unless he could swear positively they were the very words used by the deceased, and not other; but that the present witness ought to say, 'To the best of my recollection these were the very words used.' See also R. *v.* Smith, 2 Stark. (N.P.) 211; R. *v.* Carpenter, 2 Show. 47; 1 Hawk. c. 46, s. 29.

(*v*) As to depositions, *vide post*, p. 2212.

(*w*) 7 Edw. VIII. c. 23, s. 16, *ante*, p. 2033.

(*x*) The observations of the court in Stobart *v.* Dryden, 1 M. & W. 615, render it very doubtful whether dying declarations would be admissible in civil proceedings. See 1 Phill. Ev. 280. Taylor, Ev. (10th ed.), s. 714.

(*y*) 1 East P. C. 353. R. *v.* Mead, 2 B. & C. 605, Abbott, C.J. R. *v.* Hind, Bell, 253.

that statements made behind the back of the prisoner cannot be given in evidence (*z*). The declarations here treated are distinct from bedside depositions taken in accordance with the Criminal Law Amendment Act, 1867 (*a*), though where the formalities required by that Act have not been fully complied with the depositions may, as will be seen, in certain cases be treated as a dying declaration (*b*). Statements not amounting to a dying declaration, but made in the presence of the accused, cannot be admitted unless evidence can be adduced which would justify the jury in finding that the accused, having heard the statement and having the opportunity of explaining or denying it, and the occasion being one upon which he might reasonably be expected to make some observation, explanation, or denial, by his silence, his conduct, or demeanour, or by the character of any observations or explanations he thought fit to make, substantially admitted the truth of the whole or some portion of it. Whether the evidence offered for this purpose would justify the jury on so finding, or in drawing such inference, is a question for the judge to determine before he admits the evidence (*c*).

The application of the rule is strictly and absolutely limited to cases in which the death of the person who made the declaration is the subject of inquiry, or is part of the same transaction (*d*).

The dying declaration of an accomplice is admissible where the prisoner is charged with assisting the accomplice to commit suicide (*e*). But in R. *v.* Abbott (*f*), on an indictment of a husband for the murder of his wife, it appearing that the two had agreed to commit suicide together by poison, a statement made by the wife after saying 'I 'm dying,' was held inadmissible, the judge not being satisfied that the expression meant more than that the woman was in great pain. On an indictment for poisoning K., it appeared that the poison was administered in a cake, which K. ate for breakfast, immediately after which he was taken ill; and his maid servant, who was present, and had made the cake, said that she was not afraid of it, and thereupon ate of it, and was in consequence poisoned and died. Her dying declarations (made after she knew of her master's death, and was conscious of her own approaching death) as to the manner

(*z*) R. *v.* Osman, 15 Cox, 1, 3, Lush, L.J.

(*a*) 30 & 31 Vict. c. 35, ss. 6, 7, *post*, p. 2246.

(*b*) *Post*, p. 2091.

(*c*) R. *v.* Smith [1897], 18 Cox, 470, Hawkins, J. R. *v.* Bexley [1906], 70 J. P. 263. R. *v.* Stevens [1904], 4 N. S. W. State. Rep. 727.

(*d*) R. *v.* Mead, 2 B. & C. 605, Abbott, C.J., where a dying declaration was held inadmissible on an indictment for perjury. In R. *v.* Hutchinson, 2 B. & C. 608 (note), the prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion. The woman was dead, and for the prosecution, evidence of her dying declaration upon the subject was tendered. Bayley, J., rejected the evidence, observing that, although the declaration might relate to the cause of the death, still such declarations were admissible in those cases alone *where the death of the party was the subject of inquiry*. And so where the prisoner was indicted for using instruments to procure the miscarriage of a woman, her dying declaration was held inadmissible. R. *v.* Hind, Bell, 253; 29 L. J. M. C. 147. In trials for robbery the dying declarations of the party robbed were held inadmissible by Bayley, J., on the Northern Spring Circuit, 1822, and by Best, J., on the Midland Spring Circuit, 1822, and in R. *v.* Lloyd, 4 C. & P. 233, Bolland, B.; nor are they admissible in a charge of rape. R. *v.* Newton, 1 F. & F. 641, Hill, J. In R. *v.* Drummond, 1 Leach, 337, it was ruled that the dying declaration of a convict at the moment of execution was not evidence.

(*e*) R. *v.* Tinkler, 1 East P. C. 354; 1 Leach, 328, 1 Den. V. As to the nature of the crime, *vide ante*, Vol. i. p. 660.

(*f*) [1903] 67 J. P. 151, Kennedy, J.

in which she had made the cake, and that she had put nothing bad in it, and that the prisoner was present eating his breakfast at one end of the table while she was making the cake at the other end of it, were tendered in evidence, and objected to, on the ground that the only person whose dying declarations could be received in evidence was the person whose death formed the subject of inquiry at the trial; and the preceding case was relied upon. But Coltman, J., after consulting Parke, B., expressed himself of opinion that, as it was all one transaction, the declarations were admissible, and accordingly allowed them to go to the jury; but he said he would reserve the point for the opinion of the judges (*g*).

To render a dying declaration admissible in evidence it is necessary to satisfy the judge (*h*) beyond reasonable doubt not only that when it was made the deceased declarant was *in articulo mortis* or actual danger of death (*i*), but also that he had given up all hopes of life, *i.e.* was in settled, hopeless expectation of *impending* death (*j*). The fact of danger and the belief in impending dissolution must concur (*k*). But it is not necessary that the declarant should be at the point of death (*kk*).

Function of the Judge.—All the judges agreed at a conference in Easter Term, 1790, that it ought not to be left to the jury to say whether the deceased thought he was dying or not; for that must be decided by the judge before he receives the evidence (*l*). And where on a trial for murder in Ireland a dying declaration was tendered in evidence, and the judge left it to the jury to say whether the deceased knew when he made it that he was at the point of death, the question as to the propriety of the course adopted in that case was sent over for the opinion of the English judges, who answered that the course taken was not the right one, and that the judge ought to have decided the question himself (*m*). The practice has long been in accord with these rulings, and most of the modern cases are mere illustrations of the mode in which the judges have dealt with particular sets of facts.

The judge has to deal with the matter as a preliminary question of fact (*n*). The circumstances, under which the declarations were made, are to be proved to the judge, and he will hear all that the deceased has said relative to his situation, and will inquire into the state of illness in which he was; the opinions of medical and other persons as to his state, and whether they were made known to the deceased; the conduct of the deceased in settling his affairs; in making his will; giving directions as to his funeral or family; and whether he had recourse to those consolations and rites of religion which are appropriate to the last sad hours of

(*g*) R. *v.* Baker, 2 M. & Rob. 53. The prisoner was acquitted. A death-bed confession by W. that he had committed a murder was in Ireland held inadmissible on an indictment of G. for the murder. R. *v.* Gray [1841], Ir. Circ. Rep. 76, Torrens, J.

(*h*) R. *v.* Hucks, 1 Stark. (N. P.) 523.

(*i*) See Sussex Peerage claim, 11 Cl. & F. 108, 112, Ld. Denman. Taylor, Ev. (10th ed.) s. 718. Steph. Dig. Ev., Art. 97. Cf. R. *v.* Curtis, 21 T. L. R. 87, Bigham, J.

(*j*) R. *v.* Woodcock, 1 Leach, 500, Eyre, C.B. R. *v.* Peel, 2 F. & F. 21, Willes, J. R. *v.* Osman, 15, Cox 1, Lush, L.J. R. *v.* Gloster, 16 Cox, 471, Charles, J. R. *v.* Smith, 65 J. P. 426, Bruce, J.: R. *v.* Perry, 2 Cr. App. R. 267. See hereon Taylor, Ev. (10th ed.) s. 720.

(*k*) Sussex Peerage claim, *ubi sup.*

(*kk*) R. *v.* Perry, *ubi sup.*

(*l*) R. *v.* John, 1 East P. C. 357. R. *v.* Welbourn, ibid. 358. R. *v.* Hucks, 1 Stark. (N. P.) 523. R. *v.* Smith, 10 Cox, 82.

(*m*) Major Campbell's case, as stated by Parke, B., in 11 M. & W. 486.

(*n*) R. *v.* Goddard, 15 Cox, 7, Hawkins, J.

departing mortality; in a word, into every fact and circumstance which may tend to throw light upon the state of mind of the deceased at the time when the declaration was made, in order the better to enable him to arrive at a satisfactory determination as to whether the evidence is admissible or not (*o*).

The general principle on which this species of evidence is admitted is, that such declarations are made when the party is at the point of death, and has given up every hope in this world; 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 law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice (*p*). It is essential to the admissibility of dying declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were *made under a sense of impending death* (*q*); but it is not necessary that they should be stated at the time to be so made; it is enough if it satisfactorily appears in any mode that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances (*r*) of the case; all of which are resorted to in order to ascertain the state of the declarant's mind. The length of time which elapsed between the declaration and the death of the declarant furnishes no rule for the admission or rejection of the evidence, though, in the absence of better testimony, it may serve as one of the exponents of the deceased's belief that his dissolution was or was not impending. It is *the impression* of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible. Therefore, where it appears that the deceased, at the time of the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterwards, the declaration is inadmissible' (*s*). The

(*o*) R. *v.* Van Butchell [1829], 3 C. & P. 629, 631, Bolland, B. R. *v.* Spilsbury, 7 C. & P. 187, Coleridge, J.

(*p*) R. *v.* Woodcock, 1 Leach, 500, Eyre, C.B.: See R. *v.* Perry, 2 Cr. App. R. 267.

(*q*) R. *v.* Forester, 10 Cox, 368, 4 F. & F. 857. R. *v.* Smith, 1 Lew. 81. R. *v.* Ashton, 2 Lew. 147. Minton's case, 1 M'Nally, Ev. 386. R. *v.* Howell, 1 Den. 1; 1 C. & K. 689, where Denman, C.J., said, 'We all think the case beyond all doubt. Danger existed. The deceased clearly thought he was dying, and had no hope of recovery. There is no ground for holding his declaration inadmissible.' R. *v.* Thomas, 1 Cox, 52. R. *v.* Peel, 2 F. & F. 21, where Willes, J., said, 'It must be proved that the man was dying, and there must be a settled hopeless expectation of death in the declarant. There does appear to have been such an expectation in this case, and I shall therefore admit the declaration.' R. *v.* Brooks, 1 Cox, 6. R. *v.* Taylor, 3 Cox, 84. R. *v.* Mooney, 5 Cox, 318 (Ir.) R. *v.* Cleary, 2 F. & F. 850. R. *v.* Mitchell [1892], 17 Cox, 503.

(*r*) R. *v.* Bonner, 6 C. & P. 386. R. *v.* John, 1 East P. C. 357, *post*, p. 2089.

(*s*) Taylor, Ev. (10th ed.) s. 718. R. *v.* Welbourn, 1 East P. C. 358. R. *v.* Crockett 4 C. & P. 544. R. *v.* Christie, Carr. Supp. 202. R. *v.* Hayward, 6 C. & P. 157. R. *v.* Wilson, 1 Lew. 78. R. *v.* Errington, 2 Lew. 148. R. *v.* Simpson, 1 Lew. 78. R. *v.* Spilsbury, 7 C. & P. 187. R. *v.* Fagent, 7 C. & P. 238. In R. *v.* Woodcock, 1 Leach, 500, the declarations were made forty-eight hours before the death. In R. *v.* Tinkler, 1 East P. C. 354, some of them were made ten days before the death. In R. *v.* Mosley, 1 Mood. 97, they were made eleven days before the death. In R. *v.* Bonner, 6 C. & P. 386, they were made three days before death; and were all received. In R. *v.* Van Butchell, 3 C. & P. 329; they were made seven days before the death and rejected. See R. *v.* Bernadotti, 11 Cox, 316. In R. *v.* Craven, 1 Lew. 77,

crucial test of admissibility is the belief of the declarant that he is dying at the time of making the declaration (*t*), and where a declaration is made in the belief above stated, it is not rendered inadmissible to prove that the deceased afterwards took a more hopeful view of his condition (*u*).

Conversely a man may receive an injury from which he may think that he will never recover, but this will not be sufficient to dispense with an oath (*v*).

On a trial for murder, it appeared that the declaration of the murdered woman was taken by the magistrate's clerk on the night of October 17. She was then breathing with considerable difficulty. She had been thrown into a river the night before, but was rescued in an exhausted condition. She continued ill, and in great danger, and during the day had desired that someone should pray with her. In answer to the magistrate's clerk, she said she thought she was likely to die. She was sworn, and before her declaration was completed, in answer again to the magistrate's clerk, she said that she had the fear of death before her, and had no present hope of recovery. The declaration was put into writing and read over to her, and she was asked to correct any mistake; it was written down: 'I have made the above statement with the fear of death before me, and with no hope of my recovery.' She then said, 'No hope at present of my recovery.' The clerk thereupon inserted the words 'at present.' She died the next morning. The declaration was admitted in evidence at the trial. The declaration so taken was held inadmissible, inasmuch as the conduct and acts of the deceased rendered it at least doubtful whether she was under an unqualified belief that death was immediately impending and absolutely devoid of hope of recovery; and the conviction was quashed (*w*).

Where a constable stated, 'From appearances I should judge that the deceased was dying. He was making his statement to me about a quarter of an hour. I believe he knew he was dying. I cannot recollect that he said anything about dying before he began his statement. As he finished he said, "O God! I am going fast; I am too far gone to say any more."' The deceased died a few hours afterwards of a wound in the abdomen that penetrated the stomach. Cresswell, J., having consulted Williams, J., said, 'My brother Williams confirms the doubts I had on this subject; that it being possible that the man did not discover the extent of his weakness

a person who had been confined to his bed for weeks, said to the surgeon, 'I am afraid, doctor, I shall never get better,' and shortly afterwards died. Hullock, B., held that an account given by the deceased to the doctor after this declaration was receivable as a dying declaration, although made several weeks before his death: and he stated that the subject had been lately before the judges, and his mind was made up about it. It would seem that if there is surgical evidence to shew that the declarant must have known that he was dying, the declaration is admissible. R. *v.* Morgan [1879], 14 Cox, 337. In R. *v.* Dalmas, 1 Cox, 95, however, it was held that direct, and not merely inferential, proof that the declarant was aware of his danger is necessary, and that conversations between the declarant and others are admissible to shew the state he was in.

(*t*) Thus the declarations of a woman were made on proof that at 7 a.m. she said, 'I am dying,' and complained of great pain while making the declaration, and died at 7.20 a.m. R. *v.* Cowle, 71 J.P. 152.

(*u*) R. *v.* Hubbard, 14 Cox, 565. Cf. R. *v.* Reaney, D. & B. 151, Pollock, C.B.

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

(*w*) R. *v.* Jenkins, L. R. 1 C. C. R. 187. The judge must be perfectly satisfied beyond reasonable doubt that the declarant was under the belief that no hope of recovery existed. R. *v.* Qualter, 6 Cox, 357. R. *v.* Smith, 16 Cox, 171. And if he is so it is admissible. R. *v.* Goddard, 15 Cox, 7.

till he had made the statement, and that it was only after he had made it he for the first time discovered that he was going fast; there is not, consequently, that clear ascertainment of his consciousness of his state before he made it to render it admissible' (*x*).

It is not necessary that the apprehension should be of death in a certain number of hours or days. The question turns rather on the state of the person's mind at the time of making the declaration than upon the interval between the declaration and the death. Where, therefore, the deceased made a declaration on October 23, concluding, 'I have made this statement believing I shall not recover,' and at that time the deceased was in a state, from the injuries that he had received, from which it was impossible that he could recover. His spine was broken, so that death must speedily follow, and he died on November 3; and the doubt as to the admissibility of the declaration was raised by a witness, who proved that, shortly before the deceased made the statement, he asked him how he was, and the deceased answered: 'I have seen the surgeon to-day, and he has given me some little hope that I am better; but I do not myself think I shall *ultimately* recover;' and that before he left the room, on the same occasion, the deceased said that *he could not recover;* but it was held, on a case reserved, that the declaration had been properly admitted. The deceased was so injured, his *status* was such that he could not possibly recover, and his own opinion was that he could not recover; and in a case like this, where there was an injury to the spine, he was probably a more competent judge of his state than the doctor, he had no hope, though the doctor had held out hopes, and before the witness left the room he said that he could not recover. That was his own opinion of his case, and the impression on his mind was that death was impending (*y*).

It is not necessary that the deceased should *express* any apprehension of danger; for his consciousness of approaching death may be reasonably inferred, not only from his declaring that he knows his danger, but from the nature of the wound, or state of illness or other circumstances of the case (*z*).

(*x*) R. *v.* Nicolas, 6 Cox, 120. The statement was, however, afterwards received, the counsel for the prisoner withdrawing his objection to it. In a Canadian case, R. *v.* Sunfield [1907], 15 Ont. L. R. 252, after considering R. *v.* Jenkins, *ante*, p. 2088, and R. *v.* Nicolas, the Court held admissible as a dying declaration a statement made under the following circumstances. R. was found lying on floor of a bedroom in his house. He was lifted up and laid on a bed, when it appeared that he had received a wound from a pistol bullet, which it was proved caused his death. B. entered room and asked R., 'Who cut you?' R. replied, 'No cut, Jake; shoot.' He was then asked if a doctor should be sent for, and replied, 'No doctor, Billy; me die.' The Court considered that the circumstances shewed the expectation of death to exist at the time of the incriminating statement.

(*y*) R. *v.* Reaney, D. & B. 151: 7 Cox, 209. Wightman, J., said: 'The statement must have been made under an impression upon the mind of the person making it that his death was about to happen shortly, or, to use the expression found in the books, that his death was impending: that, however, is a relative term, and does not, of course, import merely an expectation that the sufferer would die at some time—for that is the debt which we all owe to nature—but it means an expectation that he is about to die shortly of the disease or injuries under which he is then suffering; that, in other words, he is without a reasonable or any hope of recovery.'

(*z*) R. *v.* John [1790], 1 East, P. C. 357, by all the judges. R. *v.* Woodcock, 1 Leach, 500. See R. *v.* Dingler, 2 Leach, 561. R. *v.* Bonner, 6 C. & P. 386, Patteson, J. R. *v.* Perkins, 2 Mood. 135. R. *v.* Morgan, 14 Cox, 337. As to R. *v.* Bedingfield, 14 Cox, 341, *vide ante*, p. 2082.

A surgeon found a transverse wound across the throat of the deceased, which had passed through the trachea, and the point of the instrument had reached the vertebræ. Three days afterwards she stated to the surgeon that she did not think she should recover. He considered her in danger, but had a hope she would recover. To the nurse who attended her she had repeated several times, both before and after the surgeon had seen her, that she should die. The nurse told her she thought she would get better. She said she thought she would, if the surgeon could see in her throat as he could see on her hands. This she said many times, and all day she said she should get better if it was not for her throat. The surgeon spoke cheerfully to her, and she appeared cheerful after that, and in better spirits. She got a little better, and was easier after the surgeon dressed the wounds. A magistrate saw her, and told her of her condition, and that she was in very great danger. He repeated two or three times, in various forms, something of the same kind—that she was likely to die; that she might die; and added, 'I hope it may please Almighty God to bring you round, but I believe you are in great danger. I think it very possible this will end fatally with you. I am come to hear you, and whatever you say, should you die, will be produced in evidence on the trial of the prisoner. You must therefore tell me the truth, and nothing but the truth, without any fear or reserve.' She said nothing. He then said: 'It would be a very sad and awful thing for you to go into the presence of your Maker, having told me anything, in your present situation, which is false.' From her not having said anything to him, he told her he should administer an oath to her, which he did, and by means of questions to her he got her to tell him, and what she said was reduced into writing, and read over to her; and he then said to her, 'Now that is perfectly true, and the whole truth?' and she said, 'It is.' She then put her mark to it. It was objected that this declaration was not made spontaneously, and not under a sense of immediate and impending death; but it was held that it must be taken on the whole that the statement was spontaneous, and that, looking at her state, and at her expressions, there was not the slightest hope in her mind of recovery (*a*).

In R. *v.* Goddard (*b*), a woman, soon after an occurrence which caused her death, was seen standing in the door of a neighbour's house in a fainting condition and apparently dying. She said: 'My husband has kicked me and I shall die: look to my children; isn't it hard that he should do like this when I have given him no cause?' Held admissible as a dying declaration on indictment of the husband for murder.

On a trial for manslaughter, where the death was said to have been caused by the illegal use of instruments on a woman in order to procure a miscarriage, the dying declaration of the woman, which had been reduced into writing and had been signed by her, was admitted in evidence (*c*).

(*a*) R. *v.* Whitworth, 1 F. & F. 382. Watson, B., refused to reserve the point.

(*b*) 15 Cox, 7. Hawkins, J., after consulting Baggallay, L.J.

(*c*) R. *v.* Woodcock, 1 Leach, 500, Eyre, C.B.; and see R. *v.* Wallace [1898], 19 N. S. W. Rep. Law, 155, 162, Darley, C.J., where the subject is fully discussed. See also R. *v.* Whitmarsh (No. 1), 62 J. P. 680; (No. 2), ibid. 711. A dying declaration in the form of answers taken down by a doctor to questions put by a magistrate has been held inadmissible. R. *v.* Smith, 65 J. P. 426, Bruce, J., *sed quære.*

The rule is that while parol evidence of the declaration is ordinarily admissible, if the declaration has been made in writing by the declarant, or reduced into writing, whether in the form of a sworn deposition or an unsworn declaration, and whether read over to and signed by the declarant or not, the writing is admissible (*cc*), and parol evidence of the declaration is not admitted (*d*) unless absence of the written declaration is properly accounted for.

Where the declaration is taken down but not signed it would seem to be available only to refresh the memory of the person who testifies as to the making of the declaration.

It is no objection to the admission of a dying declaration that the deceased made a subsequent statement to a magistrate, which was taken down in writing, and is not produced. Where three several declarations had been made by the deceased in the course of the same day at the successive intervals of an hour each; the second had been made before a magistrate, and reduced into writing, but the others had not; the original written statement, taken before a magistrate, was not produced, and a copy of it was rejected. A question then arose, whether the first and third declarations could be received; and Pratt, C.J., was of opinion that they could not, since he considered all three statements as parts of the same narrative, of which the written examination was the best proof: but the other judges held that the three declarations were three distinct facts, and that the inability to prove the second did not exclude the first and third; and evidence of those declarations was accordingly admitted (*e*).

But if the statement of the deceased was committed to writing, and *signed by him* at the time it was made, it has been held essential that the writing should be produced if existing, and that neither a copy nor parol evidence of the declaration could be admitted to supply the omission (*f*). But the decisions on this point are altogether unsatisfactory; for there is no authority, by statute or otherwise, for taking a 'dying declaration' in writing, and the words uttered by the deceased are just as much primary evidence as any writing in which they might be incorporated (*g*).

A statement of the deceased taken on oath before a magistrate, but inadmissible as a deposition, in consequence of the prisoner not having been present when it was taken, or for any other reason (*h*), is admissible as a dying declaration, if taken under such circumstances as would render such a declaration admissible (*i*). Evidence is admissible to prove that the deposition was taken when the deceased was aware of

(*cc*) See *ante*, p. 2090, note (*c*).

(*d*) R. *v.* Gay, 7 C. & P. 230, Coleridge, J.

(*e*) R. *v.* Reason, 1 Str. 499; 16 St. Tr. 1. According to the report in 16 St. Tr., Pratt, C.J. and Powys, J., deemed the evidence inadmissible. At all events, it appears that the evidence was received. Sir J. Strange was of counsel in the cause.

(*f*) R. *v.* Gay, 7 C. & P. 230. Trowter's case, 12 Vin. Abr. 118, 119. 1 East, P. C. 356. Taylor, Ev. (10th ed.) s. 720, and see R. *v.* Wallace, 19 N. S. W. Rep. Law, 155. Leach *v.* Simpson, 5 M. & W. 309.

(*g*) R. *v.* Reason, 16 St. Tr. 1, seems at variance with these cases. See Robinson *v.* Vaughton, 8 C. & P. 252, and other cases, as to the grounds on which depositions are admissible: and see R. *v.* Bell, 5 C. & P. 162. R. *v.* Christopher, 1 Den. 536.

(*h*) R. *v.* Clarke, 2 F. & F. 2.

(*i*) R. *v.* Dingler, 2 Leach, 561. R. *v.* Callaghan, M'Nally, Ev. 385; and see Rosc. Cr. Ev. (13th ed.) 29-34.

the near approach of death, although the deposition contains no statement to shew that the deceased made it in contemplation of death (*j*).

It is not necessary that the examination of the deceased should be conducted after the manner of interrogating a witness in the case; though any departure from the mode may affect the value and credibility of the declarations. Therefore, it is no objection to their admissibility that they were made in answer to leading questions, or obtained by pressing and earnest solicitation (*k*). Where a surgeon, in a case of murder, was called to prove a dying declaration, and stated that he put questions to the deceased for the purpose of ascertaining whether it would be necessary for a magistrate to come to her house to take her examination, and it was objected that the statement being in answer to questions, and not a connected continuous statement flowing from herself, could not be received; it was held that the declaration was admissible (*l*).

But whatever the statement may be, it must be complete in itself; for if the declarations appear to have been intended by the dying man to be connected with and qualified by other statements, which he is prevented by any cause from making, they will not be received.

The decision of a judge that a declaration in a dying declaration merely gets rid of the objection that it was not made in the presence of the accused nor on oath.

The declaration is admissible only as to those things to which the deceased declarant would have been competent to testify, if sworn in the case. They must, therefore, in general speak to facts only, and not to mere matters of opinion, and must be confined to what is relevant to the issue (*m*). They are admissible not only against the prisoner, but also in his favour (*n*).

As the declarations of a dying man are admitted, on a supposition that in his awful situation on the confines of a future world he had no motives to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice, it necessarily follows that the party against whom they are produced in evidence may enter into the particulars of his state of mind and of his behaviour in his last moments or may be allowed to shew that the deceased was not of such a

(*j*) R. *v.* Hunt, 2 Cox, 239. Pollock, C.B., after consulting Coleridge, J.

(*k*) R. *v.* Reason, 1 Str. 499; 16 St. Tr. 1. R. *v.* Woodcock, 2 Leach, 561, and see R. *v.* Welbourn, *ante*, p. 2087. R. *v.* Smith, L. & C. 607. R. *v.* Steele, 12 Cox, 168. R. *v.* Whitmarsh, 62 J. P. 680, 711.

(*l*) R. *v.* Fagent, 7 C. and P. 238, Gasclee, J.

(*m*) Taylor, Ev. (10th ed.) s. 720. R. *v.* Sellers, Carr. Supp. 233.

(*n*) R. *v.* Scaife, 1 M. & Rob. 551. 'The ground upon which dying declarations are admissible being that they are tantamount to statements made upon oath in the presence of the prisoner, and such statements being clearly admissible if in favour of the prisoner, there seems no reason to doubt the propriety of admitting a dying declaration which is in favour of the prisoner. Indeed, almost every case of manslaughter, in which such declarations have been admitted, is an authority to that effect, as the *primâ facie* presumption is, that the prisoner had murdered the deceased. And, moreover, a declaration in favour of a prisoner must ever be taken to be more likely to be true; as it is not probable that a person should make a statement favourable to the person who has inflicted a mortal injury upon him, but rather the contrary.' C. S. G.

character as was likely to be impressed by a religious sense of his approaching dissolution (*o*).

If a child be too young to be capable of having an idea of a future state, his declarations are inadmissible (*p*). But if a child be of intelligent mind, and fully comprehends the nature of an oath, and the consequences, in a future state, of telling a falsehood, his declarations, made under the apprehension and expectation of immediate death, are admissible in evidence (*q*).

While the admissibility of a dying declaration is, as already stated, a question for the judge, its weight is for the jury. And, though such declarations, when deliberately made, under a solemn and religious sense of impending dissolution, and concerning circumstances in respect of which the deceased was not likely to have been mistaken, are entitled to great weight (*r*) if clearly and distinctly proved, yet it is always to be remembered that the accused had not had the opportunity of cross-examination —a power quite as essential to the eliciting of *the whole* truth, as the obligation of an oath can be, and without which no statement made on oath, however solemnly administered, is admissible under any other circumstances; and that where the deceased had not a deep and strong sense of accountability to his Maker, and an enlightened conscience, the passion of anger and feelings of revenge may, as they have not unfrequently been found to do, affect the truth and accuracy of his statements, especially as the salutary and restraining fear of punishment for perjury is, in such cases, withdrawn. And it is further to be considered that the particulars to which the deceased had spoken were in general likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed and leading both to mistakes as to the identity of the persons and to the omission of facts essentially important to the completeness and truth of the narrative (*s*). When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath, yet they are nevertheless open to observation. For though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination (*t*).

(*o*) 1 Phill. Ev. 238 (7th ed.). 'In R. *v.* Macarthy, Gloucester Sum. Ass. 1842, the case on the part of the prosecution was that the prisoner had assaulted the deceased, and that the deceased followed the prisoner along several streets for the purpose of giving him into the custody of the police; and Erskine, J., permitted the counsel for the prisoner to cross-examine the witnesses for the prosecution as to the bad character of the deceased, in order to shew that the prisoner might have had a reasonable ground for supposing that the deceased followed him for the purpose of robbing him.' C. S. G.

(*p*) R. *v.* Pike, 3 C. & P. 598. Park ,J,, after consulting Parke, J. The child in the case was four years old, and it was held that his declaration was inadmissible.

(*q*) R. *v.* Perkins, 2 Mood. 135. The child was more than ten years old.

(*r*) See R. *v.* Spilsbury, 7 C. & P. 187, Coleridge, J.

(*s*) Taylor, Ev. (10th ed.) s. 722.

(*t*) R. *v.* Ashton, 2 Lew. 147, Alderson, B. 'A striking instance of the danger of trusting to statements made after a mortal wound has been inflicted occurred in R. *v.* Macarthy, Gloucester Sum. Ass. 1842. The prisoner was indicted for murder, and the deceased had been stabbed by the prisoner whilst he was pursuing him in

It may be added also that the deceased in many cases is labouring under injuries which may affect the brain, and prevent the possibility of reason guiding the words that may be uttered, and yet the means of ascertaining the state of his mind may be such as to render it in the highest degree difficult to discover whether a statement has been made under a morbid delusion of the mind, or in the tranquil exercise of calm reason, operated upon alone by the awful consciousness that he must almost immediately render an account to an all-knowing Creator.

Sect. V.—Other Forms of Hearsay.

Hearsay in Proof of Public Rights.

Hearsay evidence is also admissible for the purpose of proving public or general rights, or custom, or matters of public or general interest, and rights in the nature of public rights (*u*). Thus in questions concerning the boundary of parishes or manors, traditionary reputation is evidence (*v*): and the declarations of old persons deceased have been admitted in such cases, although they were parishioners and claimed rights of common on the wastes, which their evidence had a tendency to enlarge (*w*). The declarations are not admissible unless emanating from persons who are shewn to the satisfaction of the judge to have had competent means of knowledge (*x*). But although general reputation is evidence on a question of boundary or custom, yet the tradition of a particular fact (as that turf was dug or a post put down in a particular spot) is not admissible (*y*).

Sect. VI.—Statements against Interest by Deceased Persons.

Declarations or statements made by deceased persons, where they appear to be against their own pecuniary or proprietary interest (*z*), have in many cases been admitted as evidence of all the facts declared (*a*) as entries in their books charging themselves with the receipt of money on account of a third person (*b*), or acknowledging the payment of money due to themselves (*c*). In substance these declarations are admissions against himself by the declarant. Thus a written memorandum by a deceased man-midwife, stating that he had delivered a woman

order to give him into custody for an assault, and the deceased expressly stated that the prisoner had knocked him down, but two companions of the deceased, who were present during the whole time, distinctly proved that the deceased was not knocked down at all.' C. S. G.

(*u*) Taylor, Ev. (10th ed.) ss. 607-634. Roscoe, 'Nisi Prius' (18th ed.) 48 *et seq.* 1 Phill. Ev. 238, 241. 1 Stark. Ev. 49. Steph. Dig. Ev. art. 30.

(*v*) Nicholls *v.* Parker, 14 East, 331, in note to Outram *v.* Morewood. And it seems that a map made from the representations of a deceased person, who pointed out the boundaries, would be evidence of such boundaries. R. *v.* Milton, 1 C. & K. 58, Erskine, J.

(*w*) Nicholls *v.* Parker, *ubi sup.* But such declarations must not have been made *post litem motam.* R. *v.* Cotton, 3 Camp. 444. 1 Phill. Ev. (7th ed.) 246.

(*x*) See Steph. Dig. Ev. art. 30. Roscoe 'Nisi Prius' (18th ed.) 48.

(*y*) Weeks *v.* Sparke, 1 M. & S. 680. Ireland *v.* Powell, Peake's Ev. 15, Chambre, J. Chatfield *v.* Frier, 1 Price, 256. 1 Phill. Ev. (7th ed.) 250.

(*z*) Gleadow *v.* Atkin, 1 C. & M. 423, Bayley, J.

(*a*) See Percival *v.* Nanson, 7 Ex. 1; 21 L. J. Ex. 1.

(*b*) Middleton *v.* Melton, 10 B. & C. 317.

(*c*) Ibid., though if the effect is to revive a statute barred debt, it would be for the interest of the person making the entry, and therefore not admissible. Newbold *v.* Smith [1885], 29 Ch. D. 882.

of a child on a certain day, and referring to his ledger in which a charge for his attendance was marked as paid, was held admissible upon an issue as to the child's age (*d*). So, entries in the books of a tradesman by his deceased shopman, who thereby supplies proof of a charge against himself, have been admitted in evidence, as proof of the delivery of the goods, or of other matter there stated within his own knowledge (*e*). But where the effect of the entry is not to charge the servant, it is not evidence. Thus, in an action for the hire of horses, an entry by the plaintiff's servant, since dead, stating the terms of the agreement with the defendant, is not evidence (*f*). Such declarations are admissible only on the ground that they are against the *proprietary* or *pecuniary* interest of the party making them, and a declaration is not receivable in evidence, because it would subject the party to a prosecution if he were living. Thus, if A. were indicted for murder, and B., who was dead, had made a declaration that he was present when the murder was committed, though that declaration was against his interest, and would have subjected him to a prosecution if living, yet it would not be admissible after his death (*g*).

Declarations by Deceased Persons in course of Duty or Business.—An entry or declaration made by a disinterested person in the course of discharging a professional or official duty, is, in general, admissible after the death of the party making it. Thus field book entries made by a deceased surveyor for the purpose of a survey on which he was professionally employed, have been held admissible to prove the time of high water at ordinary spring tide, where that line was the boundary of land situate on the seashore (*h*). Such entries are not admitted, unless made contemporaneously with the doing or entry of something which it was the professional or official duty of the deceased to do or enter (*i*). If a declaration be made in the discharge of a duty by a deceased person is admissible, whether oral or written (*j*), the person who made the entry must be proved to be dead: Proof of his absence abroad is insufficient (*k*).

(*d*) Higham *v.* Ridgway, 10 East, 109, and see 2 Smith, L. C. (11th ed.) 327. Entries in the land-tax collector's books, stating A. B. to be rated for a particular house, and his payment of the sum rated, were held by Abbott, C.J., admissible evidence to shew that A. B. was in the occupation of the premises at the time mentioned. See Doe *v.* Cartwright, Ry. & M. 62. Barry *v.* Bebbington, 4 T. R. 514. Doe dem. Blayney *v.* Savage, 1 C. & K. 487.

(*e*) Taylor, Ev. (10th ed.) s. 698. Price *v.* Lord Torrington, 1 Salk. 285.

(*f*) Calvert *v.* Archbishop of Canterbury, 2 Esp. 646. Roscoe, 'Nisi Prius' Ev. (18th ed.), 55, 56. Webster *v.* Webster, 1 F. & F. 401. Smith *v.* Blakey, L. R. 2 Q. B. 326.

(*g*) Sussex Peerage claim, 11 Cl. & F. 85, Lord Lyndhurst, C. In that case a declaration by a clergyman that he had solemnized a marriage was held not to be admissible, on the ground that it might have subjected the clergyman to a prosecution for solemnizing the marriage. Standen *v.* Standen, Peake (N. P.), 45, was strongly questioned in this case.

(*h*) Mellor *v.* Walmesley [1905], 2 Ch. 164, (C. A.), applying Price *v.* Lord Torrington, 1 Salk. 288. Cf. Doe *v.* Skinner, 3 Ex. 84. R. *v.* Dukinfield, 11 Q. B. 678: 2 Smith, L. C. (11th ed.), 320. Sturla *v.* Freccia, 5 App. Cas. 623. Poole *v.* Dicas, 1 Bing. (N. C.) 649 (entry of dishonour of a bill of exchange).

(*i*) Mercer v. Dunne [1905], 2 Ch. 538, 566, Stirling, L.J.

(*j*) Stapylton *v.* Clough, 2 E. & B. 933; 23 L. J. Q. B. 5, Campbell, C.J. Sussex Peerage claim, 11 Cl. & F. 113. By the Jewish law the custom is that children are circumcised on the eighth day from their birth, and it is the duty of the Chief Rabbi to perform this rite, and make an entry of it in a book; but it has been held that an entry made by a Chief Rabbi of a circumcision is not evidence after his death. Davis *v.* Lloyd, 1 C. & K. 275, Denman, C.J., and Patteson, J.

(*k*) Cooper *v.* Marsden, 1 Esp. 2, Kenyon, C.J., where an entry by a bank clerk who had since gone to India was rejected. Cf. Stephen *v.* Gwenap, 1 M. & Rob. 121.

Declarations made in discharge of a duty are evidence only of the facts which it was the business of the writer to state (*l*), and must generally be contemporaneous with the act done, and be of matters within the knowledge of the declarant (*m*).

Where the deceased, who was a constable, had made a verbal report to his superior officer in the course of his duty, and in the absence of the accused, as to where he (the deceased) was going, and what he was going to do, the report was held admissible in evidence against the prisoner, the evidence being material to shew that the deceased intended to watch the prisoner's movements on the occasion in question (*n*). This ruling can apparently be justified, if at all, only on the ground that the report was officially made in the course of the duty of the deceased (*o*).

Certain other exceptions to the general rule against the reception of hearsay evidence, such as the admission of declarations in cases of pedigree, and of old leases, rent-rolls, surveys, &c., occur so seldom in criminal proceedings, that they will not be further noticed in this work (*p*).

(*l*) See Percival *v.* Nanson, 7 Ex. 1; 21 L. J. Ex. 1.

(*m*) Smith *v.* Blakey, L. R. 2 Q. B. 326. Doe *v.* Turford, 3 B. & Ald. 890. Mercer *v.* Dunne [1905], 2 Ch. 538, 565, Sterling, L.J.

(*n*) R. *v.* Buckley, 13 Cox, 293, Lush, J., after consulting Mellor, J. *Vide* Taylor, Ev. (10th ed.) s. 799.

(*o*) In the 6th edition of this work this case was treated under *res gestæ*, Vol. iii. p. 386.

(*p*) They are discussed in detail in Taylor, Ev. (11th ed.) s. 635-667. Phipson, Ev. (4th ed.) 275-277, 284-291. Roscoe, 'Nisi Prius' (18th ed.) 44-48, 53, 54; and see Archbold Cr. Pl. (23rd ed.) 318.

CANADIAN NOTES.

EVIDENCE.

Of the Nature and Kinds of Evidence—Improper Reception of Evidence.

The improper reception of evidence before a county Judge trying a case without a jury under the Speedy Trials Clauses will not entitle the prisoner to a new trial upon a case reserved, if the county Judge certifies therein that apart from the evidence objected to there was sufficient evidence to compel him to find the prisoner guilty. R. v. Tutty, 9 Can. Cr. Cas. 544.

Where no Substantial Wrong, the Conviction Stands.—See Code sec. 1019.

The reception of opinion testimony as to the illegality of the transactions in question was improper but as a case against the accused was sufficiently made out without that testimony and the trial was without a jury, the conviction should stand. R. v. Harkness (No. 2), 10 Can. Cr. Cas. 199.

If upon a case reserved the appellate Court finds that important depositions were improperly received in evidence, and is unable to say that no substantial wrong or miscarriage was occasioned by the irregularity, the conviction should be quashed notwithstanding sub-sec. (*f*) but a new trial may be ordered. R. v. Brooks, 11 Can. Cr. Cas. 188.

The intention is that the improper admission of evidence shall not in itself constitute a sufficient reason for granting a new trial, and that it is not necessarily a "substantial wrong or miscarriage." R. v. Woods (1897), 2 Can. Cr. Cas. 159 (B.C.).

But in the absence of a direct and unmistakable enactment the Court should not, upon a case reserved, affirm a conviction, where material evidence has been improperly received, because, in the opinion of the Court, there is sufficient good evidence to support a verdict. R. v. Dixon, 29 N.S.R. 462; R. v. Gibson (1886), 18 Q.B.D. 537.

Where a deposition of a deceased witness taken in an enquiry before a magistrate has been improperly received in evidence at the trial, and is of such a nature that it must have influenced the jury in their verdict, its improper admission is a "substantial wrong" entitling the accused to a new trial. R. v. Hamilton (1898), 2 Can. Cr. Cas. 390 (Man.).

Where an alleged confession is received in evidence after objection by the accused, and the trial Judge before the conclusion of the trial reverses his ruling and strikes out the evidence of the alleged confession, at the same time directing the jury to disregard it, the jury should be discharged and a new jury empanelled. R. v. Sonier, 2 Can. Cr. Cas. 501.

1. The circumstances that the incriminating portion of a dying declaration was made before the declarant's statement in the same interview of belief that he was dying, will not prevent the declaration being admissible in evidence.

2. A conviction on indictment is not to be set aside or a new trial ordered by reason of certain evidence being improperly admitted, unless the Appellate Court in considering the probable effect of such evidence upon the jury is of opinion that a substantial wrong or miscarriage was thereby occasioned. R. v. Sunfield, 13 Can. Cr. Cas. 1.

Sec. 1.—Direct and Circumstantial Evidence.

Circumstantial Evidence.—In order to justify a finding of guilt from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and must be incapable of explanation upon any other reasonable hypothesis than that of guilt. R. v. Telford, 8 Can. Cr. Cas. 223.

Inference from Conduct of Accused.—Where the accused charged with murder goes into the witness box on his own behalf, and then and there for the first time makes known his claim that he was a mere eye-witness of the murder, and that the principal witness for the prosecution had committed the deed, the trial Judge may properly direct the jury that they may draw inferences from the prisoner's previous silence on the matter of such claim, and consider whether the facts in evidence shewed the motive for such silence to be founded on a consciousness of innocence, *ex. gr.*, that he would thereby the better establish his innocence, or to be a design founded on a knowledge of guilt to advance a false defence at the last moment, and to take the prosecution by surprise. R. v. Higgins (1902), 7 Can. Cr. Cas. 68, 36 N.B.R. 18.

Circumstantial Evidence.—On a trial for murder, the Crown having made out a *primâ facie* case by circumstantial evidence, the prisoner's daughter, a girl of fourteen, was called on his behalf, and swore that she herself killed the deceased, without the prisoner's knowledge, and under circumstances detailed, which would probably reduce her guilt to manslaughter. Held, that the Judge was not bound to tell the jury that they must believe this witness in the absence of testimony to shew her unworthy of credit, but that he was right in leaving the credibility of her story to them; and, if from her manner he derived the impression that she was under some undue influence,

it was not improper to call their attention to it in his charge. R. v. Jones (1868), 28 U.C.Q.B. 416.

On a trial for murder the death of the deceased was shewn to have been caused by his being stabbed by a sharp instrument. It was proved that the prisoner struck the deceased, but neither a knife nor other instrument was seen in his hand. For the prisoner evidence was offered that on the day preceding the homicide the prisoner had a knife which could not have inflicted the wound of which deceased died; and that on that day the prisoner parted with it to a person who held it until after the crime was committed. This evidence was rejected as being too remote, and because it would not shew that it was impossible for the prisoner to have had a weapon that might have caused the wounds of which deceased died. R. v. Herod (1878), 29 U.C.C.P. 428.

Evidence.—In the consideration of circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, in order to justify the inference that he is guilty. R. v. Jenkins, 14 Can. Cr. Cas. 221.

Prisoner being indicted for the murder of H. the principal witness for the Crown stated that the crime was committed in a day stated, and that prisoner and one S. (who had previously been tried and acquitted) threw H. over the parapet of the bridge into the River Don. Counsel for the prisoner then proposed to prove by one D. that S. was at his place, fifty miles off, on that evening, but the Judge rejected the evidence, saying that S. might be called, and if contradicted might be confirmed by other testimony. S. was called, and swore that he was not present at the time, but he not being contradicted, D. was not examined. Draper, J., who tried the case, reserved the point for the consideration of the Court whether the evidence of D. might not be found to have been legally admissible. The Court held that the presence of S. was a fact material to the enquiry, and that D. should have been admitted when tendered, and a new trial was ordered. Robinson, C.J., observing, "It appears to me that any fact so closely connected with the alleged offence as to be in fact 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" . . "It is sufficient, I think, to make the evidence that was offered admissible, that it applied to the very fact to be determined, namely, by whom and how the deceased person came to his death. R. v. Brown (1861), 21 U.C.Q.B. 338.

Sec. 2.—Primary and Secondary Evidence.

Documentary Evidence.—See Canada Evidence Act, R.S.C. (1906), ch. 145, sec. 25.

Production of Books and Documents.—R.S.C. (1906) ch. 145, sec. 28.

Proof of Written Instrument.—R.S.C. (1906) ch. 145, sec. 32.

Sec. 3.—Of Hearsay Evidence.

Rape.—Evidence is admissible of the complaint and statement of a woman shortly after the alleged offence.

Upon the trial of a charge of rape the whole statement made by the woman by way of complaint shortly after the alleged offence, including the name of the party complained against and the other details of the complaint, is admissible in evidence as proof of the consistency of her conduct and as confirmatory of her testimony regarding the offence, but not as independent or substantive evidence to prove the truth of the charge. Whether or not the complaint was made within a time sufficiently short after the commission of the offence as to admit evidence of the particulars of the complaint, is a question to be decided by the Court under the circumstances of the particular case; but it is nevertheless the province of the jury to take into consideration the time which intervened, in weighing the probability of its truth. R. v. Riendeau (No. 2) (1901), 4 Can. Cr. Cas. 421, 10 Que. K.B. 584.

In the Riendeau Case the lapse of seven days between the date of the offence and the time of making complaint thereof was held insufficient under the circumstances to exclude testimony of the particulars of the complaint. But see R. v. Ingey (1900), 64 J.P. 106, noted in 3 Can. Cr. Cas., p. 305.

Upon a charge of rape, statements made by the complainant to a police officer on the day after the offence was alleged to have been committed and in response to his inquiries, the complainant having on the day of the offence complained to others of an assault but not of rape, are not admissible in evidence either as part of the *res gestæ* or as in corroboration. But if the jury acquit the accused of that offence but find him guilty of indecent assault, the verdict should stand notwithstanding the improper admissions in evidence of statements so made by the complainant after the alleged offence, if the other evidence in the case is ample to warrant the verdict of indecent assault. R. v. Graham (1899), 3 Can. Cr. Cas. 22 (Ont.).

Where the complainant makes a statement to a third party, not in the presence of the accused, such statement may be given in evidence, provided it is shewn to have been made at the first opportunity which reasonably offered itself after the commission of the offence, and has not been elicited by questions of a leading and inducing or intimidating nature. R. v. Spuzzum (1906), 12 Can. Cr. Cas. 287.

Where the depositions at the preliminary enquiry on which an indictment for rape is founded shew that the statements of the prosecutrix relied upon by the Crown to shew a complaint were not made spontaneously, but in answer to questions by the police officer, evidence of the answers so made is admissible against the accused at the trial. R. v. Bishop (1906), 11 Can. Cr. Cas. 30.

See also cases based on the same principle cited under sec. 292 (indecent assault), sec. 300 (attempted rape), sec. 301 (defiling child under fourteen).

On the trial of an indictment for an attempt to commit rape statements of the person assaulted, and of her companion present at the beginning of the assault, made to police officers, some four hours after the assault, that they had given a description of the assailant, but not stating what the description was, and evidence of the officers that in consequence of such description they had looked for the assailant were properly received, although statements of a like character had previously been made to other persons. And where the prosecutrix on cross-examination had stated that she had given a description of her assailant in the presence of her father, and that in consequence of such description her father had suspected a person other than the prisoner, the Crown was properly allowed to prove by the father what the description was that his daughter had given in his presence. R. v. Clarke (1907), 12 Can. Cr. Cas. 300.

In an Ontario case it has been held that in a civil action for damages under circumstances constituting the criminal offence of indecent assault, evidence is admissible of complaint made by the woman shortly after the assault was committed, in like manner as upon a criminal trial; and that complaint made by the woman to her husband, on her first meeting him some hours after the assault, but on the same day, was admissible in evidence under the circumstances of the case. The proof of such complaint by the evidence of both the woman and her husband is corroborative of the woman's evidence that she did not consent to the acts complained of. Hopkinson v. Perdue, 8 Can. Cr. Cas. 286. Where evidence of complaint is admissible on a charge of indecent assault, not only the fact of complaint may be shewn, but the particulars of the complaint. *Ibid.*

It is essential in all cases of indecent assault that complaint should have been made at the earliest opportunity after the offence, and evidence of such complaint may, under special circumstances, be received after the lapse of several days' delay. The fact of the girl being only seven years of age, that the act was committed without violence and that the girl did not realize the serious nature of the act, are circumstances which make a complaint made ten days afterwards admissible in evidence. R. v. Barron (1905), 9 Can. Cr. Cas. 196 (N.S.)

Under exceptional circumstances evidence of a complaint made by an adult female of an indecent assault may be admitted although five days had intervened between the assault and the complaint. R. v. Smith (1905), 9 Can. Cr. Cas. 21 (N.S.).

Evidence of complaint made by the woman on a charge of rape as corroboration of non-consent will be rejected if made only in answer to questions suggesting the guilt of the accused. R. v. Dunning, 14 Can. Cr. Cas., p. 461.

Sec. 4.—Dying Declarations.

A dying declaration is not admissible if there existed in the mind of the party making it a hope of recovery or a hope of escape from almost immediate death; but if there is a firm, settled expectation by deceased of impending death and no hope of recovery remaining in his mind, the declaration is admissible, although such belief was the result of panic and not well founded. The fact, that a person making a dying declaration subsequently entertains a hope of recovery, is irrelevant, except in so far as it may be evidence of his state of mind at the time of the declaration. R. v. Davidson (1898), 1 Can. Cr. Cas. 351 (N.S.); R. v. Hubbard, 14 Cox 565; R. v. Laurin (No. 1), 5 Can. Cr. Cas. 324; R. v. Laurin (No. 4), 6 Can. Cr. Cas. 104.

The rule as to the admissibility of dying declarations in evidence is thus stated in Taylor on Evidence, 6th ed., vol. 1, p. 643: "In general, it is no objection to their admissibility that they (the answers) were made in answer to leading questions, or obtained by earnest solicitations." R. v. Smith (1873), 23 U.C.C.P. 312.

It is essential to the *admissibility* of these declarations, and it is a preliminary fact to be proved by the party offering them in evidence, that they were *made under a sense of impending death;* but it is not necessary that they should be stated at the time to be so made; it is enough if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be expressly proved by the express language of the declarant, or be inferred from his evident danger, or the opinion of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case; all of which are resorted to in order to ascertain the state of the declarant's mind. Greenleaf on Evidence, 12th ed., vol. 1, p. 183, sec. 158; R. v. Smith (1873), 23 U.C.C.P. 312; R. v. McMahon (1899), 18 O.R. 502; R. v. Jenkins, L.R. 1 C.C.R. 187.

The Court must be satisfied that whatever statement is admitted in evidence must be shewn by credible testimony to have been made in full belief of approaching death, with an abandonment of all hope of life. R. v. Sparham (1875), 25 U.C.C.P. 143, 154; R. v. Osborne, 15 Cox C.C. 169.

The mere use of the words "If I die" would not alone defeat an emphatic declaration of abandonment of all hope on the same occasion; and that the second declaration was receivable in order to explain the first. R. v. Sparham (1875), 25 U.C.C.P. 143.

An objection that part of the statement was made in answer to a leading question is not sustainable. R. v. Smith (1873), 23 U.C.C.P. 312.

Evidence.—Where deceased was run over by a railroad car and died from his injuries a few hours afterwards, the statement of the deceased made immediately after he was run over in answer to a question as to how it happened, was held admissible. Armstrong v. Canada Atlantic (1901), 2 O.L.R. 219.

The essential element of a dying declaration is the abandonment of hope of recovery, and evidence tending to shew a belief that death was impending is not displaced by a statement of deceased to his physician and members of the family that he did not think he could recover, but he knew they would do all they could for him. R. v. Magyar, 12 Can. Cr. Cas. 114.

The jury should not be excluded during the preliminary enquiry as to whether a certain statement is admissible as a dying declaration. Rex v. Aho, 11 B.C.R. 114, 8 Can. Cr. Cas. 453.

The deceased must be proved to the satisfaction of the Judge to have been, at the time of making the declaration, (*a*) in actual danger of death and (*b*) to have abandoned all hope of recovery. If these conditions concur, it is immaterial that he lingered for several days or even weeks. R. v. Davidson, 1 Can. Cr. Cas. 351 (N.S.). The question as to whether there was a settled hopeless expectation of death is for the presiding Judge. R. v. Woods, 2 Can. Cr. Cas. 159 (B.C.).

The circumstance that the incriminating portion of a dying declaration was made before the declarant's statement in the same interview of belief that he was dying, will not prevent the declaration being admissible in evidence. R. v. Sunfield, 13 Can. Cr. Cas. 1.

The whole of the surrounding circumstances including the nature and extent of the wound and its immediate results are to be considered. R. v. Davidson, 1 Can. Cr. Cas. 351 (N.S.). In a shooting case, the declaration of the deceased that he was shot in the body and was "going fast" was held a sufficient indication of the settled and hopeless consciousness of the declarant that he was in a dying state. *Ibid.*

The declaration may be oral or written and a deposition read over to and signed by the deponent may be admissible in evidence as a dying declaration, although irregular as a deposition under sec. 999 of the Code because taken in the absence of the accused. R. v. Woods, 2 Can. Cr. Cas. 159 (B.C.); but, semble, its weight as evidence is impaired by that fact.

A written statement signed and sworn to by the deceased before a justice of the peace after being read over to him was admitted as a dying declaration in a homicide case, although in narrative form not embodying the exact words of the declarant. R. v. Magyar (1906), 12 Can. Cr. Cas. 114 (N.W.T.).

But the answers given to an interpreter and translated by him in narrative form to the person writing them down in the presence of the declarant may be admitted in evidence as a dying declaration, although the exact form of the questions was not proved. A dying declaration made by a person who cannot speak the language of the country, and proved only through an interpreter, is admissible if shewn to contain the exact purport of the statement without proof of the exact language of the declarant. R. v. Louie (1903), 7 Can. Cr. Cas. 347.

When Statements Admissible as Res Gestæ.—On a trial for murder by shooting, evidence of statements made by the person shot immediately after the shooting and while under apprehension of further danger from the accused and requesting assistance and protection therefrom, 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. Gilbert v. R. (1907), 12 Can. Cr. Cas. 125.

Statements not coincident, in point of time, with the occurrence of the shooting, 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. *Ibid.*

On the indictment of a prisoner for murder, a witness swore that he heard shots fired, that half an hour afterwards deceased came to his house and asked witness to take him in for he was shot, that witness did so, and deceased died some hours afterwards; it was held that evidence of statements made by deceased after being taken into the house (not provable as dying declarations) were inadmissible, as not forming part of the *res gestæ*, being made after all action on the part of the wrong-doer had ceased through the completion of the principal act, and after all pursuit or danger had ceased. R. v. McMahon (1889), 18 Ont. R. 502, following R. v. Bedingfield, 14 Cox 341, and R. v. Goddard, 15 Cox 7.

CHAPTER THE SECOND.

OF THE ADMISSIBILITY OF EVIDENCE.

SECT. I.—EVIDENCE CONFINED TO THE POINTS IN ISSUE.

EVIDENCE is not admissible unless it tends to prove the existence or non-existence of the facts in controversy upon which the legal responsibility of the defendant is to be determined. This rule is usually expressed by saying that the evidence must relate to facts in issue or facts relevant to facts in issue in the proceeding (*a*). In criminal proceedings it is even more necessary than in civil actions strictly to enforce the rule of confining the evidence to the points in issue, and that no question not relevant to the issues should be put to a witness (except for the purpose of impeaching the credibility of a witness who has sworn to relevant facts): for it is of the utmost importance to a person accused of crime that the facts laid before the jury should relate only to the transaction which forms the subject of the indictment on which he is being tried.

The application of the rule as to relevancy obviously depends on the circumstances of each particular case, and will not admit of a general demonstration (*b*). In the following pages will be found illustrations of particular cases in which the Courts have decided certain questions as to relevancy.

Acts, &c., of Conspirators, &c.—Where several are proved to have acted in concert in the preparation or commission of a crime, the acts and declarations of one in furtherance of that design may be received in evidence against another (*c*), though not present when the acts were done or the declarations made (*d*); and it makes no difference as to the admissibility of the act or declaration of one conspirator against another, whether the former is or is not indicted or tried with the latter; for to make one a co-defendant does not make his acts or declarations evidence against another any more than they were before; and the principle upon which they are admissible at all is, that the act or declaration of one is that of both united in one common design, a principle which is wholly unaffected by the consideration of their being

(*a*) See Steph. Dig. Ev. Art. 2. Taylor, Ev. (10th ed.) s. 5, 297, 298.

(*b*) Sir James Stephen (Dig. Ev. ch. 2) has attempted a definition of relevancy, which has been criticised and is not generally accepted even by commentators on the Indian Evidence Act, of which he was the draftsman. See Ameer Ali and Woodroffe, Indian Law of Evidence (4th ed.) intro. ch. 3.

(*c*) Declarations of a prisoner and seditious language used by him are of evidence against him to explain his conduct, and the nature and object of a conspiracy charged against him. R. *v.* Watson, 2 Stark. (N. P.) 134; 32 St. Tr. 1. Acts and declarations by one conspirator to a stranger not in furtherance of the common object do not fall within the rule. R. *v.* Hardy, 24 St. Tr. 199.

(*d*) R. *v.* Stone, 6 T. R. 527. See also R. *v.* Standley, R. & R. 305. R. *v.* Gogerly, ibid. 343. R. *v.* Bingley, ibid. 446.

jointly indicted (*e*). The rule applies to all cases where persons act in concert for the commission of crime, whether as accomplices or co-conspirators: nor is it material what the nature of the indictment is, provided the offence involve a common design or conspiracy; and a *primâ facie* case of the existence of the common purpose must be made before the evidence of acts and declarations of the co-conspirators are admitted in evidence (*f*). Upon an indictment for murder, if it appears that others, together with the prisoner, conspired to perpetrate the crime, the act of one done in pursuance of that intention is evidence against the rest (*g*). So where several persons are shewn to have been connected together in respect of a charge of forgery, what was said by one of them to a witness, when they were met together, on the subject of the forgery, is evidence against the others, although the person who said it is not upon his trial (*h*).

In R. *v.* Hunt (*i*), it was held that on the trial of an indictment for conspiracy, in unlawfully assembling for the purpose of exciting discontent and disaffection, the material points for the consideration of the jury are, the general character and intention of the assembly, and the particular case of each defendant as connected with that general character: and it is, therefore, relevant to prove, on the part of the prosecution, that bodies of men came from different parts of the country to attend the meeting, arranged and organised in the same manner, and acting in concert. On such a charge, it is also relevant to shew, that early on the day of the meeting, in a spot at some distance from the place of meeting (from which very spot a body of men came afterwards to the place of meeting), a great number of persons, so organised, had assembled, and had there conducted themselves in a disloyal, riotous, or seditious manner. And on such a charge proof was allowed to be given of resolutions, proposed by one of the defendants, at a large assembly in another part of the country, very recently held for the same professed object and purpose as were avowed by the meeting in question, that defendant, having acted at both meetings as president or chairman, on the ground that on a question of intention it was most clearly relevant to shew, against that individual, that, at a similar meeting, held for an object professedly similar, such matters had passed under his immediate auspices (*j*).

It appears to have been laid down in R. *v.* Hardy (*jj*) that papers found in the possession of conspirators with the prisoner, but subsequently to his apprehension, ought not to be read against him, unless there was evidence to shew their previous existence; for otherwise there was no evidence that the prisoner was a party to the letters. And on a prosecution for conspiracy, it was held that letters directed to the prisoners and intercepted at the post-office after their apprehension, were not admissible in evidence against them, as they had

(*e*) 2 Stark. Ev. (3rd ed.) 329.
(*f*) See Steph. Dig. Ev. Art, 4.
(*g*) Ibid.
(*h*) R. *v.* Stansfield, 1 Lew. 118, Littledale, J. See R. *v.* Tattersall, *post*, p. 2109, note (*j*).
(*i*) 3 B. & Ald. 566; 1 St. Tr. N. S. 171. The conduct of those who dispersed the meeting was held irrelevant to its intention or object. Cf. Redford *v.* Birley, 3 Stark. (N. P.) 87, 88, 91; 1 St. Tr. N. S. 1071.
(*j*) Ibid.
(*jj*) 24 St. Tr. 452.

never been in the custody of the prisoners, or in any way adopted by them (*k*). On an indictment for uttering a forged bank note, knowing it to be forged, it was held that a letter purporting to come from the prisoner's brother, and left by the postman pursuant to its direction at the prisoner's lodgings, after he was apprehended, and during his confinement, but never actually in his custody, could not be read in evidence as proof of his knowledge that the note was forged (*l*). But in R. *v.* Watson (*m*), it was held that papers found in the lodgings of a conspirator at a period subsequent to the apprehension of the prisoner might be read in evidence, although no absolute proof was given of their previous existence, where strong presumption existed that the lodgings had not been entered by any one in the interval between the apprehension and the finding, and where the papers were intimately connected with the objects of the conspiracy as detailed in evidence (*n*). In that case (*m*), one of the objections made to the admission of a paper found in the house of a co-conspirator was, that there was no proof that it had been published; and Algernon Sidney's case was cited: But the Court distinguished that case, and Abbott, J., said that he had always understood the ground of objection in Sidney's case was, not that the papers had never been published, but that they had no relation to the treasonable practices charged in the indictment, and he referred to 1 East P. C. 119, where it is said: 'Writings plainly applicable to some treasonable design in contemplation are clear and satisfactory evidence of such design, although not published.' If, say Foster and Blackstone, JJ., 'the papers found in Sidney's closet had been plainly relative to the other treasonable practices charged in the indictment, they might have been read in evidence against him.' That was the objection which had constantly been made to the reception of the evidence in Sidney's case. The paper there was not only an unpublished paper, but appeared to have been composed several years before the crime charged to have been committed. If there is any doubt whether the papers are connected with the common criminal design they are not admissible (*o*).

Matters found in the Possession or Control of the Accused.—In cases of treason and felony, and apparently also of misdemeanor, evidence may be given of the finding secreted in the house of the prisoner, but *after* his arrest, of *pièces de conviction* or articles suggesting his guilt of the offence charged (*p*).

In R. *v.* Watson (*q*), a charge of high treason, evidence was admitted of

(*k*) R. *v.* Hevey, 1 Leach, 237. See R. *v.* Cooper, *post*, p. 2101.

(*l*) R. *v.* Huet, 2 Leach, 820.

(*m*) 32 St. Tr. 1; 2 Stark. (N. P.) 140.

(*n*) A letter found upon the prisoner may be read, but it is no evidence of the facts it states. Thus on an indictment against a person employed in the post-office for secreting a letter containing a bill of exchange, the contents of the letter, which was found upon him, were held inadmissible to prove that the bill was enclosed in it. R. *v.* Plumer, R. & R. 264.

(*o*) R. *v.* Watson, *ubi sup.*

(*p*) See R. *v.* Hull, [1902], Queensland State Rep. 1, *post*, p. 2101, note (*w*). As to letters found on him, see *ante*, p. 2098.

(*q*) 2 Stark. (N. P.) 137; 32 St. Tr. 1. Lord Ellenborough, in giving his opinion on this point, cited a case from recollection, where a butler to a banker at Malton had been taken up upon suspicion of having committed a great robbery; the prisoner had been seen near the privy, and this circumstance having excited suspicion in the minds of the counsel, who considered the case during the assizes at York; at their instance, search was made, and in the privy all the plate was found, the plate

the finding of pikes in his house after his arrest. In R. *v.* Rickman (*r*), on a charge of arson, evidence was admitted of the finding secreted in the prisoner's house of property taken out of the house at the time of the fire, and on an indictment for larceny, though, as a general rule, it is not allowable to inquire into any stealing of goods not named in the indictment nor forming part of the same transaction (*s*), yet, for the purpose of ascertaining the identity of the person, it is often important to shew that other goods, which had been upon an adjoining part of the premises, were stolen in the same night, and were afterwards found in the prisoner's possession. This is strong evidence of the prisoner having been near the prosecutor's house on the night of the robbery; and in that point of view it is material (*t*).

On a trial for murder committed by the explosion of grenades, it appeared that the grenades had been ordered by A., and, after the apprehension of the prisoner, a letter was found in the prisoner's house, in the handwriting of A., and bearing a memorandum in the handwriting of the prisoner. The letter was held admissible, not because the writer was a co-conspirator with the prisoner, but because it was in the prisoner's possession, and because its contents were relevant to the present inquiry (*u*). But on an indictment against a merchant in London, for fitting out a ship to be employed in the slave trade, letters found on board the ship, when seized off the coast of Africa, were held inadmissible, as they were not traced in any way to the prisoner's knowledge (*v*).

The prisoner inserted an advertisement in a newspaper offering employment to persons who would transmit him one shilling's worth of postage stamps, and giving an address. The advertisement contained false statements, and upon his being apprehended six envelopes addressed to him, and containing a reply to the advertisement, and a shilling's worth of postage stamps were found upon him. And 281 other letters, contained in a sealed bag, were produced on the trial by a clerk from the post-office, and on the bag being opened, the letters were taken out and

was produced, and the prisoner was in consequence convicted; he had been separated from the custody of the plate, since he had been confined in York Castle for some time; but no doubt was entertained as to the admissibility of the evidence. Abbott, J., also observed that an assize had scarcely ever occurred where it did not happen that part of the evidence against a prisoner consisted of proof that the stolen property was found in his house after his apprehension. See R. *v.* Courvoisier, 9 C. & P. 362. Dillon *v.* O'Brien, 16 Cox, 345; 20 L. R. Ir. 316.

(*r*) 2 East, P. C. 1035.

(*s*) R. *v.* Butler, 2 C. & K. 221, *post*, p. 2102.

(*t*) 1 Phill. Ev. (7th ed.) 169. See R. *v.* Rooney, 7 C. & P. 517, *post*, p. 2105, note (*o*).

(*u*) R. *v.* Bernard, 8 St. Tr. (N. S.) 887; 1 F. & F. 240, Campbell, C.J., Pollock, C.B., Erle and Cresswell, JJ. The letter alluded to the assassination of the Emperor of the French. In R. *v.* Hare, 3 Cox, 247, the two prisoners lodged together, and a portmanteau was found in their lodgings, which R. said was H.'s, and the prosecutor's invoice for the stolen shawls was found in it, and also a paper folded in the shape of a letter, and endorsed in R.'s handwriting, 'J. R., private,' and inside this was an inventory of the shawls that had been pawned, but this was not in R.'s handwriting. It was held that this inventory was not admissible; for *non constat* that the words 'private' and the prisoner's name might not have been written previously to the writing on the other side. 'But *quære* whether, as the portmanteau was in the prisoner's lodgings, they were not both of them in possession of its contents? If the shawls had been in the portmanteau, would they not have been in the possession of both prisoners?' C. S. G.

(*v*) R. *v.* Zulueta, 1 C. & K. 215. Maule and Wightman, JJ.

read, and appeared to be addressed to the prisoner replying to his advertisement, and enclosing each one shilling's worth of postage stamps. These 281 letters had been stopped and opened by the post-office authorities before delivery to the prisoner, and had never been in his possession, or their contents brought to his knowledge; nor was there any proof as to their authenticity or otherwise: but they were held admissible against the prisoner on an indictment charging him with obtaining and attempting to obtain money by false pretences from four persons other than the writers of the letters (*w*).

Papers found in the prisoner's custody, which plainly relate to the design charged, may be read in evidence without proof that they are in his handwriting (*x*).

In a question put by the House of Lords to the judges, in the course of the proceedings in Queen Caroline's case (*y*), it was assumed that proof of the existence of a conspiracy between the prosecutor and others to suborn witnesses against the accused is a legitimate ground of defence. Abbott, C. J., in delivering their opinion, observed that the judges understood that such an assumption had been made in the question put to them, and that the House did not ask their opinion on that point; from which it may perhaps be inferred that the judges had doubts whether such a defence is allowable.

Sect. II.—Acts Forming Part of the Same Transaction.

Acts forming Part of the same Transaction.—The evidence for the prosecution is, as a general rule, limited to the proof of the facts relating to the particular transaction charged in the indictment: and it is not competent to prove the prisoner guilty of the crime charged by proving him guilty of another distinct offence. But when several offences are connected together and form part of one entire transaction, evidence of an offence not specifically charged in the indictment may be given to prove the character of the offence which is charged (*z*). In other words, the prosecution is not debarred from telling the whole story of the prisoner's doings because it involves evidence as to other crimes which cannot be, or are not specifically, charged in the indictment which is being tried (*a*).

On an indictment for abusing a child under the age of ten years, the first occasion spoken to by the child was a Thursday morning, on which the prisoner threatened to beat her if she told, and it was held that evidence of subsequent perpetrations of the offence on Saturday and Monday was admissible. Willes, J., said: 'The practice is, no doubt, in the discretion of the Court, to call on the prosecution to elect, but that is a course never taken where the acts are all in substance part of the same transaction; and here, in my opinion, it is so. It has repeatedly appeared

(*w*) R. *v.* Cooper, 1 Q.B.D. 19; 45 L.J. M.C. 15. In R. *v.* Hull [1902], Queensland State Rep. 1, letters written to a person indicted for obtaining property by false pretences, shewing that he had been engaged in a long series of frauds of the same character and found in his possession, were held admissible to prove intent; but a letter found in his possession tending to his bad character was rejected.

(*x*) 1 East, P. C. 119. See R. *v.* Plumer, R. & R. 264.

(*y*) 2 B. & B. 310.

(*z*) R. *v.* Ellis, 6 B. & C. 145, Bayley, J.

(*a*) Cf. R. *v.* Lane, 1 Cr. App. R. 158, where evidence of incitement to commit another offence was held to be part of the *res gestæ*.

to me, in cases of this sort, that the man, by a threat of violence, deters the child from complaining, and thus acquires a species of influence over her by terror, which enables him to repeat the offence on subsequent occasions, and this seems to me to give a continuity to the transaction which makes such evidence properly admissible (*b*).

On an indictment for a burglary and stealing goods, the prosecutor failed to prove any nocturnal breaking, or any larceny subsequent to the time when the prisoners entered the house, which must have been after three o'clock in the afternoon of the day on which the offence was charged to have been committed. It was then proposed to abandon the charge of burglary, and to give evidence of a larceny by the prisoners of some of the articles mentioned in the indictment, though committed before three o'clock on the day on which they were charged to have entered the house; but the Court refused to receive the evidence, on the ground that it was a distinct transaction (*c*).

On an indictment for stealing a shilling, it appeared that on the arrest of the prisoner the shilling, which had been marked, was found in his possession, and the constable asked him if he had any more of the prosecutor's money about him, on which he produced three half-crowns, and said something about them. This statement was ruled to be inadmissible as relating to another felony (*d*).

Where several offences are all parts of one entire transaction, evidence of all is admissible on the trial for any one of them. A distinction is sometimes drawn according as the indictment under trial is for felony or misdemeanor: but this appears now to be regarded as immaterial, except in so far as the judge in his discretion may consider it fair to limit the evidence when the trial is for felony.

On an indictment for stealing six shillings, it was proved that the prisoner was a shopman in the employ of the prosecutrix, and, his honesty being suspected, on a particular day the son of the prosecutrix put seven shillings, one half-crown, and one sixpence, marked in a particular manner, into a till in the shop, in which there was no other silver at that time, and the prisoner was watched by the prosecutrix's son, who from time to time went in and out of the shop, occasionally looking into and examining the till, while customers came into the shop and purchased goods. Upon the first examination of the till it contained 11*s*. 6*d*.; after that, the son of the prosecutrix received one shilling from a customer and put it into the till; afterwards another person paid one shilling to the prisoner, who was observed to go with it to the till, to put his hand in, and withdraw it clenched. He then left the counter, and was seen to raise his hand clenched to his waistcoat pocket. The till was examined by the witness, and 11*s*. 6*d*. were found in it instead of 13*s*. 6*d*. which ought to have been there. The prosecutrix was proceeding to prove other acts of the prisoner, in going to the till and taking money, when Wilde, Serjt., objected that evidence of one felony had already been given, and that the prosecutrix ought not to be allowed to proved several felonies. The

(*b*) R. *v.* Reardon, 4 F. & F. 76.

(*c*) R. *v.* Vandercomb, 2 Leach, 708. The prisoners were therefore acquitted, but were subsequently indicted for the other offence, and convicted, *vide ante*, p. 1099.

(*d*) R. *v.* Butler, 2 C. & K. 221, Platt, B.

learned judge overruled the objection; and the son of the prosecutrix proved that, upon each of several inspections of the till after the prisoner had opened it, he found a smaller sum than ought to have been there. The prisoner having been found guilty, application was made to the Court of King's Bench for a rule for staying the judgment, on the ground that the prosecutor ought to have been confined in proof to one felony; but the Court was of opinion that it was in the discretion of the judge to confine the prosecutor to the proof of one felony, or to allow him to give evidence of other acts, which were all part of one entire transaction (*e*).

So where on an indictment for stealing pork, a bowl, some knives, and a loaf of bread, it appeared that the prisoner entered a shop and ran away with the pork, and returned in about two minutes, replaced the pork in a bowl, which contained the knives, and took away the whole together; in about half-an-hour after he came back to the shop, and took away the loaf of bread. Littledale, J., said: 'This taking away the loaf cannot be given in evidence upon this indictment. I think that the prisoner's taking the pork and returning in two minutes, and then running off with the bowl, must be taken to be one continuing transaction; but I think that half-an-hour is too long a period to admit of that construction. The taking of the loaf therefore is a distinct offence' (*f*). So where the prisoner was indicted for stealing a halfpenny, and the prosecutor had marked a quantity of pence and halfpence, and locked them up in a bureau, and had missed one halfpenny on July 9, and others on the 13th; Erle, J., held that the prosecutor might prove that after the 13th the prisoner was searched, and all the marked pence found upon her, and that he could not say which of them was stolen on the 9th, but it must be one of them; for it mattered not that the evidence might apply to another charge if it were relevant and necessary for the support of this charge (*g*).

In R. *v.* Wylie (*h*), Lord Ellenborough said that he remembered a case where a man committed three burglaries in one night; he took a shirt at one place and left it at another; and they were all so connected that the Court went through the history of the three different burglaries. So where two burglaries were committed in the town of Uttoxeter, one at K.'s and another at B.'s, between twelve and three o'clock of the same night, and at B.'s a crowbar was found, which fitted some marks on a chest broken open at K.'s, and which was proved to have been in the possession of the prisoners previously to the night in question; Wightman, J., on the authority of R. *v.* Butler (*i*), allowed evidence to be given of the finding of the crowbar at B.'s, and also of the finding of the goods stolen the same night from B.'s in the possession of the prisoners, as such evidence tended to shew that the prisoners had been at B.'s, and that they might have left the crowbar there (*j*). So where on an indictment for

(*e*) R. *v.* Ellis, 6 B. & C. 145. The indictment had been removed by *certiorari* from the city of Exeter.

(*f*) R. *v.* Birdseye, 4 C. & P. 386.

(*g*) R. *v.* May, 1 Cox, 236. Erle, J., told the jury to convict, if they were satisfied that all the halfpence were identified, but to acquit if any was not identified.

(*h*) 1 B. & P. (N. R.) 94; S.C. as R. *v.* Whiley, 2 Leach, 983.

(*i*) *Ante*, p. 2102.

(*j*) R. *v.* Stonyer, Stafford Sum. Ass. 1843. MSS. C. S. G.

breaking into a counting house of the M. Railway Station at N. W., it was proposed to prove that the prisoners on the same night had successively broken into the station of W., K., N. W., and F., N. W., being at some distance from the other stations, and that some of the property taken from N. W. had been found on two of the prisoners, and property taken from another station on the third, and that jemmies had been found on each prisoner which corresponded with marks on doors and drawers broken open at one or other of the stations; Bramwell, B., said: 'I think that evidence of the acts of the prisoners during the same night is admissible in order to explain why none of the property taken from N. W. was found upon one of the prisoners. If it is proved that he was found in possession of other property stolen from another station on the same night, that, with other circumstances, might be evidence that all the men had been engaged in each burglary, and that the third man had received his share of the booty wholly from what was taken from the other stations. The events of that night, relating to these burglaries, are so intermixed that it is impossible to separate them (*k*).

Upon an indictment against two prisoners, charging each in different counts as principals in the first degree in committing a rape, and also as principals in the second degree in other counts, evidence has been held admissible that the prisoners, together with three other men, committed at the same place and time, the one after the other successively, rapes upon the body of the prosecutrix, the others aiding and abetting in turn (*l*). So where there were three indictments against the prisoner for setting fire to three ricks belonging to three different persons, and it appeared that the ricks, which were in sight of each other, were set on fire one immediately after the other, but the strongest evidence being as to the last, that indictment was tried first; the confession of the prisoner relating to all the three ricks, and the evidence of an accomplice as to all, was admitted, as the whole constituted part of the same transaction (*m*). And where an indictment for arson contained five counts for setting fire to five different houses, which were all in one row, and the fire from the one first on fire had communicated to the others, it was held that, as it was all one transaction, the evidence as to all the houses was admissible (*n*). So where upon an indictment against the prisoners for robbing W., there being another indictment against them for robbing U. of a watch, it appeared that W. and U. were travelling in a gig, when they were stopped and robbed; Littledale, J., held that evidence might be given that U. lost his watch at the same time and place that W. was robbed, but that evidence was not admissible of the violence that was offered to U. One question in the case was, whether the prisoners were at the place in question when W. was robbed; and as proof that they were so, evidence was admissible that one of them had got something which was lost there at

(*k*) R. *v.* Cobden, 3 F. & F. 833.

(*l*) R. *v.* Folkes, 1 Mood. 354. The same was held in R. *v.* Lea, 2 Mood. 9. 'There several rapes committed in one boat were given in evidence; but other rapes committed in another boat, to which the prosecutrix was carried from the first boat, were not offered in evidence, as they were the subject of another indictment.' C. S. G.

(*m*) R. *v.* Long, 6 C. & P. 179, Gurney, B.

(*n*) R. *v.* Trueman, 8 C. & P. 727. Erskine, J., refused to put the prosecutor to elect as to which count he would proceed with.

that time (*o*). Upon an indictment for robbing G. and H. P., it appeared that the prisoners attacked and robbed G. and H. P., when they were walking together, and Tindal, C.J., held that the prosecutor was not bound to elect as to which robbery he would proceed. It was all one act, and one entire transaction; the two prosecutors were assaulted and robbed at one and the same time, and there was no interval of time between the assaulting and robbing of the one and the assaulting and the robbing of the other. If there had been, the felonies would have been distinct, but that was not so in the present case (*p*). So where the prisoner was indicted (*q*) for having in his possession an edger, contrived for marking money round the edges, and proof being offered that the prisoner had used this instrument for graining the edges of counterfeit half-crowns, it was objected that the act of coining being a species of treason higher in degree than the one the prisoner was charged with, the greater offence ought not to be given in evidence to prove the less; but Burrough, J., held that the evidence was admissible, as whatever went to prove that the prisoner was guilty of the offence he was charged with was evidence, however it might also go to shew him guilty of another offence (*r*).

The prisoner was indicted (*s*) for stealing from the mine of H. J. G., coal, the property of H. J. G., and in the same count he was charged with stealing from the mines of thirty other proprietors other coal, the property of each of such proprietors (*t*). The prisoner had been lessee of a mine, which he had been working from November, 1842, till January, 1848, and in opening the case it was stated that he had, from the shaft opened to work this mine, carried on extensive workings of coals by means of levels, driftways, tunnels, cuttings, and drains; and by means of these workings he had gotten coal belonging to about forty different proprietors, without their sanction or knowledge; and in doing so had undermined part of the yard of the parish church, 144 yards of the main street of Wigan, and 220 private houses; and he had unlawfully possessed himself of £10,000 worth of the coal of other persons. It was urged that it was not competent to proceed under this indictment for felonies so entirely distinct. One of such felonies might have been committed upwards of four years before another of them, and by means of different workmen, and under the superintendence of different agents. Each severance of coal being a felony, there were thirty-one distinct felonies charged in each count, and if no restriction were put on the

(*o*) R. *v.* Rooney, 7 C. & P. 517. Littledale, J., added, 'I think it makes no difference that Urwick's watch is the subject of another indictment.' 'Suppose U. had not been there at all, and that when W. was robbed a watch had been under the seat of his gig, and that after the robbery he had discovered that the watch was missing, I have no doubt that evidence might be given of the loss of the watch at the place.'

(*p*) R. *v.* Giddins, C. & M. 634.

(*q*) Under 8 & 9 Will. III. c. 26, s. 1 (rep.). See 24 & 25 Vict. c. 99, s. 14, *ante*, Vol. i. p. 350.

(*r*) R. *v.* Moore, 2 C. & P. 235. See R. *v.* Zeigert, 10 Cox, 555 (forgery).

(*s*) Under 7 & 8 Geo. IV. c. 29, s. 37, repealed in 1861 and replaced by 24 & 25 Vict. c. 96, s. 38, *ante*, p. 1258.

(*t*) 'There were other counts charging the prisoner with the severing of coal with intent to steal, and with common larceny; and in each count the coal was laid as the property of H. J. G., and of the said thirty other separate and distinct owners. *Quære*, whether all the counts except those for common larceny, were not clearly bad, as charging thirty-one separate felonies, which by no possibility could be committed together?' C. S. G.

prosecution, there would be laid before the jury, and the prisoner would have to answer, evidence relating to many thousands of distinct felonies. What would be an unanswerable defence to one charge, might be wholly inapplicable to another, and every defence might require a different set of witnesses. Erle, J.: 'The question is, what, in such a case as this, is one entire transaction. It may be that the making a level, a tunnel, a drain, and a cutting, may also be necessary in order to take particular coal; if so, all would, I think, be part of one transaction, and might properly be given in evidence. I cannot interfere at present.' The evidence for the prosecution extended to all the operations mentioned in the opening of the case; to the getting the coal continuously during a period for upwards of four years, to operations conducted by different underlookers and by many and different workmen, and to coals taken from the coal fields of thirty or forty different owners. On the case for the prosecution closing, the counsel for the prisoner urged that the prosecution ought to elect some single charge; which he declined, unless directed so to do. Erle, J.: 'I will not so direct; but for convenience sake the prisoner's counsel may address himself to the charge of stealing the coal taken under the churchyard. The whole workings may be relied on to shew a felonious intent, though they may go into twenty different counties, and into the separate properties of twenty different persons, and extend over fifteen or twenty years, if the mining operations be continuous for that time.' In summing up, Erle, J., said: 'It has been urged that the taking of each day was a separate felony, and that only one felony could be inquired into by you on this indictment; but I should say that as long as coal was gotten from one shaft, it was one continuous taking, though the working was carried on by means of different levels and cuttings, and into the lands of different people. As, however, complaint was made by the counsel for the prisoner, I have thought it better that your attention should be confined to the charge of taking the coal of one owner; but in order to shew that when the prisoner took the coal of G. he knew he was out of his boundary, I have permitted it to be proved that he has gone out of his boundary in many other instances, and into the property of many other persons, taking in all 15,000 yards of coal' (*u*).

Upon an indictment against a son for stealing on November 20, 1843, twenty-six pairs of boots, twenty pairs of shoes, and 128 pounds weight of leather, and against his father for receiving the said goods, knowing them to have been stolen, it appeared that the son from the beginning of March, 1843, till November 20, 1843, was in the employ of the prosecutors, who were curriers and dealers in boots and shoes. The two prisoners lived together at K. till the end of April; when the elder removed to P., taking with him a hamper, which passed and repassed afterwards repeatedly between the father and the son down to October. On November 10 the lodgings of the son at K. were searched, and a quantity of shoes and leather found there belonging to the prosecutors, and at the same time and place sundry letters were found from the father to the son, which induced the prosecutors to search the shop of the father at P.,

(*u*) R. *v.* Bleasdale, 2 C. & K. 765.

and in that shop there were also found boots, shoes, and leather of the prosecutors, of the value of about £150, and letters from the son to the father. It was proposed, on the part of the prosecution, to put in the letters, both from the father to the son and from the son to the father; these letters were dated at various periods between May and October following, and referred to the transmission from the son to the father of goods of the nature of those found in the father's house. It was objected that these letters could not be read, or at any rate not all of them. As they referred continually to the transmission of property, the effect of giving them in evidence would be to assist the proof of a single felony by proof of other felonies. It was answered that it did not appear that there had been more than one taking and one receiving; and at all events the letters were evidence against the father, as shewing guilty knowledge. Maule, J., said: 'Judges are in the habit of not allowing several felonious acts to be given in evidence under one indictment, where, as will often be the case, the effect of so doing will be to create confusion, or to surprise the prisoner, or otherwise embarrass the defence. But here embarrassment and injustice would be produced by putting the prosecutors to their election. They cannot possibly know at what time the several larcenies and receivings (if more than one) took place. The whole seems to constitute a continuous transaction; therefore I shall admit evidence relating to any takings and receivings under the circumstances, provided the indictment contains corresponding charges' (*v*).

The question of the admissibility of evidence of other offences constituting parts of the same transaction does not depend on whether another indictment is or is not depending in respect of the other offences to which the evidence relates (*w*). In such cases, it is in the discretion of the judge to admit or reject evidence of other felonies which form the subject of other indictments, and that such discretion will be guided by the evidence appearing to be necessary or unnecessary in support of the indictment on which the prisoner is being tried (*x*). Where there were three indictments against a prisoner for stealing notes from three letters, and it appeared that the prisoner stole notes out of one letter, and then opened another letter, and took out of it the notes it contained, and substituted for them notes to an equal amount out of the first letter, on the trial for stealing the notes out of the first letter Patteson, J., held that the notes stolen out of the second letter might be traced to the prisoner, because such evidence was essential to the chain of facts necessary to make out the case. But where on an indictment for night-poaching, in order to prove the identity of one of the prisoners it was proposed to prove that a coat lost by one of the keepers on the occasion in question had been found in the house of that prisoner, there being a separate indictment for stealing the coat; Patteson, J., refused to receive the evidence, unless the prosecutor consented to an acquittal on the indictment for larceny (*y*), and stated that he refused to admit the

(*v*) R. *v.* Hinley, 2 M. & Rob. 524. See R. *v.* Firth, L. R. 1 C. C. R. 172: 38 L. J. M. C. 54.

(*w*) See R. *v.* Rooney, 7 C. & P. 517. Littledale, J. R. *v.* Zeigert, 10 Cox, 555 (forgery), and *ante*, p. 2105. The contrary was at one time held, see R. *v.* Smith, 2 C. & P. 633.

(*x*) R. *v.* Salisbury, 5 C. & P. 155, and MS. C. S. G.

(*y*) R. *v.* Westwood, 4 C. & P. 547.

evidence in the previous case on the ground that he did not think it necessary in support of the offence charged (*z*).

Sect. III.—Acts not Forming Part of the Incriminated Transaction.

The leading case as to the admissibility of acts of the accused not forming part of the incriminated transaction is Makin *v.* Attorney-General for New South Wales (*a*), where the rule is thus laid down. 'Although it is not competent for the prosecutor to adduce evidence tending to shew 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 shew 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.'

This rule applies to cases in which it is sought to prove criminal intent, &c., or design, or system, or guilty knowledge, or to rebut a defence of accident or the like.

Intent.—On an indictment for maliciously shooting, if it is uncertain whether the shooting was by accident or design, proof may be given that the prisoner at another time intentionally shot at the same person (*b*). On an indictment for arson of a house, previous attempts to set it on fire have been held admissible, though not proved to have been made by the prisoner, for the purpose of shewing that the fire was not accidental (*c*). On an indictment for setting fire to a rick by discharging a gun very near to it, evidence has been held admissible that it had been on fire the day before, and that the prisoner was then near it with a gun in his hand (*d*). Where upon an indictment for robbery it appeared that the prisoners went with a mob to the prosecutor's house, and one of the mob went up to him, and very civilly, and, as the prosecutor then believed, with a good intention, advised him to give them something to get rid of them, and prevent mischief, upon which the prosecutor gave them the money laid in the indictment; it was held that for the purpose of shewing that this was not *bonâ fide* advice, but, in reality, a mere mode of robbing the prosecutor, evidence was admissible of other demands of money made by the same mob at other houses, before and after the particular transaction at the prosecutor's house, but in the course of the same day, and when any of the prisoners were present (*e*). Upon an indictment for administering sulphuric acid to horses with intent to

(*z*) R. *v.* Salisbury, *ubi sup.*

(*a*) [1894] A. C. 57. Cf. Fost. Cr. L. 246.

(*b*) R. *v.* Voke, R. & R. 531.

(*c*) R. *v.* Bailey, 2 Cox, 311, Pollock, C.B. Cf. R. *v.* Taylor, 5 Cox, 138.

(*d*) R. *v.* Dossett, 2 C. & K. 306, Maule, J. See R. *v.* Harris, 4 F. & F. 342. Wills on Circumstantial Ev. (5th ed.), 58, 59. R. *v.* Garner, 4 F. & F. 346.

(*e*) R. *v.* Winkworth, 4 C. & P. 444, Parke, J. Alderson, J., and Vaughan, B., and Lord Tenterden, C.J., afterwards concurring in opinion.

kill them, it has been held that the prosecutor was not confined to the proof of a single act of administering, but that other acts of administering may be given in evidence to shew whether it was done with the intent charged in the indictment (*f*). Upon an indictment for robbing the prosecutor of his coat, the robbery having been committed by the prisoner's threatening to charge the prosecutor with an unnatural crime, Holroyd, J., received evidence of a second ineffectual attempt to obtain a £1 note the following evening by similar threats, and upon a case reserved the judges held the evidence admissible to shew that the prisoner was guilty of the former transaction (*g*). On a prosecution for a libel, the publication of other libels by the defendant, not laid in the indictment, may be given in evidence, to shew *quo animo* the defendant published that in question (*h*). On an indictment for murder, former grudges and antecedent menace are admitted to be given in evidence as proof of the prisoner's malice against the deceased (*i*). And where three persons were charged with uttering a forged note, it was held that other acts done by all of them jointly, or any of them separately, shortly before the offence, might be given in evidence to shew the confederacy and common purpose, although such acts constituted distinct felonies (*j*). On an indictment for sending a threatening letter, prior and subsequent letters, from the prisoner to the party threatened, may be given in evidence, to explain the meaning and intent of the particular letter on which the indictment is framed (*k*). Upon an indictment for the murder of H., it was opened that great enmity subsisted between P., the rector of a parish, and his parishioners, and that the prisoner had used expressions of enmity against the rector, and had said he would give £50 to have him shot, and that the rector was shot by H., and that the persons who had employed him, fearing they should be discovered as having hired him to murder the rector, had themselves murdered H.; and that H.'s bones had been found in a barn occupied by the prisoner at the time of the murders. After evidence had been given of declarations of the prisoner, shewing that he entertained malice against the rector, it was proposed to shew that H. was the person by whom the rector was murdered; it was objected that this was not

(*f*) R. *v.* Mogg, 4 C. & P. 364, Park, J.

(*g*) R. *v.* Egerton, R. & R. 375; cited by Holroyd J., in R. *v.* Ellis, 6 B. & C. 145.

(*h*) *Vide ante*, Vol. i. p. 1038. Stuart *v.* Lovell, 2 Stark. (N. P.) 95. Cf. R. *v.* Pearce, 1 Peake, 103 (3rd ed.). Finnerty *v.* Tipper, 2 Camp. 72. Odgers on Libel (4th ed.), 366. So subsequent letters relating to the same subject although libellous themselves, are admissible in an action for libel, and although the libel needs no explanation. Pearson *v.* Lemaitre, 5 M. & Gr. 700.

(*i*) 1 Phill. Ev. 476. So the declarations of the prisoner, and the seditious language used by him, and clearly admissible in evidence on an indictment for high treason, explaining his conduct, and shewing the nature and object of the conspiracy. R. *v.* Watson, 2 Stark. (N. P.) 134; 32 St. Tr. 1. On a trial for murder, Cresswell and Williams, JJ., were inclined to reject evidence of what the prisoner had done to the deceased ten days before the cause of death, no declaration accompanying the act: neither the evidence proposed to be given nor the cause of death is stated. The objection was that the act done could have no tendency to shew subsequent intention. R. *v.* Mobbs, 6 C. & P. 223. See the discussion of this case in R. *v.* Chomatsu Yabu [1903], 5. West Australia Rep. 35, *post*, p. 2112, note (*x*). In many cases evidence of previous violence has been given in cases of murder without objection, and such evidence clearly tends to prove ill-will. In R. *v.* Buckley, 13 Cox, 293, on an indictment for murder of a police constable, depositions of the deceased against the accused on another charge were admitted to prove malice or motive.

(*j*) R. *v.* Tattersall, MS. Bayley, J.: 1 B. & P. 94, *cit*: and R. & R. 113.

(*k*) R. *v.* Robinson, 2 Leach, 749: 2 East, P. C. 1110.

admissible, as the rector's death was not the subject of the present inquiry. Littledale, J., said: 'I think that I must receive the evidence. On the part of the prosecution it is put thus—that the prisoner and others employed H. to murder P., and that he being detected, the prisoner and others then murdered H., to prevent a discovery of their own guilt; now, to ascertain whether or not that was so in point of fact, it is necessary that I should receive evidence respecting the murder of P.' (*l*).

Upon an indictment for murder by poisoning with arsenic, on November 3, 1816, evidence was given, without objection, that on October 19 the deceased drank tea with the prisoner, upon which occasion she was seized with sickness and much indisposed; and that on November 3, she again drank tea with the prisoner, and was afterwards taken ill in the same manner, but more violently than before (*m*). So on an indictment for murder by prussic acid, administered in porter on January 1, evidence was given, without objection, that in September previously the prisoner had visited the deceased and sent for some porter, and that after the prisoner left the deceased was very sick and ill (*n*).

On a charge of having wilfully poisoned another, it was a question whether the accused knew a certain white powder to be arsenic, and it was held that evidence would be admissible to shew that he knew what the powder was, because he had administered it to another person who had died, although that might be proof of a distinct felony (*o*).

The prisoner was indicted for the murder of her husband, Richard Geering, in September, 1848, by arsenic. She was also charged in three other indictments with the murder of her son George by arsenic in December, 1848, of her son James by arsenic in March, 1849, and of an attempt to murder her son Benjamin by arsenic in April, 1849 (*p*). On the part of the prosecution evidence was tendered of a *post-mortem* analysis of the intestines, of the contents of the stomach, heart, &c., of Richard, James, and George, and also of a medical analysis of the vomit of Benjamin, who was still alive, in order to shew that arsenic had been taken into the stomach of the three latter persons; that two of them had died of poison, and that the symptoms of all the four were the same. Evidence was also tendered that the four, during their lives, lived with the prisoner, and formed part of her family; that she generally made tea for them, cooked their victuals, and distributed the same to them on their leaving the house to go to their work in the morning. It was objected that the facts proposed to be proved took place after the death of the husband, and that the effect of them was to shew that the three cases of poisoning were felonious (*q*). It was answered that the evidence was admissible in order to prove, not that the prisoner had feloniously

(*l*) R. *v.* Clewes, 4 C. & P. 221. Cf. R. *v.* Hopkins, 10 Cox, 229; and R. *v.* Buckley, 12 Cox, 357 (statements by a mother that an infant for whose death she was being tried 'was no good').

(*m*) R. *v.* Donnall, 2 C. & K. 308, n., Abbott, J.

(*n*) R. *v.* Tawell, 2 C. & K. 309, n., Parke, B.

(*o*) R. *v.* Dossett, 2 C. & K. 306, Maule, J.

(*p*) Benjamin had stated to the surgeon who attended him, that his symptoms were precisely the same as those exhibited by his father and his two brothers, and this statement had been reduced into writing, and read over to the prisoner, and she said, 'It is quite right.'

(*q*) It was conceded that the evidence would have been admissible had the deaths taken place *previously* to the death of the husband.

poisoned the deceased, but that the deceased had in fact died of poison administered by some one; and, secondly, for the purpose of proving that the death of the husband was not accidental. Pollock, C.B.: 'I am of opinion that evidence is receivable that the death of the three sons proceeded from the same cause, namely, arsenic. The tendency of such evidence is to prove, and to confirm the proof already given, that the death of the husband, whether felonious or not, was occasioned by arsenic. In this view of the case I think it wholly immaterial whether the deaths of the sons took place before or after the death of the husband. The domestic history of the family during the period that the four deaths occurred is also receivable in evidence to shew that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine whether such taking was accidental or not. The evidence is not inadmissible by reason of its having a tendency to prove or to create a suspicion of a subsequent felony (*r*). The ruling in this case was approved in Makin *v.* Attorney-General for New South Wales (*s*), and has been followed on other indictments for poisoning (*t*).

The prisoner and his wife were indicted for the murder of his mother by poison. The prisoner's former wife died in March, 1861, and his present wife was then their servant. The prisoner's mother lived with him after his second marriage, and died in December, 1861. He sold arsenic for agricultural purposes, and there was evidence of administration by the prisoners of articles of food in which arsenic might be contained, and of arsenical symptoms following. There was, however, evidence that three horses, one of them belonging to the male prisoner, had been accidentally poisoned by arsenic, and that some of his customers against whom he was not supposed to have any ill-feeling, had suffered from arsenical symptoms, evidently arising from some accident; and it was held that, in order to prove that the administration of the poison to the mother was wilful, evidence was admissible of the circumstances which attended the death of the first wife, and to shew that she had died of arsenic (*u*).

On an indictment for the murder by poison of S., evidence was admitted of the previous and subsequent deaths of J. and L., under like circumstances, and from similar symptoms, to shew that the poisoning was not

(*r*) R. *v.* Geering, 18 L. J. M. C. 215. Pollock, C.B., who consulted Alderson, B., and Talfourd, J., and they agreed with him in opinion, and therefore the point was not reserved. The prisoner was executed. The C.B. spoke as if the third son had died whenever he mentioned the number of deaths. Upon the trial of a prisoner for the murder of her infant by suffocation in bed, held, that evidence tendered to prove the previous death of her other children at early ages was admissible, although such evidence did not shew the causes from which those children died. Cf. R. *v.* Roden, 12 Cox, 630, a trial for murder of a child by suffocation in bed. In R. *v.* Cotton, 12 Cox, 400 (poisoning a child) evidence was admitted of the previous deaths of other children by the same poison.

(*s*) *Ante*, p. 2108.

(*t*) R. *v.* Heesom, 14 Cox, 40. R. *v.* Flannagan, 15 Cox, 403. R. *v.* Neill Cream, 116 Cent. Crim. Ct. Sess. Pap. 1451. R. *v.* Klosowski, 137 do. 471.

(*u*) R. *v.* Garner, 3 F. & F. 681; 4 F. & F. 346. Willes, J., after consulting Pollock, C.B. R. *v.* Winslow, 8 Cox, 397, in which Wilde, C.J., after consulting Martin, B., excluded evidence of the same character, has been disapproved in R. *v.* Flannagan, 15 Cox, 403, and in Makin *v.* Att.-Gen. N. S. W., it was pointed out that Martin, B., was consulted by and agreed with Willes, J., in admitting such evidence in R. *v.* Gray, 4 F. & F. 1102 (*post*, p. 2113), and that R. *v.* Winslow could not therefore be treated as of much importance.

accidental; and it being proved that a motive for the death of S. might exist from the fact of the prisoner having insured the life of S. in a Benefit Society, evidence was also admitted to shew that there might be an equal motive for the deaths of J. and L., by shewing that they also had been insured by the prisoner (*v*).

On the trial for the murder of an infant, it was proved that the prisoners had alleged that they had received only one child to nurse before, and had given it back to its parents, and that they would take the child, with whose murder they were charged, and would adopt it as their own for the payment of £3. Evidence was admitted to shew that several other infants had been received by the prisoners on like representations, and upon payment of sums inadequate for their support for any long period, and also that the bodies of several infants had been found buried in a similar manner to that of the infant in question in the gardens of other houses which had been occupied by the prisoners. On appeal it was held that this evidence was relevant to the issue and was rightly admitted (*w*).

Evidence may be given of other wounds inflicted by the prisoner on other persons at the same time and place for the purpose of identifying the instrument used (*x*). On an indictment for maliciously stabbing it appeared that the prisoner stabbed both the prosecutor and Redman at the same time and place, and it was held that evidence might be given of the shape of the wound inflicted upon Redman for the purpose of identifying the instrument with which the wound was inflicted on the prosecutor (*y*). Where on a trial for murder it appeared that three grenades had been exploded, by one of which the deceased was killed, it was held that evidence of the nature of the wounds inflicted at the same time on other persons, who were killed or wounded, was admissible for the purposes of shewing the character of the grenades, which were the first instruments of the kind which had been used (*z*).

On an indictment for procuring abortion (24 & 25 Vict. c. 100, s. 58), the procuring of other miscarriages by the prisoner and his declarations with respect to them were held admissible to prove that the operation was illegal and not done in proper course of medical treatment (*a*).

On an indictment for embezzlement where the entries of sums were correct, but the castings up incorrect, a series of similar errors in casting up, both previously and subsequently to the cases to which the indictment referred, were held admissible in order to negative the defence that these were merely accidental errors (*b*).

Upon a trial for arson with intent to defraud an insurance company,

(*v*) R. *v.* Heesom, 14 Cox, 40, Lush. J. See also R. *v.* Flannagan, 15 Cox, 403, where Butt, J., took a similar course.

(*w*) Makin *v.* Att.-Gen. of N. S. W. [1894], A. C. 57 (*ante*, p. 2108).

(*x*) R. *v.* Crickmer, 16 Cox, 701. Cf. R. *v.* Chomatsu Yabu [1903], 5. West Australia Rep. 35, where evidence was held admissible of acts of violence prior to the act complained of and accompanied by declarations and circumstances connecting them with the act complained of; 3 St. Tr. (N.S.) 543.

(*y*) R. *v.* Fursey, 6 C. & P. 81, Parke and Gaselee, JJ.

(*z*) R. *v.* Bernard, 1 F. & F. 240; 8 St. Tr. (N.S.) 887, Campbell, C.J., Pollock, C.B., Erle and Cresswell, JJ.

(*a*) R. *v.* Bond [1906], 2 K.B. 387. Cf. R. *v.* Cooper, 3 Cox, 547. R. *v.* Dale, 16 Cox, 703, *vide ante*, Vol. i. p. 834.

(*b*) R. *v.* Richardson, 2 F. & F. 343. See R. *v.* Balls, L. R. 1 C. C. R. 328. Cf. R. *v.* Proud, L. & C. 97; 31 L. J. M. C. 711. R. *v.* Stephens, 16 Cox, 387. R. *v.* Girod, 70 J. P. 514, 516. Hardgrave *v.* R. [1906], 4 Australia C. L. R. 232.

evidence that the prisoner had made claims on two other insurance companies in respect of fires which had occurred in two other houses which he had occupied previously and in succession, was admitted for the purpose of shewing that the fire which formed the subject of the trial was the result of design and not of accident (*c*). On an indictment for arson, one count laying an intent to defraud, and it being opened for the prosecution that the motive might have been to realise the money insured by the prisoner upon her goods, evidence was received that she was in easy circumstances, with a view to shew that she was, at all events, under no pecuniary temptation to commit such an act (*d*).

Where on a trial for rape it was elicited on cross-examination that the act had not caused any pain, Rolfe, B., held that it might be proved on re-examination that the prisoner had done the same thing on previous occasions; for that evidence tended to explain the fact that the act in question had not caused any pain (*e*).

On an indictment for robbery the defence was an *alibi*, and in order to shew that the prisoner was near the place of the robbery at the time it was committed, Alderson, B., held that a witness might be examined to shew not merely that he had been accosted by the prisoner on the road shortly before the prosecutor was robbed, but that he had also been in fact robbed by the party who accosted him (*f*).

In December, 1889, four men named J. Shaw, W. Shaw, Williamson, and Smith were convicted of an assault on a police constable named Eley and sentenced to penal servitude. In April, 1890, four other men named J. Dytche, H. Dytche, Tunnicliffe, and Burton were indicted for the same offence. Eley and a man named Sparks who had been with him on the occasion in question, adhered to their former evidence that the convicts, the two Shaws, Williamson, and Smith were the four men who had committed the assault. Counsel for the prosecution proposed to call these convicts to prove that they were innocent. Hawkins, J., after consideration admitted the evidence, holding that it was relevant to the charge then under inquiry (*g*).

Guilty Knowledge.—Upon an indictment for uttering a forged bank note, knowing it to be forged, evidence may be given of other forged notes having been uttered by the prisoner, in order to shew his knowledge of the forgery (*h*); but not on an indictment for

(*c*) R. *v.* Gray, 4 F. & F. 1102, approved in Makin *v.* Att.-Gen. for N. S. W. [1894], A. C. 57.

(*d*) R. *v.* Grant, 4 F. & F. 322.

(*e*) R. *v.* Chambers, 3 Cox, 92.

(*f*) R. *v.* Briggs, 2 M. & Rob. 199.

(*g*) R. *v.* Dytche, 17 Cox, 39.

(*h*) R. *v.* Wylie, 1 B. & P. (N. R.) 92, S. C. sub-nom. R. *v.* Whiley, 2 Leach, 983, where Ellenborough, C.J., said, 'The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment. But in such case the only question would be, whether the evidence was sufficient to warrant the inference of knowledge from such particular transactions? It would not make the evidence inadmissible. Such evidence may come out from these circumstances as to leave no doubt that the prisoners must have known what sort of paper they were passing.' R. *v.* Ball, R. & R. 132; 1 Camp. 324. R. *v.* Green, 3 C. & K. 209. So the possession of other forged instruments may be proved as evidence of a guilty knowledge. R. *v.* Hough, R. & R. 120; but there must be regular proof that they are forged. R. *v.* Millard, R. & R. 245. It seems that it may be proved that the prisoner had uttered forged bills or notes *of a different kind*, *ante*, p. 1674. As to the proof of an uttering, the subject of another indictment, to shew a guilty knowledge, *vide ante*, pp. 1672 *et seq.* Cf. R. *v.* Salt, F. & F. 834. R. *v.* Colclough, 10 L. R. (Ir.) 241: 15 Cox, 92.

forgery (*i*). So on a prosecution for uttering counterfeit money, for the purpose of shewing guilty knowledge, proof is admitted of more than one uttering committed by the party about the same time, though only one uttering is charged in the indictment (*j*). So, on an indictment against a thief for stealing or a receiver for receiving several stolen articles, if it is proved that they were received at several times, evidence may be given of all the receipts, for the purpose of proving guilty knowledge (*k*).

On an information against a publican for unlawfully permitting prostitutes to assemble in his house, evidence that some of the same prostitutes had on other previous occasions been in the house is admissible, in order to prove his knowledge of their character (*l*).

On an indictment for obtaining money on a chain by falsely pretending that it was a silver chain, it was held admissible to prove that the prisoner, a few days afterwards, offered a chain similar in appearance to another pawnbroker, requesting him to advance ten shillings upon it, and that twenty-six similar chains were found on the prisoner when he was apprehended (*m*).

On an indictment for attempting to obtain money by falsely pretending that a ring was composed of diamonds, which in fact was composed of crystals; it was held that evidence was admissible of a false pretence on a prior occasion to another person that a chain was gold, whereas it was plated, and on another distinct occasion that a ring was of diamonds, which it was not; and that it was no objection that the diamond ring spoken to on the prior occasion was not produced in court (*n*). Other cases in which on a prosecution for fraud, other frauds may be proved to show system, intent, or guilty knowledge have been stated, *ante*, p. 1581.

Other Acts and Declarations of the Accused.—As other acts and declarations of the prisoner, besides those charged in the indictment, may be given in evidence on the part of the prosecution, so he himself on his defence may in some cases prove other acts and declarations of his own, as evidence of his innocence. On a charge of murder, expressions of good-will and acts of kindness on the part of the prisoner towards the deceased are always considered important evidence, as shewing what

(*i*) Where, in an action on several bills of exchange drawn by one Skull, the question was whether the defendant had accepted them, and his name appeared on each as acceptor, and evidence was given for the plaintiff that the signatures were those of the defendant, and for the defendant that the signatures were forgeries, and the defendant proposed to prove that a number of bills and other papers had been taken away by the plaintiff's brother from Skull's house, and that among the bills so taken away were several bills on which the defendant's signature appeared, which signature was forged; and that the plaintiff had been circulating such forged bills since; and it was contended that the jury would be at liberty to infer that the bills on which the action was brought were part of the bills so taken from Skull's house, Tindal, C.J., rejected the evidence, and it was held that he was right in so doing, as it clearly would have been inadmissible on an indictment for forgery. Griffits *v.* Payne, 11 A. & E. 131.

(*j*) *Ante*, p. 1672, and see R. *v.* Jarvis, Dears. 552. R. *v.* Weeks, L. & C. 18. R. *v.* Foster, 24 L. J. M. C. 134: Dears. 456. R. *v.* Goodwin, 10 Cox, 534.

(*k*) R. *v.* Dunn, 1 Mood. 146. R. *v.* Oddy, 2 Den. 264. R. *v.* Firth, L. R. 1 C. C. R. 172: 38 L. J. M. C. 54. For other cases on this point, *vide ante*, p. 1308.

(*l*) Parker *v.* Green, 2 B. & S. 299.

(*m*) R. *v.* Roebuck, D. & B. 24: 25 L. J. M. C. 101.

(*n*) R. *v.* Francis, L. R. 2 C. C. R. 128: 43 L. J. M. C. 97. See R. *v.* Rhodes [1899], 1 Q.B. 77, 83. R. *v.* Wyatt [1904], 1 K.B. 188. R. *v.* Walford [1907], 71 J. P. 215, and R. *v.* Hull, *ante*, p. 2101, note (*w*).

was his general disposition towards the deceased, from which the jury may be led to conclude that his intention could not have been what the charge imputes (*o*). In R. *v.* Lambert (*p*), a prosecution in respect of a libel contained in a newspaper, of which the defendants were the printer and proprietor, Ellenborough, C.J., held that the defendants had a right to have read in evidence any other paragraph in the same newspaper connected with the subject of the passage charged as libellous (although disjointed from it by extraneous matter, and printed in a different character) for the purpose of shewing the intention and mind of the defendants with respect to the specific paragraph laid in the indictment. And as in trials for conspiracies, whatever the prisoner may have done or said at any meeting alleged to be held in pursuance of the conspiracy is admissible in evidence against him on the part of the prosecution, so, on the other hand, any other part of his conduct at the same meetings will be allowed to be proved, on his behalf; for the intention and design of the party at a particular time are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single and isolated act or declaration (*q*). In R. *v.* Walker and others (*r*), who were tried for a conspiracy to overthrow the Government, evidence was produced, on the part of the prosecution, to shew that the conspiracy existed, and was brought into overt act at meetings in the presence of W., counsel for the prisoners was allowed to ask a witness whether, at any of these times, he had ever heard W. utter any word inconsistent with the duty of a good subject. The question was objected to, but held by Heath, J., to be admissible. The prisoner's counsel were also allowed in the same case to inquire into the general declarations of the prisoner at these meetings, whether the witness had heard him say anything that had a tendency to disturb the peace of the kingdom; and questions to the same effect were put to many other witnesses in succession.

In R. *v.* Hardy (*s*), a trial for high treason in 1794, where the overt act charged was that the prisoner, for the purpose of accomplishing the treason of compassing the King's death, did conspire with others to call a convention of the people, in order that the convention might depose the King; counsel for the prisoner were allowed to ask a witness whether, before the time of the convention which was imputed to the prisoner, he had ever heard from him what his objects were, and whether he had at all mixed himself in that business. But the better opinion seems to be

(*o*) 1 Phill. Ev. 470.

(*p*) 2 Camp. 400: 31 St. Tr. 335, and see Thornton *v.* Stephen, 2 M. & Rob. 45. The same was done in Newton *v.* Rowe, Gloucester Spr. Ass. 1843, *cor.* Erskine, J. MSS. C. S. G. See Pearson *v.* Lemaitre, 5 M. & Gr. 700; Camfield *v.* Bird, 3 C. & K. 56.

(*q*) 1 Phill. Ev. 478.

(*r*) 23 St. Tr. 1131. See the observations of Alderson, B., in R. *v.* Vincent, 9 C. & P. 91, 3 St. Tr. (N. S.) 1037.

(*s*) 24 St. Tr. 1097. On an indictment for a conspiracy against the defendant and B. (who was gone to America) with intent to defraud Sir C. C. of a sum of money advanced by him by way of annuity, some letters between the defendant and B. were put in evidence on the part of the prosecution, and the defence was that the defendant had been made a dupe by B., and was not himself a participator in the fraud, and Tenterden, C.J., held that under the peculiar circumstances of the case, the whole of the correspondence between the defendant and B. on both sides, previously to the time of the execution of the annuity deeds, was admissible, but that all letters subsequent to that time were inadmissible. R. *v.* Whitehead, 1 C. & P. 67.

that, in order to make such other acts or declarations of the prisoner applicable to his defence, it must be shewn that they are in some way connected with the facts proved against him (*t*). In the case of Horne Tooke (*u*) and others, however, for high treason, several publications having been given in evidence on the part of the Crown, containing republican doctrines and opinions, the distribution of which had been promoted by the prisoners during the period assigned in the indictment for the existence of the conspiracy, the prisoner was allowed to read in his defence various extracts from works which he had published at a former period of his life; and these the jury were permitted to carry along with them when they retired to consider of their verdict (*v*). But the propriety of allowing such a defence has been questioned by very high authority (*w*).

Evidence of several Transactions when Cumulative Instances are necessary to prove the Offence charged.—In some cases from the nature of the offence charged, it is impossible to confine the evidence to proof of a single transaction. Thus on an indictment against several defendants for conspiring to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen, Lord Ellenborough allowed the prosecutor to prove various instances of their giving false representations of their circumstances (*x*); observing that the indictment was for a conspiracy to carry on the business of common cheats, and the cumulative instances were necessary to prove the offence. The same sort of evidence, he said, is allowed on an indictment for barratry (*y*); and in a prosecution for high treason itself, the gravest of all offences.

Sect. IV.—Evidence of Character.

Character of the Accused.—As a general rule the badness of the character or reputation of the accused is not a fact in issue, or relevant to the issue, and it is not permissible to shew that he is of bad character or that he has a general disposition to commit the same kind of offence as that of which he stands indicted. 'It is not competent for the prosecutor to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment (*z*) for the purpose of leading to the conclusion that the accused is a person likely from his conduct or character to have committed the offence for which he is being tried' (*a*). Thus on an indictment for an infamous crime, an admission by the defendant that he had committed such an offence at another time and with another person and that he had a tendency to such practices was ruled to be inadmissible (*b*). The reputation of the

(*t*) R. *v.* Lambert, 2 Camp. 400; 31 St. Tr. 335. Lord George Gordon's case, 21 St. Tr. 542; R. *v.* Hanson, 31 St. Tr. 4281.

(*u*) 25 St. Tr. 545.

(*v*) 1 East, P. C. 61.

(*w*) R. *v.* Lambert, *ubi supra*, Ellenborough, C.J.

(*x*) R. *v.* Roberts, 1 Camp. 400. But see R. *v.* Steel, C. & M. 337.

(*y*) See l'Anson *v.* Stuart, 1 T. R. 748, and *ante*, Vol. i. p. 586.

(*z*) *Ante*, p. 2101.

(*a*) Makin *v.* Att.-Gen. for N. S. W. [1894], A. C. 57, *ante*, p. 2108. See R. *v.* Chitson, C. C. A., 30 July, 1909.

(*b*) R. *v.* Cole, Mich. T. 1810, by all the judges (MS.), 1 Phill. Ev. 477. In an action against the acceptor of a bill of exchange, where the defence was that the acceptance was forged, the Court rejected as inadmissible evidence that the person who negotiated the bill had been guilty of other forgeries. Viney *v.* Barrs, 1 Esp. 292. See also Balcetti v. Serani, Peake

accused may be made relevant to the issue by the accused if he tenders evidence to shew that he is of good character. In all criminal proceedings the accused is allowed to call witnesses to speak to his general reputation (*c*). Such witnesses are called as part of the defence and not after verdict (*d*). The witnesses are usually examined on behalf of the defendant, as to how long they have known him, and what his general reputation for honesty, humanity, or peaceable conduct (according to the nature of the offence charged) has been during that time. The inquiry ought manifestly to bear some reference to the nature of the charge against the prisoner. On a charge of stealing it would be irrelevant and absurd to inquire into his loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings (*e*). The inquiry must also be made with reference to the general character of the prisoner; for it is general character alone which can afford any test of general conduct, or raise a presumption that the person, who had maintained a fair reputation down to a certain period, would not then begin to act an unworthy part: and, therefore, proof of *particular* transactions, in which the prisoner may have been concerned, is not admissible (*f*).

It is not the practice to cross-examine witnesses to character unless there is some definite charge against the prisoner, to which to cross-examine them (*g*). But where a witness for the prisoner having proved that he had known him for some years, and given him a good character, stated, on cross-examination, that he had never heard anything against him; but admitted that he had heard of a robbery, which had taken place in the neighbourhood some years previously; and was then asked, 'Did you ever hear that the prisoner was suspected of having done it?' it was objected that it was not competent to inquire about particular offences imputed to the prisoner. Parke, B.: 'The question is not whether the prisoner was guilty of that robbery, but whether he was *suspected* of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one. The question may be put' (*h*).

As to the course to be pursued where upon the trial of a person for any subsequent offence, he gives evidence of his good character, see *post*, p. 2271. If a prisoner cross-examines the witnesses for the prosecution as to his character, he 'gives evidence' within the meaning of these sections, and the previous conviction may be proved (*i*). Even when the

(N. P.) 142; Graft *v.* Bertie, Peake, Ev. 104. Taylor, Ev. (10th ed.), s. 319.

(*c*) Formerly such evidence was admitted only in capital cases *in favorem vitæ*. R. *v.* Harris, 2 St. Tr. 1038. See Peake, Ev. 7. The true line of distinction was said by Eyre, C.B., to be that in a direct prosecution for crime the evidence is admissible, but where the prosecution is not directly for the crime, but for the penalty (as in the case of an information for keeping false weights), it is not. Att.-Gen. *v.* Bowman, 2 B. & P. 582 (*n*).

(*d*) R. *v.* Mullins, 3 Cox, 526; 7 St. Tr. (N. S.) 1110.

(*e*) Taylor, Ev. (10th ed.) s. 351.

(*f*) Ibid. R. *v.* Rowton, L. & C. 520; *post*, p. 2118.

(*g*) R. *v.* Hodgkiss, 7 C. & P. 298. Alderson, B. It sometimes, however, is proper to ascertain from the witnesses whether they have had sufficient opportunities of knowing the prisoner's character; as whether they have lived near him, or known him down to the time of the commission of the offence. C. S. G.

(*h*) R. *v.* Wood, 5 Jurist, 295.

(*i*) R. *v.* Gadbury, 8 C. & P. 676. R. *v.* Shrimpton, 2 Den. 319; 21 L. J. M. C. 37.

defendant calls witnesses to character, the prosecutor may not examine as to particular facts, the general character of the defendant not being put in issue, but coming in collaterally (*j*).

If a prisoner on his trial gives evidence that his character is good, it is open for the prosecution, by way of reply, to prove that the prisoner's character is bad. Evidence of character must not be evidence of particular facts, but (by all the Court, except Erle, C.J., and Willes, J.) must be evidence of general reputation only, having reference to the nature of the charge. On a trial for an indecent assault, where the defendant had given evidence of his good character, a witness called by the prosecution to rebut such evidence, was asked, 'What is the defendant's general character for decency and morality of conduct?' The witness said, 'I know nothing of the neighbourhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers, who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality.' It was held, by the majority of the judges, that this answer was not admissible in evidence (*k*).

Where on an indictment for stealing a shawl evidence of the prisoner's good character was given, it was held that evidence of stealing another shawl on the same evening was not admissible in answer to the evidence of character (*l*).

On the trial of a prisoner for wounding a constable who had arrested him on suspicion of felony, the following question (in order to assist in shewing that there were reasonable grounds for the arrest) was put to the constable on the part of the prosecution, 'What do you know had been the prisoner's previous character?' The answer was, 'I knew the prisoner to be a very bad character.' It was held by the Court that this question ought not to have been put in the examination-in-chief, although it was open to the prisoner to have cross-examined the constable as to the grounds of his suspicion (*m*).

(*j*) Bull. (N. P.) 296, citing Martyn *v.* Hind, 1 Cowp. 437. The ordinary course, however, is to ask the witness in cross-examination whether he has not heard that the prisoner has been tried for a particular offence. R. *v.* Hodgkiss, 7 C. & P. 298, Alderson, B.

(*k*) R. *v.* Rowton, L. & C. 520; 34 L. J. M. C. 57. Per Erle, C.J., and Willes, J., a witness's individual opinion, respecting the general character and disposition of the prisoner with reference to the charge is admissible, although such witness knows nothing of the prisoner's general reputation. See R. *v.* Burt, 5 Cox, 284; R. *v.* Hughes, 1 Cox, 44.

(*l*) R. *v.* Rogan, 1 Cox, 291, Erle, J.

(*m*) R. *v.* Turberfield, L. & C. 495; 34 L. J. M. C. 20. 'With all deference it is submitted that this decision is erroneous. Every constable is justified in arresting any person whom he has reasonable grounds to suspect of having committed a felony; and in every case where the question arises whether he had such reasonable grounds of suspicion it is perfectly clear that it is competent to prove the grounds of such suspicion; otherwise a right to apprehend would exist without the power of justifying the arrest. In civil cases the grounds of suspicion *must* be alleged in the defence to an action for the arrest; Davis *v.* Russell, 5 Bing. 354; Hailes *v.* Marks, 7 H. & N. 56; and the reason is that, whether there were reasonable grounds of suspicion is a mixed question of law and fact. West *v.* Baxendale, 9 C. B. 141; and as where the grounds of suspicion are alleged in a plea, they must be proved on the trial; so where the general issue is given by statute, they must be proved on the trial, Davis *v.* Russell, *supra*; and so in a criminal case like the present the grounds of suspicion must be proved, in order that the jury may determine whether in fact the grounds existed, and that the Court may decide, if they did exist, whether they were reasonable grounds. If a witness

It has been usual to treat the good character of the defendant as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; but that when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be not, in any case, to withdraw it from consideration, but to leave the jury to form their conclusion upon the whole of the evidence, whether an individual whose character was previously unblemished, has or has not committed the particular crime which he is called upon to answer (*n*).

Convictions: when admissible.—Evidence of conviction of crime is admissible in the following cases:—

(1) Against a prisoner when a proof of previous conviction is made by law a ground for an increased or different punishment, or conviction of the offence for which he is being tried. The form of indictment and the time for proving the previous convictions are prescribed by the statutes stated *ante*, p. 1958, and the previous conviction may not be put in evidence until after conviction for the subsequent offence (*o*), except in cases within (2), *infra*.

(2) Against a prisoner, when he himself (*p*), or witnesses on his behalf, give evidence of his good character, or the witnesses for the prosecution

were asked whether he had reasonable grounds of suspicion, the question would clearly be erroneous; as the answer would be a conclusion of law and fact. In these cases "the question is on what grounds and motives the constable acted at the time," per Burrough, J., in Davis *v.* Russell (*ubi supra*). Now it cannot be doubted that the bad character of the party may form one ground of suspicion; and the ordinary rule applicable to the receipt of evidence of character is that general evidence is alone admissible; but in a case like the present, as both the general character of the party and particular facts might operate on the mind of the constable, it is plain that evidence of both would be admissible. It is obvious, too, that the general character of the party might be infamous, and yet the constable might himself know nothing of such general character except from what he had been told by others; to limit the question, therefore, to what the constable knew of the prisoner would be to exclude all evidence of his general character, which possibly formed a most material ground of suspicion. Lastly, evidence of the character or conduct of a prisoner is always admissible in order to show that the acts of others, especially of officers of justice, are lawful; which is a totally different issue from that raised as to the guilt of the prisoner, though that issue may depend upon the other.' C. S. G. See Taylor, Ev. (10th ed.) s. 352.

(*n*) In R. *v.* Stannard, 7 C. & P. 673, Patteson, J., said: 'I cannot in principle make any distinction between evidence of facts and evidence of character; the latter is equally laid before the jury as the former, as being relevant to the question of guilty or not guilty; the object of laying it before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case.' And Williams, J., said: 'It is evidence to be submitted to the jury, to induce them to say whether they think it is likely that a person with such a character would have committed the offence.'

(*o*) Faulkner *v.* R. [1905], 2 K.B. 76; cf. R. *v.* Huberty, 70 J. P. 6.

(*p*) Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36, s. 1 (f), *post*, p. 2271.

are cross-examined with a view to establishing the good character of the prisoner (*q*), 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 (*r*), *e.g.* by imputing on a charge of stabbing, that a witness for the Crown was the guilty person (*s*). Cross-examination of the prosecutrix of a charge of rape with a view to establishing consent is not within this rule (*t*).

(3) Against a prisoner, where the previous conviction is an essential element in the subsequent offence charged (*u*), or is admissible to shew guilty knowledge or criminal intent or to rebut a defence otherwise open to the accused (*v*).

(4) Against a witness cross-examined as to credit who denies the conviction (*w*). This does not apply to a prisoner called as a witness except in cases falling within (2) or (3).

(5) In some courts it is the practice after conviction of a prisoner to prove previous convictions not charged in the indictment as a guide to the judge, as to the *quantum* of punishment. Proof at this stage does not warrant the imposition of the increased punishment which may be given in the case of convictions proved under (1), *supra*.

Character of Prosecutor.—In criminal proceedings, the character of the prosecutor may be attacked in the prisoner's defence, in the same manner as that of any other witness. On a trial for a rape, or for an assault with an intent to commit a rape, evidence is admissible on the part of the prisoner, not merely, as in the case of an ordinary witness, to prove that from her general bad character the prosecutrix ought not to be believed on her oath, but to impeach her character as to general chastity by general evidence (*x*). And the prosecutrix may be cross-examined as to particular discreditable transactions (*y*), and as to her having had connection with the prisoner previously to the alleged rape (*z*), and if she denies such connection, the prisoner may shew that she has been previously connected with him (*a*). On an indictment for an indecent assault, as in cases of rape, or attempt to commit rape, the answer of the prosecutrix to questions put to her on cross-examination as to particular acts of connection with persons named to her, other than the prisoner, is final, and the party questioning is bound thereby, and if her answer is a denial the persons named cannot be called to contradict her (*b*).

(*q*) R. *v.* Gadbury, 8 C. & P. 676. R. *v.* Shrimpton, 2 Den. 319.

(*r*) R. *v.* Bridgwater [1905], 1 K.B. 131 : 74 L. J. K. B. 75 ; R. *v.* Rouse [1904], 1 K.B. 184. R. *v.* Preston [1909], 1 K.B. 568 : 73 J.P. 173.

(*s*) R. *v.* Marshall, 63 J. P. 36.

(*t*) R. *v.* Sheean [1908], 72 J. P. 232, Jelf, J.

(*u*) *E.g.* R. *v.* Penfold [1902], 1 K.B. 547, an indictment under 34 & 35 Vict. c. 112, s. 7, *ante*, Vol. i. p. 223.

(*v*) *Ante*, p. 2108, and 34 & 35 Vict. c. 112, s. 19, *ante*, p. 1487.

(*w*) 28 & 29 Vict. c. 18, s. 6, *infra*.

(*x*) *Vide ante*, Vol. i. p. 945.

(*y*) R. *v.* Barker, 3 C. & P. 589.

(*z*) R. *v.* Martin, 6 C. & P. 562.

(*a*) R. *v.* Aspinall, 3 Stark. Ev. (3rd ed.) 952, approved in R. *v.* Riley, 18 Q. B. D. 481.

(*b*) R. *v.* Holmes, L. R. 1 C. C. R. 334 ; 41 L. J. M. C. 12 ; overruling R. *v.* Robins, 2 M. & Rob. 512. The question may be put to her on cross-examination, but she is not bound to answer it. R. *v.* Cockcroft, 11 Cox, 410, Willes, J. R. *v.* Hodgson, R. & R. 211, all the judges.

CANADIAN NOTES.

OF THE ADMISSIBILITY OF EVIDENCE.

Acts, etc., of Conspirators.—See R.S.C. 1906) ch. 145, sec. 4.

The result of this section (4) is to empower (but not to compel) one of two persons jointly indicted to give evidence incriminating the other without the necessity of resorting to the old procedure of either taking a plea of guilty or pardoning the prisoner to be called.

Matters Found in the Possession or Control of the Accused.—In the case of persons who have passed counterfeit money or bills, when it is necessary to establish a guilty knowledge on the part of the prisoner, the prosecutor is allowed to give evidence of the prisoner having passed other counterfeit money or bills at about the same time, or that he had many such in his possession, which circumstances tend strongly to shew that he was not acting innocently and had not taken the money casually but that he was employed in fraudulently putting it off. R. v. Brown, 21 U.C.Q.B. 330.

If it be proved that the accused uttered either in the same day or at other times, whether before or after the altering charged, base money either of the same or a different denomination to the same or to a different person, or had other pieces of base money about him when he uttered the counterfeit money in question, such will be evidence of and from which a guilty knowledge may be presumed. *Ibid.*

Sec. 2.—Acts Forming Part of the Same Transaction.

Evidence of one crime may be given to shew a motive for committing another; and where several felonies are part of the same transaction evidence of all is admissible upon the trial of an indictment for any of them; but where a prisoner indicted for murder, committed while resisting constables about to arrest him, had with others, been guilty of riotous acts several days before, it is doubtful if evidence of such riotous conduct is admissible, even for the purpose of shewing the prisoner's knowledge that he was liable to be arrested, and, therefore, had a motive to resist the officers. R. v. Chasson, 3 Pugs. (N.B.) 546.

In a charge of conspiracy when the existence of the common design on the part of the defendants has been proved, evidence is then properly receivable as against both of what was said or done by either in furtherance of the common design. R. v. Connolly, 1 Can. Cr. Cas. 468.

And evidence is admissible of what was said or done in furtherance of the common design by a conspirator not charged as against those who are charged, after proof of the existence of the common design on the part of the defendants with such conspiration. *Ibid.*

The acts and declarations of any of the co-conspirators in furtherance of the common design may be given in evidence against all. And if one overt act be proved in the county where the venue is laid, other overt acts either of the same or others of the conspirators may be given in evidence, although in other counties. Before evidence is given of the acts of one conspirator against another, proof must be given of the existence of the conspiracy, that the parties were members of the same conspiracy and that the act in question was done in furtherance of the common design. Archbold, Cr. Evid., 1105-6, approved in R. v. Connolly, 1 Can. Cr. Cas., p. 491.

Sec. 3.—Evidence of Acts not Forming Part of the Same Transaction.

In an Ontario case, evidence was held admissible on a charge of murder by poisoning to shew the administration of the same kind of poison by the prisoner to another person, as proving intent. Evidence of similar symptoms of arsenical poisoning attending the death of prisoner's former husband following administration to him of food prepared by the prisoner is evidence to shew intent as regards a charge of arsenical poisoning of a second husband on evidence of arsenical poisoning of the latter and of similar preparation of food by the prisoner and her attendance on her husband during his illness. R. v. Sternaman (1898), 1 Can. Cr. Cas. 1 (Ont.).

Evidence of other facts are admissible where those facts tend to prove the point in issue, as where the intent of the prisoner forms part of the matter in issue, and such other facts tend to establish the intent of the prisoner in committing the act in question; so the deliberate menaces or threats of a prisoner made at a former time are admissible, where they tend to prove the intent of the party and the prisoner's malice against the deceased. It is quite proper on the count for murder to give evidence of the prisoner's previous assaults upon and threats against the deceased to shew the animus of the prisoner. Theal v. R. (1882), 7 Can. S.C. 397, 406.

Evidence of one crime may be given to shew a motive for committing another; and where several felonies are part of the same transaction evidence of all is admissible upon the trial of an indictment for any of them; but where a prisoner indicted for murder, committed while resisting constables about to arrest him, had, with others, been guilty of riotous conduct several days before, it is doubtful if evidence of such riotous conduct is admissible, even for the purpose of shewing the prisoner's knowledge that he was liable to be arrested, and, therefore, had a motive to resist the officers. R. v. Chasson, 3 Pugs. (N.B.) 546.

It has been held in New Brunswick that it is not a ground for quashing a conviction for unlawful assembly on a certain day that evidence of an unlawful assembly on another day has been improperly received, if the latter charge was abandoned by the prosecuting counsel at the close of the case, and there was ample evidence to sustain the conviction. And evidence of the conduct of the accused persons on the day previous to their alleged unlawful assembly is not admissible on their behalf to explain or qualify their conduct at the time of the alleged offence. R. v. Mailloux, 3 Pugs. (N.B.) 493.

On a charge of rape evidence is admissible on behalf of the defence to contradict a statement of the complainant, made on her cross-examination, denying that on an occasion when she had met the accused subsequent to the alleged rape she had refused to put an end to the interview, as requested by her mother, and had struck her mother for the latter's interference. Such evidence is relative to the charge not only as affecting the credibility of the complainant's testimony generally, but as shewing conduct inconsistent with resistance to the alleged offence. R. v. Riendeau (No. 2), 4 Can. Cr. Cas. 421 (Que.).

Questions may be put to the complainant tending to elicit the fact that she had previously had connection with other men. So, where the prosecutrix, after she had declared she had not previously had connection with a man other than the prisoner, was asked in cross-examination whether she remembered having been in the milk-house of G. with two men, D. M. and B. M., one after the other. Held, that the witness may object, or the judge may, in his discretion, tell the witness she is not bound to answer the question. R. v. Laliberté (1877), 1 Can. S.C.R. 117.

Upon a charge of obtaining goods under false pretences, evidence of other similar acts committed by the accused is not admissible in corroboration of the fact that he committed the act charged, but upon due proof of the act charged such evidence may be given in proof of criminal intent or of guilty knowledge. R. v. Komiensky (No. 2), 7 Can. Cr. Cas. 27, 12 Que. K.B. 463.

To prove intent to defraud, evidence of similar frauds having recently been practised by the defendant upon others is admissible. R. v. Durocher, 12 L.R. 697 (Que.).

In the case of persons who have passed counterfeit money or bills, when it is necessary to establish a guilty knowledge on the part of the prisoner, the prosecutor is allowed to give evidence of the prisoner having passed other counterfeit money or bills at or about the same time, or that he had many such in his possession, which circumstances tend strongly to shew that he was not acting innocently and had not taken the money casually, but that he was employed in fraudulently putting it off. R. v. Brown (1861), 21 U.C.Q.B. 330, per Robinson, C.J.

Sec. 4.—Evidence of Character.

Previous Conviction as Evidence of Character.—The Imperial Criminal Evidence Act, 1898, 61-62 Vict. ch. 36, carefully provides that a person charged and called as a witness on his own behalf shall not, except under certain specified circumstances, be asked, and if asked, shall not be required to answer, questions tending to shew that he has committed or been convicted of or charged with any offence other than that wherewith he is then charged, or is of bad character. The Canada Evidence Act contains no sections corresponding to those of the Imperial Act; the only exception it makes to the competence of the accused to testify being in respect of communications made by husband to wife or by wife to husband during their marriage. Practically, therefore, although the provisions of secs. 963 and 964 must be complied with, whenever it is intended for the purpose of imposing an increased punishment, to try the question whether the accused has been convicted of previous offences, he incurs the risk, if he chooses to testify on his own behalf, of having such convictions proved against him for the purpose of affecting his credit, and thereby incidently of prejudicing his position with the jury in regard to the charge then on trial. R. v. D'Aoust (1902), 5 Can. Cr. Cas. 407, per Osler, J.A.

Evidence of character can only be as to general reputation. R. v. Triganzie (1888), 15 Ont. R. 294.

Where evidence is adduced on behalf of the accused as to his general good character, the witnesses may be cross-examined by the prosecution as to the grounds of their belief and as to the particular facts on the question of character of which they have knowledge. R. v. Barsalou (No. 2) (1901), 4 Can. Cr. Cas. 347.

The prosecution is not entitled to give evidence of the prisoner's bad character, unless or until the prisoner adduces evidence to prove his good character, either by examining his own witnesses on that point or by questioning the Crown witnesses thereon as a part of their cross-examination. A new trial will be ordered where such evidence is wrongly admitted against the prisoner, although no objection is raised to it by the prisoner's counsel. R. v. Long, 5 Can. Cr. Cas. 493.

Except in rebuttal to evidence of good character it is not competent to give evidence of a prisoner's bad character, or the bad character of his associates, as that does not in any manner tend to establish the particular offence for which the prisoner is being tried. But if the conduct or character of his associates has a bearing upon the particular charge, forming a link, near or remote, in the chain that connects the accused with the offence, it may be admissible in evidence. Per Cameron C.J., in R. v. Bent (1886), 10 O.R. 557.

CHAPTER THE THIRD.

OF WRITTEN EVIDENCE.

SECT. I.—PUBLIC DOCUMENTS.

Statutes.—Acts of Parliament are now usually classified as (1) public and general; (2) public, local, and personal; (3) private.

Public general Acts have always been judicially noticed and not proved in evidence, (*a*) and where a private act contains clauses of a public nature, the Act, as far as those are concerned, is regarded as public. Thus a clause relating to a public highway, occurring in a private enclosure act, has been held judicially noticed (*b*).

By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 9, 'Every Act passed after 1850 . . . shall be a public Act, and shall be . . . judicially noticed as such, unless the contrary is specially provided by the Act' (*c*).

By the Evidence Act, 1843 (8 & 9 Vict. c. 113), s. 3, 'All copies of private, and local, and personal Acts of Parliament not public Acts, if purporting to be printed by the King'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' (*d*).

This enactment applies to all local and personal acts passed before 1850, and to all purely private acts passed before or since, of which copies have been printed by the King's printer or the Stationery Office.

Private acts to which the above enactments do not apply, are proved by exemplification (*e*), transcript or an examined or certified copy (*f*) from the Clerk of the Parliaments or the Record Office (*g*).

There are *dicta* in cases before 1850, to the effect that the insertion of a

(*a*) 1 Co. Inst. 98*a*. See Taylor, Ev. (10th ed.), ss. 5, 1323. Roscoe, 'Nisi Prius' (18th ed.), 104. Hardcastle on Statutes (4th ed. by Craies), 33. King's printers' copies are used not as evidence, but for reference. Forman *v.* Dews [1841], C. & M. 127. As to earlier views on the subject, see Gilb. Ev. 10; 2 Phill. Ev. 127; Stark. Ev. 274. If the copy is incorrect the Court may refer to the Parliament Roll. R. *v.* Jeffries, 1 Str. 446. Spring *v.* Eve, 2 Mod. 240.

(*b*) R. *v.* Utterby, 2 Phill. Ev. 128, per Holroyd, J., and see Hob. 227.

(*c*) This enactment re-enacts s. 7 of Brougham's Act (13 & 14 Vict. c. 21). Before 1850 it was common practice to insert in a local or personal or private Act a clause declaring it to be a public Act, to be judicially noticed without being specially pleaded. This dispensed with the need for general proof.

(*d*) Taylor Ev. (10th ed.), s. 1503. Beaumont *v.* Mountain, 10 Bing. 404. 4 M. & Sc. 177. Woodward *v.* Cotton, 1 Cr. M. & R. 4; 44 Tyrw. 689.

See Greswolde *v.* Kemp [1842], C. & M. 635. R. *v.* Wallace, 10 Cox, 500.

(*e*) College of Physicians *v.* Cooper [1675], 3 Keb. 587. Hale, C.J.

(*f*) Bull. (N. P.) 225. Woodward *v.* Cotton, 1 C. & M. & R. 44, 48.

(*g*) *Vide* Hardcastle on Statutes (4th ed. by Craies), 35, 36, 450.

judicial notice clause in a local act only affects the mode of proving it (*h*). It would seem that such acts passed since 1850 are to be treated as public acts, subject to the limitations expressly or implicitly contained (*i*). Thus a local act imposing penalties certainly binds all persons within the district without proof of its being brought to their notice.

In R. *v.* Sutton (*j*) the preamble of a public Act, reciting that certain outrages had been committed in particular parts of the kingdom, was adjudged by the Court of King's Bench to be admissible in evidence, for the purpose of proving an introductory averment in an information for a libel, that outrages of that description had existed. But it is doubtful how far this can be safely applied (*k*), except where Parliament after reciting a version of the facts has declared rights (*l*).

Ante-Union Acts.—By 41 Geo. III. c. 90, s. 9, copies of the statutes of Great Britain and Ireland prior to the Union, printed by the printer duly authorised, shall be received as *conclusive* evidence of the several statutes in the courts of either kingdom (*m*).

Colonial Acts, &c.—The statutes of British possessions do not fall within any of the above rules of proof. As to proving them see 7 Edw. VII. c. 16, *post*, p. 2140.

Journals of the Houses of Parliament.—The original journals of the House of Lords or of the House of Commons are evidence in criminal cases as well as in civil, and may be proved by examined copies.

By sect. 3 of the Evidence Act, 1843 (8 & 9 Vict. c. 113) (*n*), 'copies of the journals of either House of Parliament, purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament (*o*), or by any or either of them, shall be admitted as evidence thereof, without any proof being given that such copies were so printed.'

Acts of State and Government.—Before the passing of the Acts of 1868 and 1882, it was usual to announce the public Acts of Government, and acts by the King in his political capacity, in the London, Edinburgh, or Dublin Gazettes, published by the authority of the Crown; and of such acts announced to the public in the Gazette, the Gazette is admitted in courts of justice to be good evidence (*p*). The Gazette itself must be produced and a cutting from it is inadmissible (*q*). A proclamation for

(*h*) Brett *v.* Beales, M. & M. 421, and cases collected in Hardcastle on Statutes (4th ed. by Craies), 451, 452.

(*i*) See Aiton *v.* Stephen, 1 App. Cas. 456.

(*j*) 4 M. & S. 532, 549, Bayley, J.

(*k*) See R. *v.* Houghton, 1 E. & B. 501, Campbell, C.J. R. *v.* Hardy, 24 St. Tr. 204, Eyre, C.J.

(*l*) Labrador Co. *v.* R. [1893], A. C. 104.

(*m*) It will be noted that this does not apply to Scots Acts. Of these Acts there is a revised official edition published in 1907.

(*n*) Before this Act the printed journals were not evidence, and it was necessary to produce the original or an examined copy. Lord Melville's case, 24 St. Tr. 549, 683. R. *v.* Lord George Gordon, 21 St. Tr. 485; 2 Doug. 590. Chubb *v.* Solomons, 3 C. & K. 75. Jones *v.* Randall, 1 Cowp. 17. A resolution of either House is not evidence of the truth of the facts there affirmed; and therefore, in the case of Titus Oates (10 St. Tr. 1073, 1165), who was charged with having committed perjury on the trial of persons suspected of the Popish Plot, a resolution in the journals of the House of Commons, asserting the existence of the plot, was not allowed to be evidence of that fact.

(*o*) Or the Stationery Office (45 & 46 Vict. c. 9, s. 2).

(*p*) Roscoe, 'Nisi Prius' (18th ed.) 105. See Att.-Gen. *v.* Theakston, 8 Price, 89.

(*q*) R. *v.* Lowe, 52 L. J. M. C. 122; 15 Cox, 286.

reprisals, published in the Gazette, is evidence of an existing war (*r*). Proclamations for a public peace, and acts done by or to the King in his regal character, may be proved in this manner, or by printed copies under the Documentary Evidence Act, 1868 (*s*), and upon the same principle, articles of war, purporting to be printed by the King's printer, were allowed to prove such articles (*t*). The articles of war are now to be judicially noticed (*u*). A Gazette, in which it was stated that certain addresses had been presented to the King, has been held admissible to prove an averment of that fact in an information for a libel (*v*); for they are addresses, said Kenyon, C.J., of different bodies of the King's subjects, received by the King in his public capacity, and thus become acts of state. In R. *v.* Forsyth (*w*), and R. *v.* Raudnitz (*x*), it seems to have been considered that the production of the Gazette would be sufficient, without proof of its being bought of the Gazette printer, or where it came from.

In R. *v.* Sutton (*y*) it was held that the King's proclamation (which recited that it had been represented that certain outrages had been committed in different parts of certain counties, and offered a reward for the discovery and apprehension of offenders) was admissible in evidence as proof of an introductory averment in an information for a libel, that acts of outrage of that particular description had been committed in those parts of the country.

The Gazette is still the medium of publication for proclamations and many executive and administrative acts and orders. But it is superseded by the Rules Publication Act, 1893 (56 & 57 Vict. c. 66), as to the form of subordinate legislation known as statutory rules (*infra*).

Subordinate Legislation and Administrative and Executive Documents.

Statutory Rules are rules, regulations, or bylaws made under any Parliament which—

(a) relate to any court in the United Kingdom, or to the procedure, practice, costs, or fees therein, or to any fees or matters applying generally throughout England, Scotland, or Ireland; or

(b) are made by His Majesty in Council, the Judicial Committee, the Treasury, the Lord Chancellor of Great Britain, or the Lord Lieutenant or the Lord Chancellor of Ireland, or a Secretary of State, the Admiralty, the Board of Trade, the Local Government Board for England or Ireland, the Chief Secretary for Ireland or any other Government department (*z*).

All Statutory Rules made after December 31, 1893, are sent to the King's Printer of Acts of Parliament, and subject to regulations made by the Treasury with the concurrence of the Lord Chancellor and the Speaker of the House of Commons, are numbered, printed and sold

(*r*) But the existence of a war between this country and another requires no proof. Fost. 219. R. *v.* De Berenger, 3 M. & S. 67. Roscoe, 'Nisi Prius' (18th ed.), 190.

(*s*) *Post*, p. 2124.

(*t*) Roscoe, 'Nisi Prius' (18th ed.), 190; 2 Phill. Ev. 108, 109.

(*u*) 44 & 45 Vict. c. 58, ss. 69, 70. As to the articles of war for the navy, see 29 & 30 Vict. c. 109.

(*v*) R. *v* Holt, 5 T. R. 436; 2 Leach, 593.

(*w*) R. & R. 274. See 31 & 32 Vict. c. 37, *post*, p. 2124.

(*x*) 11 Cox, 360 (C. C. R.). Cf. R. *v.* Wallace, 17 Ir. C. L. R. 207; 10 Cox 500.

(*y*) 4 M. & S. 532.

(*z*) 56 & 57 Vict. c. 66, s. 4.

by him (*a*); where the rules are required by statute to be published in the London, Edinburgh, or Dublin Gazette, a notice in the gazette of the rules having been made and of the place where copies can be purchased is sufficient compliance with the statutory requirement (*b*).

The effect of this enactment taken with the Acts of 1868 and 1882 is to make King's printers' copies or Stationery Office copies of the Rules (including the official volume now annually issued) admissible in evidence (*c*).

By the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), as extended and amended by subsequent legislation:

Sect. 2. '*Primâ facie* evidence of any proclamation, order, or regulation issued before or after the passing of this Act by His Majesty, or by the Privy Council, and of any proclamation, order, warrant of the Treasury (*d*) 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 (*e*) 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:

(*a*) 56 & 57 Vict. c. 66. Sect. 3 (1).
(*b*) Sect. 3 (3).
(*c*) See the edition of 1904 of the Rules published up to that date, and the subsequent annual volumes and official Index to the Rules.
(*d*) Added by 8 Edw. VII. c. 48, s. 36 (*b*).

(*e*) SCHEDULE.

COLUMN 1. *Name of Department or Officer.*	COLUMN 2. *Names of Certifying Officers.*
Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
Admiralty.	Any Commissioner of the Admiralty or any Secretary or Assistant Secretary of the Admiralty.
Secretaries of State.	Any Secretary or Under Secretary of State.
Board of Trade	Any Member of the Board, or any Secretary or Assistant Secretary of the Board (And see 5 Edw. VII. c. 15, s. 52, 'Trade Marks')
Local Government Board.	Any Member or any Secretary or Assistant Secretary of the Board (34 & 35 Vict. c. 70, s. 5).
Board of Education (62 & 63 Vict. c. 33).	Any Member or Secretary or Assistant Secretary of the Board or some person authorized by the President or some member of the Board to act on behalf of a Secretary. The document must also bear the seal of the Board (33 & 34 Vict. c. 75, s. 83).
Board of Agriculture and Fisheries.	The President or any Member or Secretary or Assistant Secretary of the Board or any person authorized by the President to act on behalf of the Secretary of the Board (58 & 59 Vict. c. 9; 3 Edw. VII. c. 31, s. 1).
Postmaster General.	Any Secretary or Assistant Secretary of the Post Office (8 Edw. VII. c. 48, s. 36).

(1) By the production of a copy of the Gazette (*f*) 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 His 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' (*g*).

Sect. 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.'

By the Documentary Evidence Act, 1882 (45 Vict. c. 9), s. 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 (*gg*), 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 King's printer, or a printer authorised by His Majesty or otherwise under His 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 of His Majesty's Stationery Office' (*h*).

By sect. 4 the Documentary Evidence Act, 1868 (*supra*), as amended is extended to Ireland.

Acts, Minutes, and Bylaws of Municipal Bodies.—By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 22, '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 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

(*f*) *Ante*, p. 2122.

(*g*) Sect. 4 imposes penalties for forgery or using forged documents as evidence. See *ante*, p. 1689.

(*gg*) Or warrant of the Treasury under the Post Office Act, 1908 (8 Edw. VII. c. 48), s. 36 (2).

(*h*) By sect. 3, it is felony to forge any such document or to tender a forged copy in evidence, *vide ante*, p. 1689.

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' (*i*).

The proceedings of county councils may be proved in the same manner as those of town councils, with the substitution of the chairman for the mayor (*j*); the proceedings, &c., of metropolitan borough councils may be proved under sect. 60 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120) (*k*); the proceedings of urban and rural district councils, and boards of guardians and of other committees, proved under the Public Health Act, 1875 (*l*); and those of parish councils and meetings under Schedule 1, part 3, of the Local Government Act, 1893 (*m*).

Bylaws.—By sect. 24 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), 'The production of a written (*n*) 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 and confirmation is required to the making or before the enforcing of the bye-law' (*o*).

This section has been extended to bylaws made by county councils (*p*) and by metropolitan borough councils (*q*). Bylaws made by a sanitary authority under the Public Health Acts (other than on the council of a municipal borough) may be proved under 38 & 39 Vict. c. 55, s. 186, by a copy signed and certified by the clerk of the authority to be a true copy and to have been duly confirmed (*r*). Such copy is evidence in all legal proceedings of the due making, confirmation and existence of the bylaws until the contrary is proved.

Other Public Documents.—By the Evidence Act, 1843 (8 & 9 Vict. c. 113), s. 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, 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

(*i*) As to penalty for tendering in evidence forged copies, *vide* 45 & 46 Vict. c. 50, s. 235.

(*j*) 51 & 52 Vict. c. 41, s. 22 (5). Those of the London County Council are proved under 56 & 57 Vict. c. cexxi, s. 10.

(*k*) See 62 & 63 Vict. c. 14, s. 2 (5).

(*l*) 38 & 39 Vict. c. 55, r. 199, and Sched. 1, r. 10; as modified by 56 & 57 Vict. c. 73, s. 59.

(*m*) 56 & 57 Vict. c. 73.

(*n*) Or printed. 45 & 46 Vict. c. 50, s. 7; 52 & 53 Vict. c. 63, s. 20, *ante*, Vol. i. p. 4.

(*o*) As to the punishment for tendering, in evidence under this section, forged bylaws, &c., see 45 & 46 Vict. c. 50, s. 235, *ante*, p. 1689.

(*p*) 51 & 52 Vict. c. 41, s. 23.

(*q*) 62 & 63 Vict. c. 14, s. 5 (2).

(*r*) A printed copy has been held insufficient.

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.'

Sect. 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.'

By very many statutes provision is made for giving *primâ facie* or conclusive evidence of particular documents of a public character. These enactments are collected in the Official Index to the Statutes, tit. 'Evidence,' and in Wills on Evidence (2nd ed.), pp. 422, 465. The more important are included in the annexed table.

Societies—		
Building	Certificate of incorporation or registration	37 & 38 Vict. c. 42, s. 20.
Friendly	Certificate of incorporation or registration	59 & 60 Vict. c. 25, s. 11.
Industrial & Provident	Certificate of incorporation or registration	56 & 57 Vict. c. 39, s. 75.
Trade union	Certificate of incorporation or registration	34 & 35 Vict. c. 31, s. 5.
Joint Stock Companies	Certificate of incorporation	8 Edw. VII. c. 69, s. 17.
Newspapers not owned by limited companies	Extracts from register of proprietors	44 & 45 Vict. c. 60, ss. 15, 18.
Bankruptcy and deeds of arrangement and bills of sale	Proof by gazette, sealed order of Court, &c.	46 & 47 Vict. c. 52, ss. 132, 133, 134, 136, 140.
Patents	Certified copies or extracts from register	7 Edw. VII. c. 29, ss. 78, 79, 80, 87, 89.
Trade marks	Certified copies or extracts from register	5 Edw. VII. c. 15, ss. 50, 52, 66.
Solicitors	Law list	23 & 24 Vict. c. 127, s. 22.
Commissioners of oaths	Proof of documents sealed and signed by	52 & 53 Vict. c. 10, s. 6.
Sea fisheries	Proof of bylaws	51 & 52 Vict. c. 54, s. 5.
Submarine telegraphs	Proof of documents under the schedule	48 & 49 Vict. c. 49, s. 8.
Merchant shipping	Proof of documents made admissible under the Act	57 & 58 Vict. c. 60, ss. 694, 695, 719.
Lunacy	Orders and reports of masters in lunacy	53 & 54 Vict. c. 5, s. 144.
Inland revenue	Proof of regulations, minutes, and notices by the commissioners, &c.	53 & 54 Vict. c. 21, s. 24.

Judicial Documents:

Records.

Common Law.—At common law in answer to a plea of *nul tiel record* it was as a general rule necessary to produce the original record (*s*). The record, if a record of the same court, was produced and inspected by the Court; if a record of an inferior court, it was proved by the tenor of the record certified under a writ of *certiorari* issued by the superior court; if a record of a concurrent superior court was proved by the tenor certified under a writ of *certiorari*, issued out of chancery, and transmitted thence by writ of *mittimus* (*t*).

Where there was no plea of *nul tiel record*, the record might be proved either by an *exemplification* or an examined copy or office copy.

Exemplifications are either under the great seal or under the seal of the Court in which the record is produced, and are admissible without proof of the genuineness of the seal (*u*). *An examined copy* must be proved by some witness who has examined it line for line with the original, or who has examined the copy while another read the original (*v*). It ought to appear that the record from which the copy was taken was seen in the hands of the proper officer, or in the proper place for the custody of such records (*w*).

An office copy in the same Court in the same cause, is equivalent to a record; but in another court, or in another cause in the same Court, the copy must be proved (*x*). In order to prove a verdict, a copy of the whole record, including the judgment, was necessary, for otherwise it would not appear but that the judgment had been arrested, or a new trial granted (*y*). Where an indictment for perjury alleged that Burraston was convicted upon an indictment for perjury, upon the trial of which the perjury in question was alleged to have been committed, and it appeared by the record when produced that Burraston had been convicted, but the judgment against him reversed upon error after the finding of the present indictment, it was held that the record produced supported the allegation in the indictment (*z*).

Present Practice.—Most of the common law rules as to the proof of records, are, if not obsolete, rendered of little practical importance in criminal proceedings. As regards records of criminal cases the rules are

(*s*) An examined copy was not sufficient. *Vide* Taylor, Ev. (10th ed.), s. 1535.

(*t*) Roscoe, 'Nisi Prius' (18th ed.), 107. Before 1851, where a record of a Court of quarter sessions was pleaded in a Court of oyer and terminer, or the converse, it ought, in strictness, to have been proved as above stated; but the practice, it is said, was to apply simply to the clerk of the peace, or clerk of assize, who would make it out without writ, or would attend with the record itself at the trial. Archb. Cr. Pl. (21st ed.) 281. 14 & 15 Vict. c. 99, s. 13, *post*, p. 2132, seems to apply to the cases mentioned in it, where there is an issue of *nul tiel record*.

(*u*) Tooker *v.* Duke of Beaufort, Sayer, 297.

(*v*) Reid *v.* Margison, 1 Camp. 469. It is not necessary for the persons examining to exchange papers, and read them alternately. Gyles *v.* Hill, ibid. 471 (*n*).

(*w*) Adamthwaite *v.* Synge, 1 Stark. (N. P.) 183; 4 Camp. 372.

(*x*) Roscoe, 'Nisi Prius' (18th ed.), 97. Burnand *v.* Nerot, 1 C. & P. 578.

(*y*) Bull. (N. P.) 234. But the nisi prius record, with the postea endorsed, was sufficient evidence that the cause came on to be tried. Pitton *v.* Walter, 1 Str. 162. There is not now any nisi prius record in civil actions in the High Court.

(*z*) R. *v.* Meek, 9 C. & P. 513, Williams, J.

in practice superseded, but not abolished, by the statutes regulating the proof of conviction or acquittal, *post*, p. 2132. The fusion of the superior courts into a single court and the changes in procedure have altered the form of the record in civil proceedings in the High Court. The existence and result of a civil action in the High Court is proved by production by the proper officer on the order of a master without *subpœna* (*a*) of the copy, writ, and pleadings filed under the Rules of the Court, and by production of the original judgment, or order of dismissal (*b*). In the case of decrees, orders, or judgments in exercise of Probate (*c*) or matrimonial jurisdiction (*d*), *copies* of the decree, &c., sealed with the seal of the Court, are receivable in evidence without further proof. These provisions extend to Probates, letters of administration, and other instruments and exemplifications or copies thereof, purporting to be sealed with the seal of the Court (*e*). The originals of records or affidavits filed may be proved by production by the proper officer, or by an 'office copy' (sealed with the seal of the office) if they are still in the custody of the High Court (*f*), or by a record office copy if they have been transferred to the Record Office (*g*).

County Courts.—By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 28, the registrar of every court shall cause a note of all plaints and summonses, and of all orders, and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered from time to time in a book belonging to the court, which shall be kept at the office of the court; and such entries in the said book, or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the registrar of the court, shall at all times be admitted in all courts and places whatsoever as evidence of such entries and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding, without any further proof (*h*).

Courts-baron, &c.—Judgments in a court-baron, or other inferior court, may be proved by the production of the book containing the proceedings of the court from the proper custody, and if not made up in form, the minutes of the proceedings will be evidence, or an examined copy of such proceedings or minutes will be evidence (*i*). But this rule does not extend to Courts of Quarter Sessions which are courts of record (*j*).

(*a*) R. S. C. Order LXI. rr. 28, 29.

(*b*) R. *v.* Scott, 2 Q.B.D. 415. Taylor, Ev. (10th ed.), s. 1570. Roscoe, 'Nisi Prius' (18th ed.), 107, 108.

(*c*) 20 & 21 Vict. c. 85, s. 13.

(*d*) 20 & 21 Vict. c. 77, s. 22.

(*e*) Ibid., and 20 & 21 Vict. c. 85, ss. 61, 62.

(*f*) R. S. C. Order LXI. r. 7. 36 & 37 Vict. c. 66, s. 61.

(*g*) 1 & 2 Vict. c. 94, ss. 11–13, by which every copy of a record in the custody of the Master of the Rolls certified as a true and authentic copy by the deputy keeper of the records, or one of the assistant record keepers, and purporting to be sealed or stamped with the seal of the record office, shall be received as evidence in all courts of justice, and before all legal tribunals, and before either House of Parliament, or any committee of either House, without any further or other proof thereof, in every case in which the original record could have been received there in evidence.

(*h*) See Daws *v.* Ryley, 20 L. J. C. P. 264. R. *v.* Rowland, 1 F. & F. 72.

(*i*) R. *v.* Hains, Comb. 337, Holt, C.J., 12 Vin. Abr. Ev. A. *b.* 26, p. 99. Roscoe, 'Nisi Prius' (18th ed.), 117. As to its being necessary in proving the judgment of such a court to give evidence of the proceedings previous to the judgment, see Com. Dig. Ev. C. 1.

(*j*) R. *v.* Smith, 8 B. & C. 341.

Ecclesiastical Courts.—Proceedings in ecclesiastical courts are proved in the same way at common law as those in equity; and their sentences are received in the temporal courts as conclusive evidence of the fact adjudged, upon questions within their jurisdiction (*k*). The old cases on wills proved in the ecclesiastical courts are no longer of value (*l*), being superseded by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), *ante*, p. 2129.

Criminal Proceedings.

Courts of Record.—At common law wherever it was necessary to prove the finding or the trial of an indictment, the record must be regularly drawn up, and produced, or an examined copy of it must be produced and proved. Where an indictment for conspiracy alleged that at a Court of Quarter Sessions an indictment was preferred against A. B., and found by the grand jury, the Court of King's Bench held that the indictment, endorsed a true bill, but without any caption to it, and the minutes made by the clerk of the peace containing the style of the sessions, and the minutes of the business done at it, were not sufficient evidence of the finding of the bill, and that the record itself or an examined copy was the only legitimate evidence to prove it (*m*). And it was held that a plea of *autrefois convict* could not be supported by the indictment with the finding of the grand jury upon it (*n*). So where the prisoner was in fact confined in Abingdon gaol, and the governor of that gaol proved that he was present in Court when the prisoner was tried for housebreaking, and heard sentence passed upon him, and he produced the calendar of the sentences passed at those assizes signed by the clerk of assize, and stated that there was not any other authority for carrying into execution the sentences of the Court at the assizes, even in cases of murder; Maule, J., held that this was not evidence of the prisoner being in lawful custody, as the sentence of the Court at the assizes could only be proved by the record (*o*). On an indictment for the non-repair of certain highways, upon the trial of which the question was, whether a parish was bound to repair all the highways in it as a parish, or the several townships the highways situate in each of them, in order to prove the conviction of the parish upon a similar indictment in 1806, a witness proved that he went to the house of the clerk of assize for the Oxford circuit, in London, and there saw him and his son, and asked for the record, and received a written paper, which he produced, which he and the son of the clerk of assize compared with a document then

(*k*) Duchess of Kingston's case, 11 St. Tr. 263, where a decree in an ecclesiastical suit for jactitation was held not conclusive.

(*l*) See R. *v.* Barnes, 1 Stark. (N. P.) 243. Kempton *v.* Cross, Cas. temp. Hardw. 108. R. *v.* Buttery, R. & R. 342. R. *v.* Ramsbottom, 1 Leach, 25. Elden *v.* Keddel, 8 East, 187. Davis *v.* Williams, 232.

(*m*) R. *v.* Smith, 8 B. & C. 341.

(*n*) R. *v.* Bowman, 6 C. & P. 101. See the cases collected *ante*, p. 1994, and Porter *v.* Cooper, 6 C. & P. 354, and R. *v.* Thring, 5 C. & P. 507, where Gurney, B., held that the minute-book of the Court of Quarter Sessions was not admissible in evidence on an indictment for perjury to prove the trial on which the perjury was alleged to have been committed; and R. *v.* Bellamy, Ry. & M. 171.

(*o*) R. *v.* Bourdon, 2 C. & K. 366.

produced as the record, and which the witness stated he thought was on paper, but he was not sure whether it was on paper or parchment, but it was much torn. The son of the clerk of assize stated that he could not recollect the particular transaction, but the practice was, when a record was required, to make it out from the minutes and the indictment on an original parchment roll, which was signed by the clerk of assize, and a copy was then made on paper and compared with the roll, and stamped with the Oxford circuit stamp, which copy was given to the party applying for it, and that, as far as his own experience went, the roll was drawn up from the indictment and minutes, without any paper draft in the first instance being made, and that he never knew of a paper copy having been kept; and that the paper produced was signed by his father and stamped with the circuit stamp. Coleridge, J., held that the paper was admissible as an examined copy of the record (*p*).

The minutes of a court of oyer and terminer may be received, where the matter to be proved by the minutes has occurred before the same Court sitting under the same commission; as upon the trial of Horne Tooke (*q*), where the minutes of the Court were received as proof of the trial of Hardy. So the indictment with the officer's note upon it of a verdict of not guilty is sufficient evidence during the same assizes, upon a plea of *autrefois acquit*, that the prisoner was acquitted upon such indictment (*r*). And so the caption of the general gaol delivery of the Central Criminal Court, the indictment with the note of the prisoner's plea, the verdict and the sentence entered thereon, together with the minutes of the trial entered by the officer of the Court in the minute book, has been held sufficient evidence at a subsequent session of the Central Criminal Court (*s*).

Where on an appeal against an order of removal the book containing the proceedings at the sessions was proved to be the original sessions book, regularly made up and recorded after each sessions by the clerk of the peace, from minutes taken by him in Court, and the minutes of each sessions were headed by an entry containing the style and date of the sessions, and the names of the justices in the usual form of a caption, and no other record was kept of the proceedings of the sessions than the said sessions book, and it had always been received in evidence in the Court of Quarter Sessions for the purpose of proving them; the Court of Queen's Bench held, that such book was properly received in order to prove the quashing of an order of removal on the trial of a former appeal between the same parishes (*t*).

Records properly produced in evidence are conclusive against those who are parties to them:—Thus a record of conviction of a parish for not repairing a road, is for ever afterwards evidence of its liability to

(*p*) R. *v.* Pembridge, C. & M. 157.

(*q*) 25 St. Tr. 446, 449.

(*r*) R. *v.* Parry, 7 C. & P. 836, Bolland, B.

(*s*) R. *v.* Newman, 2 Den. 390; 21 L. J. M. C. 75.

(*t*) R. *v.* Yeoveley, 8 A. & E. 806. This case appears to overrule R. *v.* Ward, 6 C. & P. 366, where Parke, J., on an indictment for perjury alleged to have been committed on the hearing of an appeal against an order of removal, refused to receive as evidence the sessions book produced by the clerk of the peace. The case does not state what the entry in the book was. The clerk said he would have drawn up a record on parchment if he had been asked. And see R. *v.* Nottingham Old Water Works Co., 6 A. & E. 355, Patteson, J.

repair (*u*); but it is not conclusive as against other parties, except as to the fact that the persons charged have been convicted (*v*); therefore an accessory may controvert the guilt of his principal, notwithstanding the record of his conviction (*w*), and it seems that the record of the conviction of the principal is not admissible against the accessory in any case (*x*).

Since the abolition of writs of error (*y*) there is now hardly any case in which the full record of criminal proceedings is needed in evidence in England.

Convictions.—Besides the particular modes of proving a previous conviction allowed by the statutes increasing the punishment of offences committed after a previous conviction (*vide ante*, pp. 1958 *et seq.*) the following general enactments give a simpler mode than the common law of proving a conviction (*z*).

By the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 13, 'Whenever in any proceeding whatever (*a*) it shall 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 judgement or acquittal, as the case may be, omitting the formal parts thereof' (*b*).

By the Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 6, which applies to criminal as well as to civil proceedings (sect. 1), 'a witness may be cross-examined as to whether he has been convicted of any felony or misdemeanor, and if on being so questioned 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

(*u*) R. *v.* St. Pancras, Peake, 219; see 2 Wms. Saund. 160.

(*v*) See R. *v.* Shaw, R. & R. 526, where upon an indictment for delivering instruments to a prisoner to facilitate his escape from gaol, it was held that the record of his conviction being produced by the proper officer, no evidence was admissible to dispute what it stated.

(*w*) R. *v.* Smith, 1 Leach, 288.

(*x*) R. *v.* Turner, 1 Mood. 347. In Keable *v.* Paine, 8 A. & E. 555, Patteson, J., said: 'On an indictment for receiving goods feloniously taken, the felony must be proved, and neither a judgment against the felon, nor his admission, would be evidence against the receiver.'

(*y*) 7 Edw. VII. c. 23, s. 20 (1), *ante*, p. 2005.

(*z*) These and the other statutes affording facilities for proving a conviction are alternative to the modes recognized at common law of proving the conviction by the record. See R. *v.* Henry Saunders, Gloucester Spr. Ass. 1829, MSS. C. S. G. The prisoner was indicted under 15 Geo. II. c. 28, s. 2 (rep.), for uttering base coin after a previous conviction, and Parke, J., held that an examined copy of the record of the previous conviction was sufficient evidence thereof; for the statute, by giving an easier means of proof under s. 9, did not exclude the proof by means of an examined copy. See also R. *v.* Carter, 1 Den. 65; Northam *v.* Latouche, 4 C. & P. 140. Edwards *v.* Buchanan, 3 B. & Ad. 788. R. *v.* Manwaring, D. & B. 132. Police Commissioner *v.* Donovan [1903], 1 K.B. 895.

(*a*) Whether criminal or civil. Richardson *v.* Willis, L. R. 8 Ex. 69; 42 L. J. Ex. 15.

(*b*) Cf. 14 & 15 Vict. c. 100, s. 22, with reference to proceedings for perjury, &c., *ante*, Vol. i. p. 482.

indictment and conviction for such offence, purporting to be signed by the clerk or officer 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 four 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 and the preceding enactment apply only to convictions or acquittals on *indictment*.

By the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 18, 'a *previous* conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted. A record or extract of a conviction shall in the case of an indictable offence consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction), and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and in the case of a summary conviction (*c*) 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.'

This enactment applies to previous summary convictions (*c*) as well

(*c*) Apart from this Act and the statutes set out *ante*, pp. 1958 *et seq.*, conviction before a court of summary jurisdiction (1) may be produced in court, and the handwriting of the magistrates to them proved. Massey *v.* Johnson, 12 East, 67. Gray *v.* Cookson, 16 East, 13. Mason *v.* Barker, Gloucester Spr. Ass. 1843, Erskine, J. (MSS. C. S. G.). R. *v.* Smith, 8 B. & C. 341. Or (2) may be proved by examined copies, which the clerk of the peace of the proper county will make out, upon an application for that purpose (Hartley *v.* Hindmarsh, L. R. 1 C. P. 553; 35 L. J. M. C. 255). It would seem from this last case that oral evidence of a conviction before justices is not accepted, and that if required the justices must have a record of the conviction drawn up, p. 556, Byles, J. The minutes or memoranda of convictions kept in courts of summary jurisdiction are not admissible in evidence as to convictions except in the court to which they relate, 11 & 12 Vict. c. 43, s. 14; 42 & 43 Vict. c. 49, s. 22. Police Commissioner *v.* Donovan [1903], 1 K.B. 895. London School Board *v.* Harvey, 4 Q.B.D. 451.

as to *previous* convictions on indictment. It is used in practice in preference to the other modes of proving a previous conviction authorized by common law and statutes. But the following statutes deal with the same subject matter.

The following table includes most other statutes regulating proof of convictions:—

Statute.	Offence.	Mode of Proof.
5 Geo. IV. c. 84, s. 24	Being at large during a sentence of penal servitude	Certificate in writing containing the substance and effect only of the indictment, conviction, and sentence or order for penal servitude, made by the clerk or officer having custody of (*e*) the records of the court where the sentence was passed, receivable as evidence of proof of the signature and official character of the officer; or if verified by the seal of the court, signature of the judge without further proof.
7 & 8 Geo. IV. c. 28, s. 11	Felony after previous conviction of felony	'Certificate containing substance and effect only, omitting formal parts of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court or other officer having custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer' (*f*).
24 & 25 Vict. c. 96, s. 116 (*g*)	Offence against Larceny Act after previous conviction (*vide ante*, p. 1959)	In similar terms but extended to the previous felony or misdemeanor or offence punishable on summary conviction and to the clerk or officer of any court into which the summary conviction has been returned.
24 & 25 Vict. c. 99, s. 37	Offence against Coinage Offences Act, 1861, after previous conviction	In similar terms but applied to offences against the Act or any former Act relating to the coin, and apparently limited to convictions on indictment.
34 & 35 Vict. c. 112, s. 19	Indictment for receiving stolen goods	Evidence of previous convictions within five years of offences involving fraud or dishonesty. The previous conviction need not be charged, but seven days' notice in writing must be given of the conviction (*h*).
42 & 43 Vict. c. 49, s. 22	Summary proceeding for an offence in a court of summary jurisdiction	Minute of the conviction in the register of the court (*i*).

(*e*) By an officer *de facto* if not *de jure* in custody of the records. See R. *v.* Parsons, L. R. 1 C. C. R. 24; 35 L. J. M. C. 167, as to certificate by deputy clerk of peace in a borough, and see 45 & 46 Vict. c. 50, s. 164; 6 Edw. VII. c. 46, as to power to appoint such deputy.

(*f*) The certificate should shew that judgment was given. R. *v.* Ackroyd, 1 C. & K. 158.

(*g*) The provisions of 24 & 25 Vict. c. 96, ss. 110, 112, and of 24 & 25 Vict. c. 97, ss. 68, 70, as to proof of certain convictions were repealed as to E. in 1884 (47 & 48 Vict. c. 43 s. 4).

(*h*) See R. *v.* Girod, 70 J. P. 514 (C. C. R.). R. *v.* Bromhead, 71 J. P. 102 (C. C. R.). R. *v.* Whitley, 72 J. P. 272.

(*i*) See Police Commissioner *v.* Donovan [1903], 1 K.B. 895. This Act appears to override Giles *v.* Siney, 11 L. T. 310.

Identity.—Production of the conviction is not sufficient unless supplemented by evidence of the identity of the prisoner or witness with the person to whom the conviction refers. In order to prove the identity it is not necessary to call a witness who was present at the former trial; it is sufficient to prove that the prisoner was the person who underwent the sentence mentioned in the certificate. In order to prove a previous conviction a certificate was put in, stating that at the sessions for the borough of Newbury, held on October 31, 1837, the prisoner had been convicted of stealing cotton-prints, and sentenced to be imprisoned for four months. The governor of Reading gaol proved that the prisoner was in his custody before those sessions; that he sent him to Newbury at that time, and received him back with an order from the Newbury sessions, and that he remained in his custody for four months under that sentence; and this was held sufficient (*j*). But where a certificate stated that L. was convicted of felony at the Herefordshire sessions for July, 1841, and sentenced to hard labour for a month, and the porter of the gaol proved that previous to those sessions the prisoner was in his custody, and went up, with others, for trial, and returned the same evening to prison, where he continued for one month from the day of the trial; Maule, J., held that there was no evidence that the prisoner was the person who was convicted of the particular offence mentioned in the certificate; the offence for which the prisoner suffered the punishment mentioned by the witness might have been a misdemeanor (*k*). And where, a certificate having been put in, a gaoler, who was called to prove an admission made by the prisoner, said: 'I asked the prisoner, "How many years ago was it that you were here before?" He said: "It was a many years ago." I then said: "You were then convicted of felony"; and the prisoner said: "Yes, I was."' It was objected, first, that some one ought to have been called who was present when the prisoner was previously tried; and secondly, that this admission was not sufficient, as it did not shew of what felony the prisoner was convicted, but only that he had been convicted of *a* felony. Bosanquet, J., 'I think an admission of the prisoner is sufficient but I think this evidence is not sufficient; it must be proved to be the same felony as that mentioned in the certificate' (*l*). Where, however, W. L. had been summarily convicted at Leeds under 18 & 19 Vict. c. 126 (*m*), and a conviction before the justices of Leeds was put in, and the governor of Leeds gaol produced a commitment signed by the same justices and otherwise agreeing in every particular with the conviction, and proved that the prisoner had undergone the sentence in pursuance of the terms of the commitment; it was held that this was sufficient evidence of the identity of the prisoner (*n*).

(*j*) R. *v.* Crofts, 9 C. & P. 219. '*Sed quære*, whether this evidence shewed that the prisoner was imprisoned for the same felony as that mentioned in the certificate? It shewed, indeed, that he was in gaol for *some* offence, but it might be another felony or a misdemeanor.' C. S. G.

(*k*) R. *v.* Lloyd, 1 Cox, 51, MSS. C. S. G.

(*l*) R. *v.* J. and T. Goodman, Stafford Sum. Ass. 1830, MSS. C. S. G., decided on 6 & 7 Will. IV. c. 111, *ante*, p. 1958.

(*m*) Superseded and to a great extent repealed by the Summary Jurisdiction Act, 1879 and 1884.

(*n*) R. *v.* Levy, 8 Cox, 73, Byles, J., S. C. as R. *v.* Leng, 1 F. & F. 77.

Foreign Laws and Foreign Public Documents.

Subject to particular legislative provisions, foreign laws and judgments must be proved as facts, where they come into question in a criminal or civil proceeding in England. The expression foreign applies to the laws and judgments of any other part of the King's dominions than England and Wales, and perhaps Ireland (*o*).

Foreign law must be proved in a criminal case by oral evidence, and cannot be ascertained by merely producing copies of statutes or text books, except under the provisions of the Acts stated *post*, p. 2138 (*p*). It was decided in the Sussex Peerage claim (*q*) that the person who proves a foreign law must be *peritus virtute officii vel professionis* (*i.e.* a lawyer of the country in question or an official of that country, whose position requires a competent knowledge of the law question); and that though the witness may refresh his memory, or correct or confirm his opinion, by foreign law books, yet the law itself must be taken from his evidence (*r*). Where, therefore, evidence having been given to shew the state of the law of inheritance in Alsace at a particular time, a witness was called, who stated himself to be a French advocate practising at Strasbourg, in the department of Bas Rhin, and that the feudal law had been put an end to in Alsace by the torrent of the French revolution *de facto* in 1789, and by the treaty of Luneville *de jure;* and upon being asked whether there was not a decree to that effect, he added that there was such a decree of the August 4, 1789, of the National Assembly, and that he had learned this in the course of his legal studies, it being part of the history of the law which he learned while studying the law: it was objected that this evidence could not be received, unless the decree itself were proved and put in; but the majority of the court held that it might; for 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 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. If an English court were to attempt to expound the written law of a foreign country, it would be liable to the most serious errors. The question is not what the language of written law is, but what the law is altogether, as shewn by exposition, interpretation, and adjudication (*s*).

(*o*) Reynolds *v.* Fenton, 3 C. B. 194.

(*p*) See Roscoe, 'Nisi Prius' (18th ed.) 120. Baron de Bode's case, 6 St. Tr. N. S. 237. *Ex parte* Percival [1907], 1 K.B. 696.

(*q*) 11 Cl. & F. 85; 8 E. R. 1034; 6 St. Tr. N. S. 79; 11 Cl. & F. 85. This case overrules R. *v.* Dent [1843], 1 C. & K. 97.

(*r*) In this case it was held that a Roman Catholic bishop, holding the office of co-adjutor to a vicar apostolic in this country, was, in virtue of that office, to be considered as a person skilled in the matrimonial law of Rome, and therefore competent to prove that law. In Lacon *v.* Higgins, 3 Stark. (N.P.) 178, where, to prove the law of France as to marriage, the French vice-consul produced a book, which he said contained the code of laws upon which he acted at his office; that it was printed at the office for the printing of the laws of France; and that it would have been acted upon in any of the French courts,—it was ruled by Abbott, C.J., to be sufficient proof of the law.

(*s*) Baron de Bode's case, 8 Q.B. 208, 246; 6 St. Tr. (N. S.) 237. Patteson, J. But see Concha *v.* Murietta, 40 Ch. D. 543, as to the power of the court to examine the foreign statutes when vouched.

Where a witness was a German jurisconsult, and had studied the German law at the University of Leipsic in Saxony, but had not transacted business at Cologne, and had no knowledge of the laws of Cologne but from books; Alderson, B., held that he could not give evidence of the law of Cologne, as he had not had any practice at Cologne (*t*). But where a native of Belgium stated that he had formerly carried on the business of a merchant and commissioner in stocks and bills of exchange at Brussels, but was now an hotel-keeper in London, and that he was well acquainted with the Belgian law upon the subject of bills and notes; it was held that he was competent to prove that by the law of Belgium it is not necessary, even though a bill or note is made payable at a particular place, that it should be presented there for payment; for inasmuch as he had been carrying on a business which made it his interest to take cognisance of the foreign law, he fell within the description of an expert (*u*).

And the proper course is to ask the expert witness, on his responsibility, what that law is, and not to read any fragments of a code (*v*). A person of experience in the profession of the law of another country may state what in his opinion, according to the law of that country, would be the legal effect of the facts previously spoken to by the witnesses, taking the facts to be accurate. Thus a Scotch advocate has been allowed to state his opinion, whether a marriage, as proved by the witnesses, would be valid according to the Scotch law (*w*).

A judgment obtained in one of the superior Courts in Ireland, since the Union, is not a record in England (*x*). But by the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 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.'

By sect. 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

(*t*) Bristow *v.* De Secqueville, 5 Ex. 275. Cf. *In the goods of* Bonelli, 1 P. D. 69, where Hannen, P., rejected the evidence of an English barrister who had studied Italian law, and Cartwright *v.* Cartwright, 26 W. R. 684, where an English barrister who practised before the Privy Council was not accepted as an expert in Canadian law. As to the law of Malta, see Wilson *v.* Wilson [1903], P. 156; and as to colonial law, see Cooper King *v.* Cooper King [1900], P. 65. R. *v.* Picton, 30 St. Tr. 336. As to Persian law, see *In bonis* Dost Aly Khan, 6 P. D. 6.

(*u*) Van der Donckt *v.* Thellusson, 8 C. B. 812. The competency of a witness to prove foreign law is a question for the Court, and it seems, as a general rule, that in order to render a person competent he should have some peculiar means, from his profession or business, of becoming acquainted with the law with respect to which he is called on to speak. Van der Donckt *v.* Thellusson, 8 C. B. 812, Cresswell, J. See R. *v.* Povey, 6 Cox, 83.

(*v*) Cocks *v.* Purday, 2 C. & K. 269, Erle, J. Sussex Peerage Claim, *ante*, p. 2136.

(*w*) R. *v.* Wakefield, Murray's Report, p. 238.

(*x*) Harris *v.* Saunders, 4 B. & C. 411.

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' (*y*).

Ascertainment of Law of Foreign State or of another Part of the King's Dominions.—By the British Law Ascertainment Act, 1859 (22 & 23 Vict. c. 63), in any judicial proceeding instituted in any Court, civil, *criminal*, or ecclesiastical, within the King's dominions, if the Court deem it necessary for the proper disposal of such proceeding to ascertain the law applicable to the facts of the case as administered in any other part of the King's dominions, the Court in which the proceeding is pending may direct a case to be prepared setting forth the facts, as these may be ascertained by verdict of a jury or other mode competent, &c., and the Court shall settle the question of law arising out of the same, and remit the case to the superior Court whose opinion is desired in such other part of the King's dominions. The Act then prescribes the mode of obtaining the opinion of the Court, and of remitting it to the Court by which the opinion was required, which Court is thereupon to apply such opinion to such facts in the same manner as if the same had been pronounced by such Court itself upon a case reserved, or upon a special verdict; or the Court may, if the opinion has been obtained before the trial, order it to be submitted to the jury with the other facts of the case as evidence, or conclusive evidence, of the foreign law therein stated.

The Foreign Law Ascertainment Act, 1861 (24 & 25 Vict. c. 11), contains similar provisions for the purpose of enabling any superior Court in the King's dominions to obtain the opinion of any Court of any foreign state with which His Majesty may have made a convention for that purpose, as to the law of such state.

By the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), the provisions of the Act of 1861 may be extended to foreign countries in which His Majesty has jurisdiction (*z*).

By the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 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

(*y*) By s. 11, documents admissible without proof of seal, &c., in England, Wales, or Ireland, are equally admissible in the colonies.

(*z*) For extent to which the power has been exercised see the Order in Council in Stat. R. & O. Rev. (ed. 1904), Vol. v. *tit.* 'Foreign Jurisdiction,' and St. R. & O. 1905–1909.

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.'

By the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 6, 'The certificate of the clerk or other proper officer of a legislative body in any colony (*a*) to the effect that the document to which it is attached is a true copy of any colonial law assented to by the governor of such colony, or of any bill reserved for the signification of His Majesty's pleasure, by the said governor, shall be *primâ facie* evidence that the document so certified is a true copy of such law or bill, as the case may be, that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the governor; and any proclamation purporting to be published by authority of the governor in any newspaper in the colony to which such law or bill shall relate, and signifying His Majesty's disallowance of any such colonial law, or His Majesty's assent to any such reserved bill as aforesaid, shall be *primâ facie* evidence of such disallowance or assent.'

(*a*) By s. 1 the term 'colony' shall in this Act include all of His Majesty's possessions abroad in which there shall exist a legislature, as hereinafter defined, except the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in His Majesty, under or by virtue of any Act of Parliament for the government of India. The terms 'Legislature' and 'Colonial Legislature' shall severally signify the authority, other than the Imperial Parliament or His Majesty in Council, competent to make laws for any colony.

The term 'Representative Legislature' shall signify any colonial legislature which shall comprise a legislative body, of which one-half are elected by inhabitants of the colony.

The term 'Colonial Law' shall include laws made for any colony either by such legislature as aforesaid, or by His Majesty in Council.

An Act of Parliament, or any provision thereof, shall, in construing this Act, be said to extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of Parliament.

The term 'Governor' shall mean the officer lawfully administering the government of any colony.

The term 'Letters Patent' shall mean letters patent under the Great Seal of the United Kingdom of Great Britain and Ireland.

By the Evidence (Colonial Statutes) Act, 1907 (7 Edw. VII. c. 16), which received the royal assent on August 21, 1907 (*b*)—

Sect. 1. '(1) Copies of acts, ordinances, and statutes passed (whether before or after the passing of this Act) by the Legislature of any British possession, and of orders, regulations, and other instruments issued or made, whether before or after the passing of this Act, under the authority of any such Act, ordinance, or statute, if purporting to be printed by the Government printer, shall be received in evidence by all courts of justice in the United Kingdom without any proof being given that the copies were so printed.

'(2) If any person prints any copy or pretended copy of any such Act, ordinance, statute, order, regulation, or instrument which falsely purports to have been printed by the Government printer, or tenders in evidence any such copy or pretended copy which falsely purports to have been so printed, knowing that it was not so printed, he shall on conviction be liable to be sentenced to imprisonment with or without hard labour for a period not exceeding twelve months.

'(3) In this Act—

The expression "Government printer" means, as respects any British possession, the printer purporting to be the printer authorized to print the Acts, ordinances, or statutes of the Legislature of that possession, or otherwise to be the Government printer of that possession:

The expression "British possession" means any part of His Majesty's dominions exclusive of the United Kingdom, and, where part of those dominions are under both a central and a local Legislature, shall include both all parts under the central Legislature and each part under a local Legislature.

'(4) Nothing in this Act shall affect the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), *ante*, p. 2139.

'(5) His Majesty may by Order in Council extend this Act to Cyprus and any British Protectorate, and where so extended this Act shall apply as if Cyprus or the protectorate were a British possession, and with such other necessary adaptations as may be made by the Order.'

'Foreign' Judgments.—The common law mode of proving the judgment of a foreign Court (*i.e.* of a Court outside England) was usually by proving the authenticity of the seal affixed to the judgment. In Henry *v.* Adey (*c*), where the plaintiff, who sued on a judgment obtained in the island of Grenada, was non-suited, because he could not prove the seal affixed to be the seal of the island, the Court said, they could not take official notice that the seal affixed was the seal of the island, which was necessary to be shewn in order to prove the judgment, which it purported to authenticate; and that proving the judge's handwriting could not advance the proof of the seal, unless by considering him in the nature of a witness to it, which was not pretended. If a colonial Court possesses a seal, it ought to be used for the purpose of authenticating

(*b*) This Act seems to have been passed in consequence of the decision in *Ex parte* Percival [1907], 1 K.B. 696.

(*c*) [1803] 3 East, 221. Roscoe, 'Nisi Prius' (18th ed.), 83, 122. See also Buchanan *v.* Rucker, 1 Camp. 63. Flindt *v.* Atkins, 3 Camp. 215, n.

its judgments (*d*). If it is clearly proved that the Court has not any seal, so that the document cannot be clothed with the form of a legal exemplification, it must be shewn to possess some other requisite to entitle it to credit; as by proving the signature of the judge upon the judgment (*e*). An exemplification of a foreign judgment, that is, a copy authenticated under the seal of the Court, is evidence of the judgment in the Courts of this country (*f*): but a document, purporting to be a copy of a judgment made by the officer of the Court, is not admissible (*g*).

Public Books and Registers.

In many instances, public books are admitted in evidence to prove the facts recorded in them. The muster-book in the navy office has been admitted in evidence to prove the death of a sailor (*h*); and the log-book of a man-of-war, which convoyed a fleet, to prove the time of the convoy's sailing (*i*). The books of the Bank of England are good evidence to prove the transfer of stock (*j*); and on a prosecution for a libel published concerning a person in his office of treasurer of a parish, an entry in a vestry-book, stating that he was elected at a vestry duly held in pursuance of notice, has been considered sufficient evidence to support an allegation in the indictment that he was duly elected treasurer (*k*). The day-book of a prison, containing a narrative of the transactions of the prison, has been received as proof of the time of a prisoner's commitment or discharge (*l*); but it would not be admissible to prove the cause of his commitment (*m*). So on an indictment for forging a seaman's will, an entry in a book called the assignation book of an ecclesiastical Court, in which all causes were officially entered, was admitted to prove revocation of probate (*n*).

Registers of Births, Baptisms, &c.—The registers of baptisms, marriages, and burials, preserved in churches, are good evidence (*o*); and in order to prove the register of a marriage, it is not necessary to call the attesting witnesses; but as the register affords no proof of the identity of the parties, some evidence of that fact must be given, as by calling the minister, clerk, or attesting witnesses, if they were acquainted with the parties; or the bell-ringers may be called to prove that they rang the bells, and came immediately after the marriage, and were paid by the parties; or the handwriting of the parties may be proved, even where the register is not produced (*p*); or persons may be called who were present at the wedding dinner, &c. (*q*); a mere certificate by the person officiating at the marriage is not evidence (*r*). Registers are in

(*d*) Cavan *v.* Stewart, 1 Stark. (N. P.) 525.

(*e*) Alves *v.* Bunbury, 4 Camp. 28.

(*f*) Black *v.* Lord Braybrook, 2 Stark. (N. P.) 11, 12.

(*g*) Appleton *v.* Lord Braybrook, 2 Stark. (N. P.) 6, 7; 6 M. & S. 34.

(*h*) Bull. (N. P.) 249. R. *v.* Rhodes, 1 Leach, 24.

(*i*) D'Israeli *v.* Jowett, 1 Esp. 427.

(*j*) Breton *v.* Cope, Peake (N. P.), 30. Marsh *v.* Colnet, 2 Esp. 665.

(*k*) R. *v.* Martin, 2 Camp. 100.

(*l*) R. *v.* Aickles, 1 Leach, 390.

(*m*) Salte *v.* Thomas, 3 B. & P. 188.

(*n*) R. *v.* Ramsbottom, 1 Leach, 25, in note. It would have been no bar to the conviction had the probate been unrepealed. R. *v.* Buttery, R. & R. 342.

(*o*) Bull. (N. P.) 247. Doe *v.* Barnes, 1 M. & Rob. 386.

(*p*) Sayer *v.* Glossop, 2 Ex. 409.

(*q*) Birt *v.* Barlow, 1 Dougl. 171. As to mere similarity of names being evidence of identity, see Hubbard *v.* Lees, L. R. 1 Ex. 255: and see *post*, p. 2148.

(*r*) Nokes *v.* Milward, 2 Addams (Eccl.), 320.

the nature of records, and need not be produced or proved by subscribing witnesses (*s*) : and may be proved either by an examined copy or by a copy certified under sect. 14 of the Evidence Act, 1851 (*t*).

By sect. 42 of the Marriage Act, 1836 (6 & 7 Will. IV. c. 85), all the provisions and penalties of the 'Births and Deaths Registration Act, 1836 (6 & 7 Will. IV. c. 86), relating to any registrar or register of marriages or certified copies thereof, are to be taken to extend to the registrars and registers of marriages to be solemnized under the Marriage Act, 1836, and to the certified copies thereof, so far as the same are applicable thereto.' By sect. 38 of the Registration Act, the Registrar-General shall cause to be made a seal of the said register office (*u*), and the Registrar-General shall cause to be sealed or stamped therewith, all certified copies of entries given in the said office : and the Births and Deaths Registration Act, 1836 (6 & 7 Will. IV. c. 86), by sect. 38 enacts that 'all certified copies of entries purporting to be sealed or stamped with the seal of the said register office shall 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 shall be of any force or effect which is not sealed or stamped as aforesaid.'

The Births and Deaths Registration Act, 1875 (37 & 38 Vict. c. 88), s. 38, 'An entry, or certified copy of an entry, of a birth or death in a register under the Births and Deaths Registration Acts, 1836 to 1874, or in a certified copy of such a register, shall not be evidence of such birth or death, unless such entry either purports to be signed by some person professing to be the informant, and to be such a person as is required by law at the date of such entry, to give to the registrar information concerning such birth or death, or purports to be made upon a certificate from a coroner, or in pursuance of the provisions of this Act with respect to the registration of births and deaths at sea ; and when more than three months have intervened between the day of the birth and the day of the registration of the birth of any child, the entry or certified copy of the entry made after the commencement of this Act of the birth of such child in a register under the Births and Deaths Registration Acts, 1836 to 1874, or in a certified copy of such a register, shall not be evidence of such birth, unless such entry purports,

(a) If it appear that not more than twelve months have so intervened, to be signed by the superintendent registrar, as well as by the registrar, or

(b) If more than twelve months have so intervened, to have been made with the authority of the Registrar-General, and in accordance with the prescribed rules.

'When more than twelve months have intervened between the day of a death or the finding of a dead body and the day of the registration of the death or the finding of such body, the entry or certified copy of the entry made after the commencement of this Act of the death in a register under the Births and Deaths Registration Acts, 1836 to

(*s*) Birt *v.* Barlow, 1 Dougl. 171, Lord Mansfield.

(*t*) *Post*, p. 2144.

(*u*) The general register office, 5 & 6 Will. IV. c. 86, s. 2 ; 15 & 16 Vict. c. 25.

1874, or in a certified copy of such register, shall not be evidence of such death, unless such entry purports to have been made with the authority of the Registrar-General, and in accordance with the prescribed rules.'

Sect. 49. 'Where reference is made in this Act to a registrar or superintendent registrar in connection with any birth or death or other event, or any register, such reference shall (unless the contrary be expressed) be deemed to be made to the registrar who is the registrar for the sub-district in which such birth or death or other event took place, or who keeps the register in which the birth or death or other event is or is required to be registered, or who keeps the register referred to, and to the superintendent registrar who superintends such register as aforesaid.'

Sect. 51. 'This Act, save as is herein otherwise expressly provided, shall extend only to England and Wales.'

The Non-Parochial Registers Act, 1840 (3 & 4 Vict. c. 92), which relates to registers or records of births or baptisms, deaths or burials, and marriages lawfully solemnised, kept in England and Wales, other than the parochial registers and the copies thereof deposited with the diocesan registrars, enacts (sect. 6), that all registers and records deposited in the general register office by virtue of that Act (except the registers and records of baptisms and marriages at the Fleet and King's Bench prisons, at May Fair, at the Mint in Southwark, and elsewhere, which were deposited in the registry of the Bishop of London in 1821) (*v*) shall be deemed to be in legal custody, and shall be receivable in evidence, subject to the provisions of that Act. But by sect. 17, 'In all criminal cases in which it shall be necessary to use in evidence any entry or entries contained in any of the said registers or records, such evidence shall be given by producing to the Court the original register or record' (*vv*).

By the Registration of Burials Act, 1864 (27 & 28 Vict. c. 97), s. 1, 'All burials in any burial ground in England which are not now by law required to be registered shall be registered in register books to be provided for each such burial ground by the company, body, or persons to whom the same belongs, and to be kept for that purpose according to the laws in force by which registers are required to be kept by rectors, vicars, or curates of parishes or ecclesiastical districts in England' (*w*).

Sect. 2. 'Such register books shall be so kept for every such burial ground by some officer or person to be appointed to that duty by the company, body, or persons to whom such burial ground belongs.'

Sect. 3. 'Copies of the register books kept under this Act for every such burial ground shall be from time to time made, verified, and signed

(*v*) These registers were transferred in 1840 to the custody of the Registrar-General, but the transfer does not make them receivable in evidence (3 & 4 Vict. c. 92, s. 92). As to the value of the Fleet Register, see Lloyd *v.* Passingham, 16 Ves. 39; 33 E. R. 906, Eldon, C. Doe *d.* Davies *v.* Gatacre, 8 C. & P. 578. Reed *v.* Passer, 1 Peake (N. P.), 303.

(*vv*) The Births and Deaths Registration Act, 1858 (21 & 22 Vict. c. 25), s. 3, extends the provisions of ss. 5–19, of the Act of 1840 to certain other non-parochial registers or records of births or baptisms, deaths or burials, and marriages.

(*w*) The keeping and preservation of registers of baptisms and burials, according to the rules of the Church of England, is regulated by the Parochial Registers Act, 1812 (52 Geo. III. c. 146). Sect. 5 provides for searches and taking copies.

by such officer or person as aforesaid, and sent by him to the registrar of the diocese wherein the burial ground to which the same relates is situate, to be kept with the copies of the register books of the parishes, within such diocese' (*x*).

Sect. 5. 'The register books kept under this Act, or copies thereof, or extracts therefrom, shall be received in all courts as evidence of the burials entered therein' (*y*).

As to proof of births and deaths, &c., at sea, see the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 240, 243.

As to proof of marriages under British law abroad, see 55 & 56 Vict. c. 23, s. 16.

Examined Copies.—Whenever an original document is of a public nature, and admissible in evidence, an examined copy is also admissible (*z*). Thus examined copies of the entries in the privy council book, or of a licence preserved in the Secretary of State's office (*a*), of entries in the books of the Bank of England (*b*), or of commissioners of land tax (*c*), or of excise (*d*), are admissible in evidence. So an examined copy of a parish register is evidence (*e*).

By the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 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 entrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words' (*f*).

A copy of an entry in the register book of births in a registrar's district within a superintendent registrar's larger district, certified to be a true copy under the hand of the deputy superintendent registrar, who also certified under his hand that the register book was in his lawful custody, is admissible evidence of the entry in the register book (*g*) and

(*x*) Sect. 4 imposes penalties on persons failing to comply with the provisions of ss. 1–3.

(*y*) Sect. 6 applies the regulations of the Births and Deaths Registration Act, 1836 (s. 35). As to searches in register books, so far as those regulations relate to registers of burials kept by rectors, vicars, or curates.

(*z*) Lynch *v.* Clerke, 3 Salk. 154.

(*a*) Eyre *v.* Palsgrave, 2 Camp. 606.

(*b*) Marsh *v.* Colnet, 2 Esp. 665.

(*c*) R. *v.* King, 2 T. R. 234.

(*d*) Fuller *v.* Fotch, Carth. 346.

(*e*) Bull. (N. P.) 247. But an examined copy of the register of a marriage in the Swedish ambassador's chapel in Paris was rejected. Leader *v.* Barry, 1 Esp. 353.

(*f*) This section is cumulative, and does not restrict the proof to the mode pointed out by this section. R. *v.* Manwaring, D. & B. 132, where Williams, J., said: 'I must protest against it being supposed that I agree in the notion that when a document of a public nature cannot be produced the parties are tied down to any particular mode of secondary proof.' See Dorrett *v.* Meux, 15 C. B. 142, and see R *v.* Manwaring, D. & B. 132, as to a certificate of a superintendent registrar of the registration of a chapel.

(*g*) R. *v.* Weaver, L. R. 2 C. C. R. 85: 43 L. J. M. C. 13.

of the date of birth (*h*). But the age of a child may be proved without production of a certificate of birth (*i*).

Inspection of Documents.

In a criminal case the defendant is not obliged to produce nor to give discovery or inspection of any document or matter in his possession or under his control, on the ground that he cannot be compelled to disclose anything tending to criminate himself, except when a witness in his own behalf. But this rule does not exclude the use of documents, &c., found on him on arrest, or brought under the custody of the law by search warrant or other methods (*j*).

If on proper notice to produce he does not produce documents, secondary evidence of their contents becomes admissible (*k*).

The accused appears to be entitled to have produced to him for inspection all documents on which the prosecution relies, *i.e.* the indictment, the depositions (*l*), and all exhibits referred to therein, or in any notice of intention to produce exhibits not included in the depositions (*m*).

There is a general right to inspect and take copies of public books (*n*) and records subject to the specific statutory provisions which regulate the keeping, custody, and inspection, and to the existence of some public or private interest in the person seeking inspection, and it seems to be immaterial whether the inspection is sought for the purposes of criminal (*o*) or of civil proceedings (*p*). The question as to what is a public and what a private book must be determined in each case by consideration of the nature of the book and the purpose for which and the conditions under which it is kept or made (*q*).

Judicial Records.—The judicial records of the King's Courts are safely kept (*r*) for public convenience, that any subject may have access to them for his necessary use and benefit (*s*). In the case of an acquittal on a prosecution for felony, it has been ruled that a *copy* of the indictment

(*h*) *Re* Goodrich [1904], Prob. 138, where *Re* Wintle, L. R. 9 Eq. 373 was disapproved.

(*i*) R. *v.* Cox [1898], 1 Q.B. 179.

(*j*) *Ante*, pp. 2073, 2075.

(*k*) *Ante*, p. 2078.

(*l*) *Post*, p. 2252.

(*m*) Under the Criminal Appeal Act, 1907, and Criminal Appeal Rules, 1908, a proper list of exhibits produced in Court must be made by the proper officer of the Court. *Vide ante*, p. 2031.

(*n*) Tidd, Pr. 647.

(*o*) It is said in Tidd's Practice, 649, that a rule for inspecting public writings is never granted where the person who has them in his custody would, by producing them for inspection, subject himself to criminal proceedings, '*for in criminal cases a party is never compelled to furnish evidence against himself.*' This statement, if accurate, is good news for dishonest custodians of public writings.

(*p*) See R. *v.* Merchant Taylors' Company, 2 B. & Ad. 115, approved in Bank of Bombay *v.* Suleman Sonje [1908], L. R. 35 Ind. App. 130.

(*q*) In R. *v.* Holland, 4 T. R. 691. An information had been filed against an officer of the East India Company, on charges of delinquency founded upon a report of a board of inquiry in India; and the Court of King's Bench were of opinion that he had no right to have an inspection of that report, and that the Court had no discretionary power to grant it.

(*r*) The records of the Superior Courts are kept in the Courts for twenty years and then transferred to the Record Office. The records of Quarter Sessions are kept by the Clerk of the Peace under the *custos rotulorum*. See Duke of Bedford *v.* Duke of Westminster [1899], 16 T. L. R. 114.

(*s*) So provided by 46 Edw. III. which is declaratory. See 2 Phill. Ev. 174. Taylor, Ev. (10th ed.) s. 148.

cannot be regularly obtained without an order from the Court (*t*). In a Canadian case (*u*) it is stated that the English law officers on being consulted had replied that the fiat of the Attorney-General was never asked for to enable a person acquitted to get a copy of the record of his indictment.

A copy of a record is admissible without proof of the order of the Court allowing the copy; for though it is the duty of the officer charged with the custody of the records of the Court not to produce a record, or give a copy of it except under order of a competent authority, yet if the officer, in neglect of his duty, has given a copy, or produces the original, the evidence in itself is unobjectionable, and must be received (*v*).

(*t*) This practice originated with an order made in 16 Car. II. by Hyde, Chief Justice of the King's Bench; Bridgman, Chief Justice of the Common Pleas; Twisden, J., Tyril, J., and Kelyng, J., 'to be observed by the justices of the peace and others at the sessions in the Old Bailey,' as follows: 'That no copies of any indictment for felony be given without special order, upon motion made in open Court, at the general gaol delivery under motion, for the late frequency of actions against prosecutors (which cannot be without copies of the indictments) deterreth people from prosecuting for the King upon great occasions.' Kel. (J.) 3. The object of the rule is said to be to protect prosecutors from unfounded actions for malicious prosecution, Tidd, Pr. 647. Groenvelt *v.* Burrell, 1 Ld. Raym. 253. The jurisdiction to make this order appears extremely questionable, and has been frequently doubted. See Browne *v.* Cumming, 10 B. & C. 70, and the authorities there referred to. In R. *v.* Brangan, 1 Leach, 27, the prisoner, having been acquitted, applied for a copy of the indictment; but Gilles, C.J., admitting that the prosecution bore the strongest marks of being malicious, refused the application, because it was not necessary that he should grant it, declaring that by the laws of this realm every prisoner, upon his acquittal, had an undoubted right and title to a copy of the record of such acquittal, for any use he might think fit to make of it, &c.; and that after a demand of it had been made the proper officer might be punished for refusing to make it out. In Browne *v.* Cumming the Court expressed no opinion as to the authority of the judges to make the order, but refused to restrain the plaintiff from using a copy of an indictment alleged to have been improperly obtained, on the ground that, taking all the facts together, they did not think there had been a mistake or misrepresentation of such a nature as to call upon the Court to interfere. The order in question, if not expressly overruled, is much shaken by R. *v.* Middlesex Justices, 5 B. & Ad. 1113. In that case Bowman had been tried and convicted of larceny at the Clerkenwell sessions, after those sessions had lapsed for want of an adjournment, and being indicted for the same offence afterwards, at the Old Bailey, he proposed to plead *autrefois convict*, and the Court adjourned the case to give time for an application for a copy of the record; R. *v.* Bowman, 6 C. & P. 101; and an application was afterwards made to the clerk of the peace for a copy of the record, which was refused. And the Court of Queen's Bench granted a mandamus to make up the record of the proceedings against Bowman, on the ground that 'the prisoner had a right to have the record of the proceedings which passed at the sessions correctly made up, and to make any use of it he could.' The report in R. *v.* The Justices of Middlesex erroneously states the application for the mandamus to have been after the prisoner had pleaded his former conviction. See R. *v.* Bowman, 6 C. & P. 101, 337. This case seems to overrule R. *v.* Vandercomb, 2 Leach, 708, and R. *v.* Parry, 7 C. & P. 836, where the Court refused to grant the prisoners copies of their indictments, in order to enable them to plead *autrefois acquit*, and seems to establish the position that the prisoner is entitled, *as of right*, to a copy of the indictment for such a purpose; and if for such a purpose, it is difficult to see why he should not have the same right for the purpose of instituting a civil suit to seek reparation for the injury which he has sustained by the malicious conduct of the prosecutor. C. S. G. The rule, whatever its value, is limited to cases of felony, and in prosecutions for misdemeanor the defendant is entitled to a copy of the record as of right without any previous application to the Court. Morrison *v.* Kelly, 1 W. Bl. 385. Evans *v.* Phillips, MS. Selw. (N. P.) 952. 2 Phill. Ev. 176.

(*u*) Att.-Gen. *v.* Scully, 4 Ontario, L. R. 394, 410.

(*v*) Legatt *v.* Tollervey, 14 East 302.

Sect. II.—Private Documents.

By *private* documents for purposes of evidence are meant documents private both as to the mode of proof and as to their effect, which is as against parties and privies only (*w*).

Execution.—By the Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), which by sect. 1 applies to criminal as well as to civil proceedings, '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' (sect. 7) (*x*). This enactment alters the common law rule of proof which required that documents in fact attested should be proved by the attesting witness if he was available as a witness (*y*). Where the attesting witness was dead (*z*), or insane (*a*), or absent in a foreign country, or not amenable to the process of the superior Courts (*b*), or where he could not be found after diligent inquiry (*c*), evidence of the witness's handwriting was admissible (*d*). Proof of the subscribing witness's handwriting was treated as evidence of the execution of the instrument by the party therein named, whose signature the instrument purported to bear; and for the purpose of proving that the instrument was executed by the party so named, it was not necessary to prove the handwriting of the party (*e*).

The private documents which need attestation to be valid must still, as a general rule, be proved by calling an attesting witness, and not by the admissions of the parties, whether out of Court or in the witness box (*f*). The rule does not apply if the document is over thirty years old (*g*), or is in the possession or control of the other party, who fails to produce it on proper notice (*h*) or claims a subsisting interest under it, which claim is treated as an admission (*i*), or where the attesting witness is unavailable (*j*).

The obligation to prove such documents applies even if the document is lost, destroyed, or cancelled, if the name of the attesting witness is known and he is available or his attestation can be proved by others (*k*).

Where an instrument is lost its execution by the parties may be proved (*l*), but where attestation was requisite and the attesting witness is dead, it is unnecessary to prove his handwriting, except for the purpose of proving his identity (*m*). Under particular circumstances an

(*w*) Phipson, Ev. (4th ed.) 476.

(*x*) 17 & 18 Vict. c. 125, s. 6, which related to civil cases only, was repealed in 1892 (S. L. R.).

(*y*) Doe *v.* Durnford, 2 M. & S. 62. Higgs *v.* Dixon, 2 Stark. (N. P.) 180. Abbot *v.* Plumbe, 1 Dougl. 216. Whyman *v.* Garth, 8 Ex. 803. The rule applied even if the witness were blind. Cronk *v.* Frith, 9 C. & P. 197.

(*z*) Anon. 12 Mod. 607. See R. *v.* St. Giles, 1 E. & B. 642.

(*a*) Currie *v.* Child, 3 Camp. 283.

(*b*) Prince *v.* Blackburn, 2 East, 250. *e.g.* when he was in Ireland. Hodnett *v.* Forman, 1 Stark. (N. P.) 90.

(*c*) Cunliffe *v.* Sefton, 2 East, 183.

(*d*) Taylor, Ev. (10th ed.) ss. 1854 *et seq.*

(*e*) Taylor, Ev. (10th ed.) s. 1856.

(*f*) Phipson, Ev. (4th ed.) 480.

(*g*) Taylor, Ev. (10th ed.) ss. 87, 88.

(*h*) *Ante*, p. 2074.

(*i*) Phipson, Ev. (4th ed.) 483. Roscoe, 'Nisi Prius' (18th ed.), 142. In criminal cases admissions by the accused except in open Court are not as a general rule operative.

(*j*) See Roscoe, 'Nisi Prius' (18th ed.), 133. Wills, Ev. (2nd ed.) 378.

(*k*) Phipson, Ev. (4th ed.) 482.

(*l*) Keeling *v.* Ball, Peake, Ev. App. XXXII. R.

(*m*) R. *v.* St. Giles, 1 E. & B. 642.

instrument signed by one prisoner and attested by another prisoner has been held admissible against both upon proof of their signatures (*n*).

Three bills of exchange were accepted in the name of H. T. R., and made payable at a named bank, and the cashier of that bank proved that he knew the handwriting of H. T. R., and that the acceptances were in his writing, that he had kept an account at the bank, but his only means of knowledge as to the handwriting consisted in his having as cashier paid cheques drawn in the name of H. T. R., whom he did not know and had never seen write. It was held that there was sufficient evidence of identity of the person who had accepted the bills with H. T. R., the defendant in an action brought upon those bills (*o*). So where a witness proved that he saw a person of the name of W. S. E. write a letter about five years ago, which letter was produced, and established a case against the defendant, W. S. E., for goods sold and delivered, if the identity of the writer and the defendant were shewn, but the witness had not seen the person since, and did not know whether he was the defendant ; it was held that there was sufficient evidence of the identity (*p*). Evidence that the defendant was present when the instrument was prepared (*q*), or that he had made acknowledgments respecting it (*r*), would be sufficient to connect him with the instrument. If an instrument describes a party on the face of it by name, place of abode, and trade, proof of the handwriting of the subscribing witness is sufficient to shew that it was signed by a person truly described as being of that name and place ; but it must also be proved that the party against whom the document is to be used corresponds with

(*n*) R. *v.* Marsh, 1 Den. 505 : 19 L. J. M. C. 12. This was an indictment against Marsh and Lord for attempting to obtain money from an insurance company by a false claim in writing for a loss of a horse, which was signed by Marsh and attested by Lord ; and Wightman, J., held that the document was admissible on proof of the handwriting of the prisoners without calling Lord as a witness. The point was reserved, but the case went off on an objection to the indictment, and this point was not noticed. It should be noted that in this case the instrument was put in evidence as part of the fraud charged against both prisoners.

(*o*) Roden *v.* Ryde, 4 Q.B. 626. See Greenshields *v.* Crawford, 9 M. & W. 314. For cases where identification was held insufficient, see Whitelock *v.* Musgrove, 1 Cr. & M. 511 ; Jones *v.* Jones, 9 M. & W. 75.

(*p*) Sewell *v.* Evans, 4 Q.B. 626. The grounds of the decision seem to have been that where no particular circumstance tends to raise a question as to the party being the same, even identity of name is something from which an inference may be drawn. If the name were one of very frequent occurrence, there might not be much ground for drawing the conclusion ; but where a name is not so common, the inference would be different. The supposition that the right man had been sued is reasonable, because, if not, he might so easily prove that he was not the person, and on account of the danger a party would incur if he served process on a wrong party intentionally. In a criminal case it seems that in general the mere fact that a person of the same name as the prisoner signed a document or the like would not be considered sufficient evidence of identity. See Logan *v.* Alder, 3 Tyrw. 537, where Bolland, B., said, 'Suppose a person to be tried for forging the signature of W. R. A. of H. House to a bond, and that the subscribing witness said, "I saw that bond signed at the inn I keep, but I never saw the party executing before or since," could that prisoner's case be left to the jury ? ' See Roden *v.* Ryde, *supra*, Patteson, J., and Denman, C.J. In R. *v.* Murtagh, 6 Cox, 447 (Ir.), the prisoner was indicted for making a false declaration, and it was proved that the declaration was made by a woman describing herself as E. M., and that she affixed her mark to it, but the witnesses were unable to identify the prisoner as that woman, and a statement of the prisoner having been held inadmissible, she was acquitted, and it was not even suggested that there was any evidence to go to the jury. Pennefather, B., and Moore, J.

(*q*) Nelson *v.* Whittall, 1 B. & Ald. 19.

(*r*) Whitelock *v.* Musgrove, 1 Cr. & M. 511, Bayley, J.

that description (*s*). Where in an action against J. R., as a petitioning creditor, proceedings in the bankruptcy which showed that the petitioning creditor was J. R. were held sufficient *primâ facie* evidence of identity (*t*). So where a genuine licence was proved under the seal of the Apothecaries' Company, granting a right to practise and dispense medicines as an apothecary to a person of the same Christian and surname as the plaintiff, who had, as an apothecary, prescribed and dispensed medicines to his patients; it was held that there was ample evidence to go to the jury of the identity of the plaintiff with the person named in the licence (*u*). So where in an action against a pilot for negligence in the management of a vessel, it was objected that no evidence had been given that the defendant was the pilot, whereon the plaintiff's counsel called out Mr. Henderson, intending to call the defendant's son as a witness to prove that fact, when a person answered him and said, 'I am the pilot'; he was not sworn, but was proved to have been acting as pilot at the time of the accident; it was held that there was some evidence of identity, as the name and calling resembled those of the defendant (*v*).

Handwriting.—In Doe *d.* Mudd *v.* Suckermore (*w*), Patteson, J., 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; Garrels *v.* Alexander (*x*), Powell *v.* Ford (*y*), Lewis *v.* Sapio (*z*); 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 communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication, between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party; Lord Ferrers *v.* Shirley (*a*), Buller's 'Nisi Prius,' 236, Carey *v.* Pitt (*b*), Thorpe *v.* Gisburne (*c*), Harrington *v.* Fry (*d*); evidence of the identity of the party being of course added *aliunde*, if the witness

(*s*) Ibid.
(*t*) Hamber *v.* Roberts, 7 C. B. 861.
(*u*) Simpson *v.* Dismore, 9 M. & W. 47, and see Russell *v.* Smyth, 9 M. & W. 810, where the same Christian and surname, profession, residence, and age of a person named in a suit as those of the defendant were held sufficient evidence of identity of the party named in the suit with the defendant.
(*v*) Smith *v.* Henderson, 9 M. & W. 978.
(*w*) 5 A. & E. 730.
(*x*) 4 Esp. 37. Cf. Willman *v.* Worrall, 8 C. & P. 380.
(*y*) 2 Stark. (N. P.) 164.
(*z*) M. & M. 39.
(*a*) Fitzg. 195.
(*b*) Peake, Add. (Cas.) 130.
(*c*) 2 C. & P. 21.
(*d*) Ry. & M. 90.

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 observations 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 so say, unintentionally, without reference to any particular object, person, or document.'

If a witness state that he has only seen a party write once, but thinks the signature is his handwriting, it is evidence to go to the jury (*e*). On an information for a libel, in order to shew that certain letters were in the handwriting of the defendant, a witness who had never seen the defendant write, proved that he had seen a number of letters, which purported to have come from the defendant on the subject of a cause in which he was engaged on one side, and the witness on the other side, and that the witness had acted upon those letters in the course of the cause. Tenterden, C.J., held that the witness was competent to prove the defendant's handwriting (*f*). But where an attorney for three defendants stated that he did not know the handwriting of one of the defendants, but before undertaking to defend the action he had required a retainer signed by all three defendants, and had received a retainer purporting to be signed by all the defendants, upon which he had acted; it was held that the attorney was not competent to prove the handwriting of the one defendant; for one of the other two defendants might have signed the retainer for him with his assent (*g*).

By the Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 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 (*h*) respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute' (*i*). This section, which applies to criminal as well as to civil proceeding, alters the former rule, that handwriting could not be proved by comparing the paper with any other papers acknowledged to be genuine (*j*).

This section allows documents proved to be genuine but not relevant

(*e*) Garrels *v.* Alexander, 4 Esp. 37. Cf. Lewis *v.* Sapio, M. & M. 391, Abbott, C.J. Stranger *v.* Searle, 1 Esp. 14. R. *v.* Crouch, 4 Cox, 163. R. *v.* Barber, 1 C. & K. 434. A witness may prove the identity of a mark from having seen the person make it on several occasions. George *v.* Surrey, M. & M. 516.

(*f*) R. *v.* Slaney, 5 C. & P. 213.

(*g*) Drew *v.* Prior, 5 M. & Gr. 264.

(*h*) See R. *v.* Williams, 9 Cox, 448.

(*i*) This section is applied by s. 1, '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.' See Doe *d.* Mudd *v.* Suckermore, 5 A. & E. 702. 2 Nev. & P. 16. R. *v.* Cator, 4 Esp. 107. Goodtitle *v.* Braham, 4 T. R. 497. Gurner *v.* Longlands, 5 B. & Ald. 330. As to cross-examining a witness before this Act, as to other documents which were not in evidence in the case, see Young *v.* Honner, 2 M. & Rob. 536; 1 C. & K. 51. Griffits *v.* Ivery, 11 A. & E. 322. Hughes *v.* Rogers, 8 M. & W. 123, Parke, B.

(*j*) R. *v.* Wilton, 1 F. & F. 391, Bramwell, B. R. *v.* Coleman, 6 Cox, 163. R. *v.* Shepherd, 1 Cox, 237, Erle, J. Griffith *v.* Williams, 1 Cr. & J. 47. Doe *d.* Perry *v.* Newton, 5 A. & E. 514: 1 Nev. & P. 4. Solita *v.* Yarrow, 1 M. & Rob. 133. Eaton *v.* Jervis, 8 C. & P. 273. Bromage *v.* Rice, 7 C. & P. 548.

to the issue to be put in for the purpose of comparison (*k*). The genuineness of such documents must be decided by the judge (*l*). It seems that a person may write something in Court for the express purpose of comparison under this section. A document, however, written under such circumstances, cannot altogether be relied on as representing the writer's ordinary handwriting (*m*).

A witness giving evidence under this section need not be a professional expert, or a person whose skill in the comparison of handwriting has been gained in his profession or business. A solicitor who had paid some attention to the study of handwriting has been allowed to give evidence under the section (*n*).

If a person has been in the habit of spelling a word in an unusual manner, that is some evidence that a writing containing that word so spelled was written by that person, the value of such evidence depending on the degree of peculiarity in the mode of spelling and the number of occasions on which the person has used it; and the proof of such habit is not confined to the evidence of a witness who is acquainted with it from having seen the person write or correspond with him, but one or more specimens written by him with that peculiar orthography will be admissible; for the object is not to shew similarity of the form of the letters and mode of writing of a particular word or words, but to prove a particular mode of spelling a word, which may be evidenced by the person having orally spelt it in a different way, or written it in that way once or oftener in any sort of characters, the more frequently the greater the value of the evidence. Letters, therefore, written by a plaintiff, in which the defendant's name was improperly spelled Titchborne instead of Tichborne, were held to be admissible in evidence, in order to shew that a libel in which the name was spelt in the same erroneous manner was in fact written by the plaintiff (*o*).

As to the examination of skilled witnesses as to the genuineness of writings, see *post*, p. 2261.

In order to prove the contents of a telegram sent by the prisoner, the original message handed in at the post office should be produced and evidence given to shew that it was sent by him or by his authority, and the copy received through the office cannot be used until it is shewn that the original is destroyed (*p*).

A copy of a parish register purporting to be signed by the curate eighty years ago may be received with no other proof of handwriting than the evidence of the present parish clerk, who speaks from his having seen the same handwriting attached to other entries in the register (*q*).

Unstamped Documents.—By the Stamp Act, 1891 (54 & 55 Vict.

(*k*) Birch *v.* Ridgway, 1 F. & F. 270. Cresswell *v.* Jackson, 2 F. & F. 24.

(*l*) Cooper *v.* Dawson, 1 F. & F. 550. Bartlett *v.* Smith, 11 M. & W. 483.

(*m*) See Cobbett *v.* Kilminster, 4 F. & F. 490. Arbon *v.* Fussell, 3 F. & F. 152. R. *v.* Aldridge, 3 F. & F. 781. R. *v.* Williams, 1 Lew. 137. R. *v.* Taylor, 6 Cox, 58.

(*n*) R. *v.* Silverlock [1894], 2 Q.B. 766: 63 L. J. M. C. 233. Apparently a police constable will not be allowed to give evidence as an expert in handwriting. R. *v.* Wilbain, 9 Cox, 448. R. *v.* Harvey, 11 Cox, 546, Blackburn, J.

(*o*) Brookes *v.* Tichborne, 5 Ex. 929.

(*p*) R. *v.* Regan, 16 Cox, 204.

(*q*) Doe *d.* Jenkins *v.* Davies, 10 Q.B. 314. As to proof of ancient writings, see cases cited, Doe *d.* Mudd *v.* Suckermore, 5 A. & E. 718. See also Taylor, Ev. (10th ed.) ss. 1873–1876. Fitzwalter Peerage claim, 10 Cl. & F. 193: 8 E. R. 716.

c. 39), s. 14 (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 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.' This section replaces 17 & 18 Vict. c. 83, s. 27, which superseded prior Stamp Acts, under which want of a stamp excluded certain documents even in criminal proceedings (*r*).

Bankers' Books.—By the Bankers' Books Evidence Act, 1879 (42 Vict. c. 11), s. 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.'

By sect. 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 authorized to take affidavits.'

By sect. 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 authorized to take affidavits.'

By sect. 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.'

By sect. 7, 'On the application of any party to a legal proceeding, the 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.'

The effect of the definition of Court and legal proceeding, sect. 10, is that a magistrate sitting in Court may make an order for inspection of bankers' books containing the account of a person accused of crime (*s*).

This section gives power to order inspection of entries in bankers'

(*r*) See Rayson *v.* South London Tramways Co. [1893], 2 Q.B. 304. Highmore, Stamp Laws, p. 58. As to cases on former law, see Archb. Cr. Pl. (22nd ed.) 354. Taylor, Ev. (10th ed.) s. 426.

(*s*) R. *v.* Kinghorn [1908], 2 K.B. 949, dissenting from the view of Coleridge, C.J., in R. *v.* Bradlaugh, 15 Cox, 222 (n).

books relating to banking accounts kept on behalf of a party to the action, although in the name of a person who is not a party (*t*).

By sect. 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, when 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 proceedings.'

By sect. 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.'

By sect. 11 (2) of the Revenue Friendly Societies, and National Debt Act, 1882 (45 & 46 Vict. c. 72), the expressions 'bank' and 'bankers' are extended to include 'any company carrying on the business of bankers to which 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.' 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 H.M. 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.

By sect. 10, 'In this Act the expression "legal proceeding" means any civil or criminal proceeding (*u*) 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. . . . The judge of a county court may, with respect to any action in such court, exercise the powers of a judge under this Act.'

By sect. 11, 'Sunday, Christmas Day, Good Friday, and any bank holiday shall be excluded from the computation of time under this Act.'

(*t*) Howard *v.* Beale, 23 Q.B.D. 1. See the Annual Practice, 1909, for decisions on this Act.

(*u*) See R. *v.* Kinghorn [1908], 2 K.B. 949. *ante*, p. 2152.

CANADIAN NOTES.

OF WRITTEN EVIDENCE.

Sec. 1.—*Public Documents.*

(*a*) *Official Documents.*

Judicial Notice.

(1) Shall be taken of Imperial Acts, of ordinances, etc. R.S.C. (1906) ch. 145, sec. 17.

Under this section it was held in a Quebec case that the Court should take judicial notice of the Ontario Companies Act in proof that the accused charged as a director of a trading company with fraudulently publishing a false statement of its affairs, was in fact a director because he was the president of the company, and by the Ontario Companies Act, under which the company was incorporated, the president must be chosen from the directors. R. v. Gillespie (1898), 1 Can. Cr. Cas. 551 (Que.).

(2) Shall be taken of all public Acts of Canada. R.S.C. (1906) ch. 145, sec. 18.

Documentary Evidence.

Copies of Acts, etc., by King's printer shall be evidence. R.S.C. (1906) ch. 145, sec. 19.

Imperial proclamations, how admitted as evidence. R.S.C. (1906) ch. 145, sec. 20.

Proclamations, etc., of Governor-General, how admitted as evidence. R.S.C. (1906) ch. 145, sec. 21.

Proclamations, etc., of Lieutenant-Governor, how admitted as evidence. R.S.C. (1906) ch. 145, sec. 22.

In the North-West Territories, how admitted as evidence. R.S.C. (1906) ch. 145, sec. 22.

No order, conviction or other proceeding made by any justice or stipendiary magistrate shall be quashed or set aside, and no defendant shall be discharged, by reason of any objection that evidence has not been given of a proclamation or order of the Governor in Council or of any rules, regulations, or by-laws made by the Governor in Council in pursuance of a statute of Canada or of the publication of such proclamation, order, rules, regulations or by-laws in the *Canada Gazette*. And such proclamation, order, rules, regulations and by-laws

and the publication thereof shall be judicially noticed. Cr. Code sec. 1128.

Official documents of municipal corporations, etc., how admitted as evidence. R.S.C. (1906) ch. 145, sec. 24.

A copy of by-laws of the Montreal Harbour Commissioners, certified as a true copy under the hand and seal of the secretary, is sufficient, to the extent it covers; but, semble, proof should also be made of approval by the Governor in Council and of publication in the *Canada Gazette*. Perrault v. Montreal Harbour Commissioners (1898), 4 Can. Cr. Cas. 501 (Que.).

Public account books, etc., and documents, how admitted as evidence. R.S.C. (1906) ch. 145, sec. 25.

Entries in books of Government departments, how admitted as evidence. R.S.C. (1906) ch. 145, sec. 26.

Notarial Acts of Quebec province, how receivable in evidence. R.S.C. (1906) ch. 145, sec. 27.

Order in writing of Secretary of State, how receivable. R.S.C. (1906) ch. 145, sec. 29.

Copies of official notices, etc., how receivable. R.S.C. (1906) ch. 145, sec. 30.

Notice of production of official book or document. R.S.C. (1906) ch. 145, sec. 28.

The provisions of the section do not apply to the registers of acts of civil status in the Province of Quebec; certified extracts of which are admissible under the law of Quebec without previous notice to the accused. R. v. Long (1902), 5 Can. Cr. Cas. 493 (Que.), and Can. Evidence Act, sec. 35.

Proof of handwriting of person certifying copy of official document not required. R.S.C. (1906) ch. 145, sec. 31.

(*b*) *Judicial Documents, Records, etc.*

(*a*) *Evidence of Judicial Proceedings, Records, etc.*—R.S.C. (1906) ch. 145, sec. 23.

Depositions Under Fugitive Offenders Act.—The Fugitive Offenders Act, R.S.C. (1906), provides as follows:—

"Depositions, whether taken in the absence of the fugitive or otherwise, and copies thereof, and official certificate of, or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under this Act." Sec. 28.

"Warrants and depositions, and copies thereof, and official certificates of facts 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 His 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.

"(2) All Courts and magistrates shall take judicial notice of every such seal, and shall admit in evidence without further proof of the documents authenticated by it." Sec. 29.

(*b*) *Criminal Proceedings.—Proof of Matters of Record.*

Certificate of former trial upon trial of indictment for perjury. Code sec. 979.

Proof of Matters of Record.—On a charge of perjury committed at the trial of an indictment, such trial and the indictment, verdict, and judgment therein must be proved as matters of record. Such proof may be given either by the production of the original record or of an exemplification thereof, or by a certificate under Code sec. 979 of the substance and effect of the indictment and trial. R. v. Drummond, 10 Can. Cr. Cas. 340 (Ont.).

The *viva voce* testimony of the clerk of assize and of the official stenographer with the production of the official book of entry in which the clerk recorded his memoranda of the proceedings and of the stenographer's notes of the evidence, are insufficient as legal proof of the fact of the former trial. Where a conviction has been made without the legal proof required by law of an essential part of the crime, such defect is a "substantial wrong or miscarriage at the trial," and the conviction must be set aside. R. v. Drummond, 10 Can. Cr. Cas. 340, 10 O.L.R. 456.

Upon a charge of perjury in respect of evidence taken by a magistrate on requiring sureties to keep the peace under sec. 748(2) the false statement may be proved by oral testimony, although not recorded in the minutes of evidence then made by the magistrate. R. v. Doyle (1906), 12 Can. Cr. Cas. 69.

Proof of Previous Conviction.—See R.S.C. (1906) ch. 145, sec. 12.

Proof of Previous Conviction.—The date of the information upon which a summary conviction is based may properly be included in the conviction itself, although it is no longer essential for the purpose of upholding the conviction.

If the certificate or exemplification be that of a Court having a seal it must be certified under such seal; if the proceedings to be certified be before a justice of the peace or coroner, the proceeding may be certified under the hand or seal of such justice or coroner; and, if any such Court, justice or coroner has no seal, or so certifies, then a copy pur-

porting to be certified under the signature of a Judge or presiding magistrate of such Court or of such justice or coroner is admissible without any proof of the authenticity of such signature or other proof whatsoever. Canada Evidence Act, R.S.C. ch. 145, sec. 23.

The question whether the defendant had been previously convicted or not is within the jurisdiction of the magistrate on a charge for a second offence in a summary conviction matter, and his finding thereon on competent evidence is conclusive. R. v. Brown, 16 Ont. R. 41.

It is said that where no particular circumstance tends to raise a question as to the party being the same, identity of name is in civil cases something from which an inference of identity may be drawn in proof of a signature to a document, but that, in a criminal case, the mere fact that a person of the same name as the prisoner signed a document, or the like, would not be considered sufficient. Russell on Crimes, 6th ed. (1896), vol. 3 (*n*). Section 982 expressly refers to "proof of identity of the person," but it has been held that where the name and description is the same, a presumption of identity arises, which throws the onus on the accused to disprove the same. Ex parte Dugan, 32 N.B.R. 98; R. v. Clarke, 15 O.R. 49; R. v. Batson, 12 Can. Cr. Cas. 62. But quære whether such construction gives full force to the words of the section.

A defendant in a criminal case tendering himself as a witness on his own behalf is subject on cross-examination to be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction; and a certificate under Code sec. 982 will upon proof of the identity of the witness as such convict, be sufficient evidence of his conviction, without proof of the signature or the official character of the person appearing to have signed the certificate. Can. Evid. Act, sec. 12; Phipson on Evidence, 2nd ed., 164.

Where the depositions and record of proceedings before the magistrate for a second offence under the Ontario Liquor License Act did not disclose any evidence or submission of a prior conviction, leave was refused on habeas corpus to supplement the proof by affidavits shewing that such evidence was in fact given or admission made. R. v. Farrell (1907), 12 Can. Cr. Cas. 524, 15 O.L.R. 100.

The omission of the magistrate to ask the accused on a charge of a second or subsequent offence, whether he had been previously convicted does not deprive him of jurisdiction to receive proof of the prior conviction. R. v. Wallace, 4 Ont. R. 127, per Armour, J.; R. v. Brown, 16 Ont. R. 41.

It has been held that the magistrate cannot act on his own personal knowledge of identity. R. v. Herrell (No. 1), 1 Can. Cr. Cas. 510.

An accused person examined as a witness on his own behalf may

be cross-examined as to whether he has been previously convicted of an indictable offence, whether or not the charge upon which he is being tried sets out the fact of a previous conviction, and although no evidence of good character has been adduced for the defence. R. v. D'Aoust (1902), 5 Can. Cr. Cas. 407 (Ont.).

(c) *Foreign Judicial Proceedings.*

Proof of in Evidence.—See R.S.C. (1906) ch. 145, sec. 23.

(d) *Public Books and Registers.*

Proof of public books, documents, and registers. R.S.C. (1906) ch. 145, sec. 25.

Proof of entries in books of Government department. R.S.C. (1906) ch. 145, sec. 26.

Notice of production of book, etc. R.S.C. (1906) sec. 28.

Sec. 2.—Private Documents.

Execution.—See R.S.C. (1906) ch. 145, sec. 32.

Impounding of Forged Document Admitted in Evidence.—See R.S.C. (1906) ch. 145, sec. 33.

Comparison of Disputed Handwriting with Genuine.—See R.S.C. (1906) ch. 145, sec. 8.

A jury may properly make a comparison of disputed handwriting although no witness has been called to prove the handwriting to be the same in both, and may draw their own conclusions as to its authenticity, if an admittedly genuine handwriting and the disputed handwriting are both in evidence for some purpose in the case. R. v. Dixon (No. 2) (1897), 3 Can. Cr. Cas. 220 (N.S.).

An accused person does not, by offering himself as a witness on his own behalf become bound to write in the witness-box at the direction of the Judge a specimen of his handwriting for comparison with a document in evidence. Where the accused had furnished a specimen of his handwriting by direction of the Court at a previous trial, but under protest from his counsel, the specimen so obtained should be excluded on the subsequent trial. R. v. Grenier, 10 Can. Cr. Cas. 33.

Inspection of Documents.—Right of accused to inspect documents. See Code sec. 894.

CHAPTER THE FOURTH.

OF CONFESSIONS, ADMISSIONS AND DEPOSITIONS.

SECT. I.—OF CONFESSIONS AND ADMISSIONS.

JUDICIAL confessions, *i.e.* pleas of guilty on arraignment if made freely (*a*) by a person in a fit state to plead are conclusive as to guilt in fact of the offence charged (*b*): but are not conclusive that the indictment charges an offence against the law (*c*). As to confessions or admissions before a magistrate at the preliminary inquiry, *vide post*, pp. 2214, 2217.

Extrajudicial Confessions.—A free and voluntary confession of guilt made by a person accused of crime, in the course of conversation with persons other than a judge or magistrate seised of the charge against him is admissible in evidence against him, because it is presumed that no man would make such a confession against himself if the facts confessed were not true (*cc*).

(*a*) Archb. Cr. Pl. (23rd ed.) 330. See Taylor, Ev. (10th ed.) s. 872; Phipson, Ev. (4th ed.) 242.

(*b*) An appeal against a conviction after a plea of guilty on the ground that the appellant's plea was not in law sufficient to warrant conviction has been summarily dismissed as frivolous. R. *v.* Oliver, 1 Cr. App. R. 45. But in R. *v.* Verney, 2 Cr. App. R. 107, a man who had pleaded guilty at the trial was allowed to prove on appeal that the plea was false in fact.

(*c*) R. *v.* Brown, 24 Q.B.D. 357.

(*cc*) Gilb. Ev. 123. R. *v.* Lambe, 2 Leach (4th ed.) 552. And see R. *v.* Thompson [1893], 2 Q.B. 12, 15. Blackstone and Foster, JJ., entertained a different opinion. (See Fost. 243.) The former says (4 Bl. Com. 357), in speaking of confessions made to persons not in authority as magistrates: 'Even in cases of felony at common law, they are the weakest and most suspicious of all testimony, very liable to be obtained by artifice, false hopes, promises of favour, or menaces, seldom remembered accurately, or reported with precision, and incapable in their nature of being disproved by other negative evidence.' A distinction may be properly made in the weight to be attached to confessions. If a confession be reduced into writing, either by the prisoner, or by some one else, and read over to him, and it be clearly shewn that the confession was the spontaneous and voluntary act of the prisoner, such a confession would be entitled to great consideration. But if a confession were proved by a witness, and rested upon his capability of understanding what was said by the prisoner, his competency to remember the very words used, and his fidelity and accuracy in relating them to the jury, it ought to be received with very great caution. 'For besides the danger of mistake, from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner himself is oppressed by the calamity of his situation, and that he is often influenced by motives of hope or fear to make an untrue confession. The zeal, too, which so generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition in the persons engaged in pursuit of evidence to rely on slight grounds of suspicion, which are exaggerated into sufficient proof, together with the character of persons necessarily called as witnesses in cases of secret and atrocious crime, all tend to impair the value of this kind of evidence, and sometimes lead to its rejection where in civil actions it would have been received.' Taylor, Ev. (10th ed.) s. 872. The weighty observation of Foster, J., is also to be kept in mind, that 'this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence by which the proof of plain facts may be and often is confronted.' Fost. 243. Parke, B., said

An extrajudicial confession, if duly made and satisfactorily proved, is sufficient alone to warrant a conviction, without any corroboration *aliunde* (*d*) in the case of most crimes: but such a confession is not as a rule accepted by itself in cases of murder (*e*), or bigamy, or offences involving title to property, all which may involve mixed questions of law and fact (*f*).

A confession is not conclusive evidence against a prisoner, and when it involves matter of law as well as matter of fact, is to be received with more than usual caution. Thus on an indictment for setting fire to a ship with intent to defraud G. and E. being part-owners of the ship, a declaration of the prisoner that G. and E. were part-owners was received in evidence; but it was objected that the bill of sale, under which G. and E. claimed, was invalid in law; and it was held that, if by reason of the invalidity of the document evidencing the transfer of their shares, their legal title to them could not be established, the declaration of the prisoner could not be relied upon for that purpose (*g*). Where, on an indictment for bigamy, the prisoner had confessed the first marriage, but it appeared that the marriage was void for want of the consent of the guardian of the woman, the prisoner was acquitted (*h*). And admissions of a former valid marriage is regarded as some, but not as sufficient evidence to convict of bigamy (*i*).

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.' Earle *v.* Picken, 5 C. & P. 542, note. R. *v.* Simons, 6 C. & P. 540.

(*d*) R. *v.* Wheeling, 1 Leach, 311 n. R. *v.* Eldridge, R. & R. 440. R. *v.* Falkner, ibid. 481. R. *v.* White, R. & R. 508. R. *v.* Tippet, R. & R. 509. R. *v.* Burton, Dears. 282. R. *v.* Tuffs, 5 C. & P. 167. R. *v.* Unkles, Ir. Rep. 8 C. L. 50. R. *v.* Sullivan, 16 Cox, 347. R. *v.* Kersey, 1 Cr. App. R. 260. In R. *v.* Edgar, Monmouth Spr. Ass. 1831 (MSS. C. S. G.), the prisoner was indicted for obtaining money of a friendly society by false pretences; the rules of the society had not been enrolled, but the prisoner, who was a member of the society, had acted under them, and it was contended that he had thereby admitted their validity, and the position in the text was cited as a stronger decision; on which Patteson, J., said: 'Could a man be convicted of murder on his confession alone, without any proof of the person being killed? I doubt whether he could.' In R. *v.* Sutcliffe, 4 Cox, 270, where a robbery had been committed on a moonlight night, Cresswell, J., left the case to the jury on confessions of the prisoner, though the prosecutor swore the prisoner was not one of the men who robbed him. The remark on this case is that the prosecutor *might* be in error; the prisoner *must* know whether he was guilty or not. In Ireland on the authority of these cases it has been held that a confession although extrajudicial is sufficient without independent proof of the crime to sustain a conviction R. *v.* Sullivan 16 Cox, 347. It seems doubtful whether in England, the mere confession, if extrajudicial, by a prisoner would be sufficient in itself to warrant a conviction. See Taylor, Ev. (10th ed.) s. 868. Roscoe, Cr. Ev. (13th ed.) 35, 36. 2 Hawk. c. 46, s. 36. But see R. *v.* Kersey, *ubi sup.* In the United States the prisoner's confession when the *corpus delicti* is not otherwise proved, has been held insufficient to warrant conviction. Greenleaf, Ev. 251. Guild's case, 5 Halst. 163, 185. Long's case, 1 Hayw. 524 (455).

(*e*) In R. *v.* Warickshall, 1 Leach, 263, note (*a*), reference is made to the case of three men tried and convicted for the murder of H. at Campden in Gloucestershire. One of them, under the promise of pardon, confessed himself guilty of the fact. The confession, therefore, was not given in evidence against him, and a few years afterwards it appeared in evidence that H. was alive.

(*f*) See Phipson, Ev. (4th ed.) 212.

(*g*) R. *v.* Philp, 1 Mood. 263.

(*h*) Anon. 3 Stark. Ev. 894, note (*m*), Le Blanc, J.

(*i*) R. *v.* Flaherty, 2 C. & K. 782. R. *v.* Savage, 13 Cox, 178. R. *v.* Lindsay, 66 J. P. 505. R. *v.* Johnson, 103 L. T. 109 (C. C. R. Ir.).

(a) *Confessions must be Free and Voluntary.*

A confession, to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threat or violence, nor obtained by any direct or implied promise, however slight, nor by the exertion of any improper influence (*j*) by persons in authority, because under such circumstances the party may have been influenced to say what is not true (*k*).

The object of the rule relating to the exclusion of 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 (*l*). In determining, therefore, whether a confession be admissible or not, 'the only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an untrue one' (*m*).

The general principle on which the decisions on this subject seem to have proceeded seems to be that if, under the circumstances, there is reasonable ground for presuming that the disclosure was made under the influence of any promise or threat of a temporal nature by a person in authority, the evidence ought not to be received: for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted. It is a question for the Court, and not for the jury, to decide whether, under the particular circumstances of the case, the confession is admissible (*n*); and if there is reason to think that the confession was induced by the pressure of questions by one in authority or in order to escape from his custody it should be rejected (*o*).

There is a simple test by which the admissibility of a confession may be decided. Is it proved affirmatively by the prosecution that the confession was free and voluntary? that is, was it preceded by any

(*j*) This statement, attributed to Sir E. V. Williams, is quoted and approved in R. *v.* Fennell, 7 Q.B.D. 147, 150, and again in R. *v.* Thompson [1893], 2 Q.B. 12, 17. It is a mistaken notion that evidence of confessions obtained by promises or threats is to be rejected from regard to public faith, or on a presumption of law that they are false by reason of the circumstances under which they were made. See R. *v.* Baldry, 2 Den. 430, Pollock, C.B. Confessions are received in evidence, or rejected as inadmissible, upon a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving the highest credit, because it is presumed to flow from the strongest sense of guilt; and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected. R. *v.* Warickshall, 1 Leach, 263. Eyre and Nares, BB. And see Taylor, Ev. (10th ed.) s. 872. R. *v.* James, C. C. A. 30 July, 1909.

(*k*) R. *v.* Scott, D. & B. 47; 25 L. J. M. C. 128, Campbell, C.J.

(*l*) R. *v.* Court, 7 C. & P. 486, Littledale, J. In R. *v.* Baldry, 2 Den. 430, Campbell, C.J., said: 'The reason is, not that the law supposes that the statement will be false, but that the prisoner has made the confession under a bias, and that, therefore, it would be better not to submit it to the jury.' But see Lord Campbell's dictum, R. *v.* Scott, *supra*.

(*m*) R. *v.* Thomas, 7 C. & P. 345, Coleridge, J.

(*n*) R. *v.* Nute, *post*, p. 2180. In R. *v* Garner, 1 Den. 329, Erle, J., said: 'In every case it is for the judge to decide whether the words were used in such a manner, and under such circumstances, as to induce the prisoner to make a confession of guilt, whether such confession were true or no.'

(*o*) R. *v.* Knight, 20 Cox, 711: 69 J. P. 106, Channell, J.

inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of that statement is inadmissible (*p*). The burden of proof lies upon the prosecution (*q*) and for this reason it is unusual if not improper to open to the jury the details of any alleged confession.

(b) *Persons whose Inducements will exclude Confessions.*

An inducement to confess does not render the confession inadmissible unless it was held out by a person *in authority* or by a person acting in the presence of and without the dissent of a person in authority (*r*). All who are engaged in the arrest, detention, prosecution, or examination of a prisoner are considered as persons of such authority that their inducements will exclude any confession thereby obtained. Thus an inducement held out by the prosecutor (*s*), the prosecutor's wife (*t*), or his attorney (*u*), or by a constable or other officer (*v*), or by some person assisting a constable (*w*), or assisting the prosecutor (*x*), in the apprehension or detention of the prisoner, or by a coroner (*y*) or a magistrate acting in the case (*z*), or other magistrate (*a*) or magistrate's clerk (*b*), or by a gaoler (*c*), or by a person having authority over the prisoner, as the master or mistress of a servant in the case of an offence against the person or property of either (*d*), or by a person in the presence of one in authority with his assent, whether direct or implied (*e*), will be sufficient to exclude a confession made in consequence of such inducement.

The prisoner, when taken into custody, was told by a person who had accompanied the prosecutor in pursuit of the prisoner that it would be better for him to confess; but it was urged that as he was a person who had no authority to interfere, the confession was admissible. Littledale, J., rejected the confession, saying: 'That applies to mere strangers; here the person went with the prosecutor, and was acting with his authority and sanction' (*f*).

Where a felony was committed on board a ship by the prisoner, (one of the crew), against another of the crew, and the master of the ship threatened to apprehend the prisoner, it was held that this threat excluded a confession; for the offence being a felony,

(*p*) R. *v.* Thompson [1893], 2 Q.B. 12, Cave, J. R. *v.* McCraw, 12 Canada Cr. Cas. 253.

(*q*) R. *v.* Thompson, *ubi sup.*, and cases there cited. Cf. R. *v.* Rose, 67 L. J. Q.B. 289, 18 Cox, 717.

(*r*) Phipson, Ev. (4th ed.) 243. R. *v.* Pountney, 7 C. & P. 302.

(*s*) R. *v.* Jenkins, R. & R. 492. R. *v.* Thompson, 1 Leach, 291. R. *v.* Cass, ibid.

(*t*) R. *v.* Upchurch, 1 Mood. 465.

(*u*) R. *v.* Croydon, 2 Cox, 67, an attorney endeavouring to discover some burglars for the purpose of prosecution, *post*, p. 2168.

(*v*) R. *v.* Gillis, 11 Cox, 69. R. *v.* Shepherd, 7 C. & P. 579, but not his wife. R. *v.* Hardwick, 1 Phill. Ev. (7th ed.) 3; 1 C. & P. 98 (*n*), *post*, p. 2162.

(*w*) 1 Phill. Ev. 407.

(*x*) R. *v.* Stacey, MSS. C. S. G. *infra*, note (*f*).

(*y*) R. *v.* Waltho, June 17, 1905. Cited in Phipson, Ev. (4th ed.) 243.

(*z*) R. *v.* Gillis, 11 Cox, 69.

(*a*) R. *v.* Clewes, 4 C. & P. 221.

(*b*) R. *v.* Drew, 8 C. & P. 140.

(*c*) R. *v.* Gilham, 1 Mood. 136, *post*, p. 2175.

(*d*) R. *v.* Upchurch, *supra*. R. *v.* Taylor, 8 C. & P. 733. R. *v.* Moore, 2 Den. 522. R. *v.* Warringham, 2 Den. 447 n.

(*e*) R. *v.* Taylor, *supra*. R. *v.* Pountney, 7 C. & P. 302. R. *v.* Garner, 1 Den. 329.

(*f*) R. *v.* Stacey, Monmouth Spr. Ass. 1830, MSS. C. S. G.

and a felony having been actually committed, the master had power to apprehend the prisoner on reasonable suspicion that he was guilty (*g*).

Where a constable, who had a prisoner in custody on a charge of murder, placed her in the custody of a woman whilst he went to the inquest, to prevent her going away, and the woman held out an inducement to her, it was held that a statement made in consequence was not admissible, as it was made after an inducement held out by a person who had her in custody (*h*).

'It has been argued, that a confession made upon the promises or threats of a person erroneously believed by the prisoner to possess authority, the person assuming to act in the capacity of an officer or magistrate, ought upon the same principle (on which confessions to persons having authority are rejected) to be excluded. The principle itself would seem to include such a case; but the point is not known to have received any judicial consideration' (*i*).

(*g*) Anon., as stated by Parke, B., in R. *v.* Moore, 2 Den. 522; 21 L. J. M. C. 199. This seems to be the same case as R. *v.* Parratt, 4 C. & P. 570, except that the threat there was by the captain. The case as stated by Parke, B., fully supports note (*i*), *infra*. C. S. G.

(*h*) R. *v.* Enock, 5 C. & P. 539, Parke, J., after consulting Taunton, J. See R. *v.* Windsor, 4 F. & F. 360. Roscoe, Cr. Ev. (13th ed.) 36. But in R. *v.* Sleeman, Dears. 249, the last ground of decision is the other way. Cf. R. *v.* Vernon, 12 Cox, 153. Taylor, Ev. (10th ed.) s. 873.

(*i*) Greenleaf, Ev. 258. As the question turns upon the effect produced upon the mind of the prisoner, and as that effect must be the same, whether the party be an officer or not, provided the prisoner believed him to be so, it should seem that a confession under such circumstances ought not to be admitted. See R. *v.* Frewin, 6 Cox, 530. In considering these questions it should be remembered that every person has authority where a felony has been committed to arrest the party who committed it; in this respect, therefore, a private individual and a constable stand upon the same footing, and this may be well deserving of consideration in cases where the inducement is held out in the absence of the prosecutor or an officer. If a private person after a felony had been committed were to tell a person not in custody that he suspected him of the felony, and that if he would confess he would let him go, but that if he would not he would apprehend him, it might, it is conceived, be well contended that a confession obtained thereby would be inadmissible, on the ground that the party had authority to apprehend, and was in effect a constable *pro hac vice*. After the recent cases, an inducement by a private person, it should seem, can only be considered as inoperative when it is given in the presence of a person in authority, such person expressing his dissent to it or cautioning the prisoner against trusting to it, or where it is given to a prisoner in custody, no one having authority being present, as if a private person were to advise a prisoner in gaol through the grating to confess, or send a letter to him to the same effect. 'The difficulty experienced in this matter' (Greenleaf, Ev. 259) 'seems to have arisen from the endeavour to define and settle, *as a rule of law*, the facts and circumstances which shall be deemed *in all cases* to have influenced the mind of the prisoner in making the confession. In regard to persons in authority there is not much room to doubt. Public policy, also, requires the exclusion of confessions obtained by means of inducements held out by such persons. Yet even here the age, experience, intelligence, and constitution, both physical and mental, of prisoners are so various, and the power of performance so different in the different persons promising, and under different circumstances of the prosecution, that the rule will necessarily sometimes fail of meeting the truth of the case. But as it is thought to succeed in a large majority of cases, it is wisely adopted, as a rule of law applicable to them all. Promises and threats by private persons, however, not being found so uniform in their operation, perhaps may, with more propriety, be treated as mixed questions of law and fact; the principle of law that the confession must be voluntary being strictly adhered to, and the question whether the promises or threats of the private individuals who employed them were sufficient to overcome the mind of the prisoner, being left in the discretion of the judge under the circumstances of the case.' C. S. G. See Taylor, Ev. (10th ed.) s. 874.

An inducement held out in the presence and without the dissent of a person in authority is treated as if held out by him.

Upon an indictment for housebreaking, it appeared that the prisoner resided with her husband, and that a constable went to their house, and charged her with breaking into the prosecutor's house, which she denied; but her husband coming in shortly afterwards, he told her if she knew anything about it to tell the truth. The constable, though present, made no observation, except that he must take her to the station-house, and desired her to go upstairs and put her things on. While she was upstairs she desired the constable to call her husband, and then made a statement as to certain articles of dress, which she produced, as having been purchased with the money which had been stolen. It was objected that what the prisoner said was inadmissible, as it was obtained by an inducement held out by her husband in the presence of the constable; and as the proceeds of the stolen property were found in the husband's house, he was *prima facie* liable to account for it, and that a statement made by the wife in the presence of and under the coercion of the husband, by which she accused herself and exculpated him, was clearly caused by undue influence on her mind. Pollock, C.B., said: 'The fact of the constable being present and not dissenting from what was said places the expressions used by the husband on the same footing as if they had been used by the constable; and I think that, as the constable was a person in authority, such an inducement ought to be sufficient to exclude the admission. Besides, I think there is a great deal of weight in what is urged as to the effect of the prisoner's statement being to exculpate her husband, and that I ought to be careful not to admit anything which may have been said in consequence of his coercion (*j*).

Where two prisoners charged with murder were being conveyed in a cart, and the constable was in the cart with them, and could hear all that passed, and one prisoner said to the other, 'You had better speak the truth,' and the constable made no remark; Wightman, J., after consulting Parke, B., held that a statement then made was inadmissible, as the inducement appeared to have the sanction of the constable who was present, and apparently assented to it (*k*).

Where the prisoner, a girl of fifteen, while in the custody of a policeman, said to her mistress, 'If you will forgive me I will tell you the truth,' to which the mistress replied, 'Ann, did you do it?' and the prisoner thereupon, in the presence of the constable, made a statement, Watkin Williams, J., held this to be inadmissible in evidence (*l*).

Where on an indictment for committing an unnatural crime with a mare, the prisoner was found by the owner of the mare in a stable with the mare, and his trousers undone, and the mare bleeding and straining; and a man shortly afterwards, at a house whither the prisoner had gone, said to the prisoner, 'I wish to know what business you had in the stable.' He said, 'You know.' The man said, 'I don't know, and have come on purpose to know, and will know before I leave, and if you don't tell me I will give you in charge to the police till you do tell

(*j*) R. *v.* Laugher, 2 C. & K. 225; cf. R. *v.* Pountney, 7 C. & P. 302.

(*k*) R. *v.* Millen, 3 Cox, 507.

(*l*) R. *v.* Mansfield, 14 Cox, 639.

me.' The prisoner said again, 'You know.' The man said, 'I don't know, but, according to what I could see of the mare, it is the best of my belief that you had connection with her.' He said, 'I had; for God's sake, say nothing about it.' The owner of the mare was close by at the time this conversation took place. It was held that the confession ought not to have been received. There was a threat used; and though there was no statement of the charge when the threat was made, yet before the confession the prisoner was told, in the presence of the owner of the mare, that the charge was for having connection with the mare, which was just the same as if the threat had been made by the owner himself, and he, being the owner of the mare, was a person in such authority that a threat by him would exclude a subsequent confession (*m*).

Upon an indictment for setting fire to the house of R. L., it appeared that on the morning of the fire the prisoner, who was the servant of the prosecutor, was sent for into the parlour in which Mrs. L. and Mr. W. were; and that Mr. W., who was not a constable, or in any office or authority, said to the prisoner, 'You had better tell how you did it'; and that thereupon she made an answer. Patteson, J., said, 'It is the opinion of the judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority; and in this case I should have received the evidence of the statement made to Mr. W. if the inducement had been held out by him alone. But here the inducement does not rest with him alone, because Mrs. L., who was the wife of the prosecutor and also the mistress of the prisoner, was present with Mr. W., and must, as she expressed no dissent, be taken to have sanctioned the inducement. I think, therefore, that the inducement must be taken as if it had been held out by Mrs. L., who was a person in authority over the prisoner, and that therefore the evidence is inadmissible' (*n*).

On an indictment for a misdemeanor in attempting to set fire to her master's house, it appeared that the prisoner, a girl aged thirteen, was a domestic servant to the prosecutor, whose wife lived with him, and took a share in the management of the house. After the attempt to set fire to the house was discovered, the prisoner's mistress, in the absence of the prosecutor, said to her, 'Mary, my girl, if you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; if H. (another person suspected, and whom the prisoner had charged) is found clear, the guilt will fall on you.' She made no answer. The mistress then said, 'Pray tell me if you did it.' The prisoner then confessed. It was contended on the part of the prosecution that the wife had no authority, real or apparent, over the prisoner, so as to hold out any hope which could influence the prisoner to make a false statement, in order that her life might be spared, and therefore that the confession was admissible. On a case reserved it was held the confession ought not to have been received (*o*).

Upon an indictment for stealing the goods of two partners, the wife

(*m*) R. *v.* Luckhurst, Dears. 245; 23 L. J. M. C. 18.

(*n*) R. *v.* Taylor, 8 C. & P. 733.

(*o*) R. *v.* Upchurch, 1 Mood. 465. See R. *v.* Garner, 1 Den. 329, *post*, p. 2212.

of one of the partners said, 'I told the prisoner it would be better for him if he would tell how we had been robbed, and put us on our guard. I occasionally take the management of the shop. I manage the shop in my brother's and husband's absence.' For the prosecution it was urged that an inducement by the prosecutor's wife rendered a confession inadmissible only when it was held out in the presence of her husband, and that an inducement by the wife of a constable would not vitiate a confession (*p*). Parke, B., said, 'The wife of a constable has no control over the prisoner. This woman, being the wife of one of the prosecutors, and concerned in the management of their business, must be looked upon as a person in authority. I think this confession inadmissible' (*q*).

But where upon the trial of a prisoner for murder there was offered in evidence against her a confession made by her in the presence of her mistress to a surgeon, who was attending her, of her having strangled her child with a thread, and placed the dead body in a privy, where it was found with the string round its neck. Her mistress had told her before the surgeon came in that 'she had better speak the truth,' and in answer she said she would tell it to the surgeon. An objection was taken that any subsequent confession was inadmissible. Upon a case reserved, after argument for the prisoner, Parke, B., delivered judgment: 'A rule has been laid down that if the threat or inducement is held out actually or constructively by a person in authority, the confession cannot be received, however slight the threat or inducement; and the prosecutor, magistrate, or constable is such a person, and so the master or mistress may be. If not held out by one in authority, they are clearly admissible. But in referring to the cases where the master or mistress has been held to be a person in authority, it is only when the offence concerns the master or mistress that their holding out the threat or promise renders the confession inadmissible. In the present case the offence of the prisoner, in killing her child and concealing its dead body, was in no way an offence against the mistress of the house. She was not the prosecutrix then, and there was no probability of herself or the husband being the prosecutor of an indictment for that offence. In practice the prosecution is always the result of the coroner's inquest. Therefore we are clearly of opinion that the confession was properly received' (*r*).

In R. *v.* Simpson (*rr*), a trial for setting fire to a house, it appeared that the prisoner, a girl about fifteen years old, was a servant in the prosecutor's house, and that soon after the fire was put out H., a neighbour of the prosecutor, said to the prisoner, 'I doubt you have set this house on fire by the candle between the laths.' She said she did not. On the same day Mrs. A., the mother of Mrs. B., the wife of the prosecutor, who lived about three hundred yards from the house of the prosecutor, spoke to the prisoner in the prosecutor's house (in the presence of Mrs. B., who was very deaf, and of the prisoner's mother), and told her that she had

(*p*) R. *v.* Hardwick, 1 Phill. Ev. (7th ed.) 111.

(*q*) R. *v.* Warringham, 2 Den. 447, note; 15 Jur. 318.

(*r*) R. *v.* Moore, 2 Den. 522; 3 C. & K. 152. R. *v.* Parker, L. & C. 42; 30 L. J. M. C. 144, at first sight may appear the other way; but in all probability this decision proceeded on the ground that desiring a prisoner to tell the truth is not an inducement.

(*rr*) 2 Mood. 410.

better confess the truth, because she believed it was her that fired both the house and the stack, and that it would be a great deal the worse for her if she did not confess. The prisoner said she did not. On the same day the prisoner was taken before a magistrate at S. On the next morning, Mrs. A. saw the prisoner again on the road to her house. Mrs. A. said to the prisoner, she should not come to her house, and told her again it was her that fired both the house and stack; she said she did not do it. Soon after H. came up and joined them, and said to the prisoner, 'Don't be so bold; perhaps you will have to go to S. to-morrow.' S. was the place where the magistrates met. He told her that perhaps somebody will come forward to-morrow that saw you do it. She took her apron up and held it to her face, and said no more. She always denied it; and when H. said she might have to go to S. she denied it again. He said, 'If you be guilty, go along with Mrs. A. and beg your master's and mistress's pardon, and get away, and be better in future, and we shall not seek after you'; and he said, 'Never mind your wages: I'll give you a few shillings out of my pocket.' And H. also told her it would be better for her to confess. After he went away, Mrs. A. went with the prisoner to B.'s house, and talked to her about the fire all the way; and after they got there, they went out of the house, and Mrs. A. said to the prisoner, 'Now, Sarah, you lighted the bunch of matches, and put it into the thatch of the house.' Before she said that, she told the prisoner that if she went to S. again she would be a great deal worse off, and she said to her several times, both going along the road to B.'s house, and also in the house, and also when she spoke to her out of doors, that it would be a great deal better for her if she would confess, and a great deal worse for her if she did not confess. Counsel for the prisoner objected to evidence being given of what the prisoner said, on Mrs. A. charging her as before stated, on the ground that after these promises and threats had been held out to her, her answer could not be received unless she had a caution. For the prosecution it was contended that her answer might be received, because H. was neither a constable, nor did he stand in any relation to the prosecutor; and though Mrs. A. was the mother of the prosecutor's wife, yet that promises and threats made by a person standing in that situation were not sufficient to exclude a confession. Littledale, J., allowed the evidence to be given, but reserved the question for the opinion of the judges, whether it ought to have been received. On Mrs. A. saying to the prisoner, 'Now, Sarah, you lighted the bundle of matches, and put it to the thatch?' the prisoner said, 'Yes, I did.' Mrs. A. then told Mrs. B. what had passed, and Mrs. B. then came out, and then Mrs. A., in the presence of Mrs. B., asked the prisoner what she did it for; whether it was for anything against the family? She said, 'No.' Mrs. B. asked if any one persuaded her to it? She said, 'No'; she said she had no malice. The prisoner in her defence asserted her innocence, and said that Mrs. A. said that if she would confess to it she should have her liberty and she added that she did it on purpose to get her liberty, and that they frightened her to do it. The jury said they found the prisoner guilty by her own confession; but Littledale, J., told them they must find her either guilty or not guilty, and then they gave a verdict of guilty; and all the

judges, upon a case reserved, were unanimously of opinion that the confession ought not to have been received, and that the conviction was bad (*s*).

Confessions to Persons having no Authority over the Prisoner.—The result of the cases seems to be, that a confession is not inadmissible, although made after an exhortation, or admonition, or other similar influence, proceeding at a prior time from some one who has nothing to do with the apprehension, prosecution, or examination of the prisoner (*t*): for a promise made by a person who interferes without any authority of this kind is not to be presumed to have such an effect on the mind of the prisoner as to induce him to confess that he is guilty of a crime of which he is innocent.

In a case of murder a surgeon stated that he had held out no threat or promise to induce the prisoner to confess; but a woman who was present said that she had told the prisoner she had better tell all; and then the prisoner made certain confessions to the surgeon. It was objected that, as the confession was made after an inducement held out, it could not be received in evidence; but Park, J., after consulting Hullock, B., held that, as no inducement had been held out by the surgeon to whom the confession was made, and the only inducement had been held out by a person having no authority, it must be presumed that the confession to the surgeon was free and voluntary and admissible in evidence. If the promise had been held out by a person having any office or authority, as the prosecutor, constable, &c., the case would be different; but here, some person having no authority of any sort officiously says, 'You had better confess.' No confession follows, but some time

(*s*) R. *v.* Simpson, 1 Mood. 410. 'The grounds upon which this decision proceeded are not mentioned in the report, and the real import of the case does not appear to be correctly abstracted in the text books, as observes Mr. Joy, p. 9; and after abstracting the case he well observes, 'that it was in the prosecutor's house, and in the presence of the prisoner's mother, and of the prisoner's mistress, a person in authority over her, and under her implied sanction, that the prisoner was told in the first instance that it would be better for her to confess. So in the conversation that immediately elicited the confession, the inducement was held out *in* the prosecutor's house [this is an error, it was after "they went out of the house,"] and although it does not appear distinctly whether the prosecutor or his wife were then present [it is clearly to be inferred that they were not present, for after the prisoner said "I did," Mrs. A. told Mrs. B., and she "*then* came out,"] the influence caused by the inducement held out on the preceding morning, in the presence of the prosecutor's wife, and in his house, may perhaps be considered to have continued,' Joy, 10 and 11, and he refers to R. *v.* Upchurch, *ante*, p. 2161, and R. *v.* Taylor, *ante*, p. 2161, to shew that the mistress is a person in authority. It may be observed, also, that in R. *v.* Taylor, Patteson, J., held, that an inducement held out by a person in the presence of the prisoner's mistress must be taken as if it had been held out by the mistress herself: from which it may be inferred that that very learned judge considered the person holding out the inducement as the agent for that purpose of the mistress. In that case, as the prosecutrix expressed no dissent, she was taken to have sanctioned the inducement; so in the present case the same must be inferred as to the inducement first held out in the presence of the mistress; and as by her conduct in the latter part of the transaction the prosecutrix sanctioned what Mrs. A. had done in her absence, the learned judges may have thought that Mrs. A. was the agent of the prosecutrix for the purpose of discovering the guilt of the prisoner. If a person were expressly employed by the prosecutor to discover the person who had committed a felony, there seems good reason why he should be considered as a person having so much to do with the apprehension and prosecution as to render a confession obtained by his inducements inadmissible. See R. *v.* Stacey, *ante*, p. 2158.' C. S. G.

(*t*) R. *v.* Row, R. & R. 153. R. *v.* Tyler, 1 C. & P. 129.

afterwards, to another person, the prisoner, without any inducement held out, confesses (*u*).

The prisoner was indicted for placing a piece of iron on a railway, and a platelayer in the service of the company, but who was not employed by any of his superiors to see the prisoner, had told him that it would be a good deal better for him if he owned to it. The prisoner knew that the platelayer worked on the line. Cresswell, J., said: 'I am disposed to think the statement of the prisoner is receivable, the witness not being a person having any authority to make any promise; still he was in a position that might reasonably lead the prisoner to believe he had'; and thereupon the counsel for the prosecution declined to ask as to the statement of the prisoner (*v*).

There has been a difference of opinion among the judges whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable: some of the judges thinking it receivable, and others thinking it is not so (*w*). And several cases have occurred, in which confessions made to persons without authority, in consequence of inducements held out by such persons, have been rejected (*x*). But it is said to be the opinion of the judges that 'evidence of any confession is receivable, unless there has been some inducement held out by some person in authority' (*y*).

What Promises and Inducements will exclude Confessions.—A promise or threat to exclude a confession must relate to the charge (*yy*) as to which the confession is made. It may be express, or implied from the conduct of the person in authority, the declarations of the prisoner, or the other circumstances of the case (*z*), and it need not be made directly to the prisoner (*a*).

(*u*) R. *v.* Gibbons, 1 C. & P. 97.

(*v*) R. *v.* Frewin, 6 Cox, 530. The prisoner was not defended. The marginal note treats this as an actual decision.

(*w*) R. *v.* Spencer, 7 C. & P. 776, Parke, B.

(*x*) In R. *v.* Dunn, 4 C. & P. 543, a witness proved that the prisoner wished to sell a stolen book to him, and that he told him he had better tell where he got it. Bosanquet, J., said: 'Any person telling a prisoner that it will be better for him to confess will always exclude any confession made to that person. Whether a prisoner's having been told by one person, that it will be better for him to confess, will exclude a confession subsequently made to another person, is very often a nice question; but it will always exclude a statement made to the same person.' In R. *v.* Slaughter, ibid. note (*a*), the same learned judge rejected a confession made by the prisoner to one of his fellow-workmen, who had told him it would be better for him to confess. In R. *v.* Arundel, Gloucester Summer Assizes, 1830, the same learned judge ruled the same way, saying: 'If an unauthorized person makes a promise, it will not prevent a statement made to another person from being received in evidence; but if the statement be made to the person who makes the promise, I think it ought not to be received.' 'The same distinction is also adverted to in a note to R. *v.* Gibbons, 1 C. & P. 97. For this distinction, however, there seems no sufficient reason. The correct inquiry in every case is, whether the inducement was such as to lead the prisoner to suppose that it would be better for him to confess himself guilty of a crime he did not commit. If it was, then a statement made under its influence, whether to the party using the inducement, or to another person, would be inadmissible. At the same time, it must ever be a circumstance deserving of consideration, in conjunction with others, that the prisoner did not make the confession to the party using the inducement at the time, but made it afterwards to another party; as that tends to shew that he was not under the influence of the inducement when he confessed; and this is the view which the court seems to have adopted in R. *v.* Gibbons. See also Mr. Joy's observations, pp. 26, 27.' C. S. G.

(*y*) R. *v.* Taylor, 8 C. & P. 733, Patteson, J. See R. *v.* Moore, 2 Den. 526, Parke, B.

(*yy*) See R. *v.* James, 30 July, 1909, C. C. A.

(*z*) See R. *v.* Gillis, 11 Cox, 69.

(*a*) See Phipson, Ev. (4th ed.) 244. R. *v.* Thompson [1893], 2 Q.B. 12: 62 L. J. M. C. 93.

Saying to the prisoner that it will be better for him to confess is an inducement sufficient to exclude the confession (*b*).

Where on an indictment for robbery, a witness stated that he had said to one of the prisoners, 'You had better split, and not suffer for all of them,' the statement of the prisoner was rejected (*c*). A statement by the prosecutor's brother that it would be 'the right thing for him (the prisoner) to make a clean breast of it,' was sufficient inducement to render a subsequent confession by the prisoner inadmissible (*d*).

If a person advises a prisoner to be sure to tell the truth, and he then makes a statement, such statement is admissible, on the ground that such advice cannot be supposed to induce the prisoner to confess that he is guilty of crime of which he is really innocent (*e*).

Upon an indictment for murder, it appeared that the prisoner, who was a boy of the age of fourteen, was taken into custody by Mr. W., not a constable, and on the same night was in the parlour of the inn, to which he was taken; several persons, neighbours, but no constable, were in the room, and had been asking him questions about the children, whom he was charged with drowning. One C., who was present when W. took the prisoner up, and who was not a constable, stated, 'I told him to kneel down and tell the truth. W. took him into A.'s parlour, and began to question him how the children came to get into the pit; whether they fell in, or were put in; he said he should not tell anything about it. W. asked him if he would tell any one else, if he would go out of the parlour; the prisoner said nothing; W. then went out. I said to the prisoner, "No, kneel you down by the side of me, and tell me the truth." I believe this was the first thing. He did kneel down. I said I was going to ask him a very serious question, and I hoped he would tell me the truth in the presence of the Almighty. I then said, "Did these children fall into the pit?" He said he pushed one in with one foot, and the other with the other, but not purposely.' Mr. M. asked him if he had any malice or revenge, he said, 'No.' Subsequently to this, the son of the innkeeper stated that next day the prisoner said he would tell him all about it. He neither promised nor threatened him. The prisoner then made

(*b*) 2 East P. C. 659. R. *v.* Fennell, 7 Q.B.D. 147, and see *ante*, p. 2165, note (*x*).

(*c*) R. *v.* Thomas, 6 C. & P. 353, Patteson, J. By such a statement as that made by the witness the prisoner *might* be induced to suppose that he would be more mercifully dealt with if he confessed, and that he might therefore be induced to confess himself guilty of an offence he never committed. See the Reporter's note, ibid. There are many similar cases. R. *v.* Moody, 2 Crawf. & Dix. (C.C. Ir.) 12. R. *v.* Walkley, 6 C. & P. 175. R. *v.* Mills, 6 C. & P. 146; and MSS. C. S. G. R. *v.* Shepherd, 7 C. & P. 579. R. *v.* Kingston, 4 C. & P. 387.

(*d*) R. *v.* Thompson [1893], 2 Q.B. 12. This case appears to overrule R. *v.* Reeve, L. R. 1 C. C. R. 362: 41 L. J. M. C. 92. R. *v.* Jarvis, L. R. 1 C. C. R. 244; and 34 L. J. M. C. 1, where Kelly, C.B., said: 'As to the words "you had better" referred to in the argument, there are many cases in which those words have occurred, and they seem to have acquired a sort of technical meaning, that they hold out an inducement or threat within the rule that excludes confessions, under such circumstances. It is sufficient to say that those words have not been used on this occasion; and that the words used appear to me to import advice given on moral grounds, and not to infringe upon the rule of law prohibiting a threat or inducement in these cases.'

(*e*) R. *v.* Court, 7 C. & P. 486, Littledale, J. See R. *v.* Holmes, 1 C. & K. 248; and R. *v.* Sleeman, Dears. 249, where the words were, 'Don't run your soul into more sin, but tell the truth,' and it was held that there was no threat or inducement. An exhortation to speak the truth ought not to exclude confession. R. *v.* Moore, 2 Den. 522, Erle, J.

a statement to him, which was given in evidence. Other declarations also were given in evidence. An examination of the prisoner, who could not write, was put in; it began, 'W. W. being cautioned, &c.,' and the evidence being read over to him said, 'I can give no other account than I have already given,' &c. (*f*). The prisoner having been found guilty, upon a case reserved as to the admissibility of the evidence, the judges present were unanimous that the confession was strictly admissible, but much disapproved of the mode in which it was obtained (*g*).

A confession induced by saying, 'I am in great distress about my irons; if you will tell me where they are, I will be favourable to you,' was held inadmissible (*h*).

On an indictment for larceny, it appeared that the prisoner, being in the custody of a constable, the latter said to the prosecutor, 'You must not use any threat or promise to the prisoner'; and immediately after this the prosecutor said to the prisoner, 'I should be obliged to you if you would tell us what you know about it; if you will not, we, of course, can do nothing; I shall be glad if you will.' The confession was held inadmissible; Patteson, J., saying, 'I think this is a distinct promise; what could the prosecutor mean by saying, that if the prisoner would not tell, they could do nothing, but that if the prisoner did tell, they would do something for him?' (*i*).

Where the prosecutor asked the prisoner, on finding him, for the money he, the prisoner, had taken out of the prosecutor's pack, but before the money was produced, said, 'he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased'; upon which the prisoner took 11*s*. 6½*d*. out of his pocket, and said it was all he had left of it; a majority of the judges held that the evidence was inadmissible (*j*). Where an attorney, who was endeavouring to discover some burglars for the purpose of prosecution, said to the prisoner,

(*f*) 'The statement is given at length in the report, as well as the statement made to the innkeeper's son, but they are omitted, as nothing turned upon their contents.' C. S. G.

(*g*) R. *v.* Wild, 1 Mood. 452. 'The grounds of this decision are not stated in the report; but it would seem that the case may well be supported on the ground that the words addressed to the prisoner had no tendency whatever to induce him to make a false statement, but, on the contrary, were a most solemn adjuration to speak the truth. The decision seems fully warranted by the principle on which R. *v.* Gilham rests. The decision, however, could hardly be supported on the ground that the inducement was held out by a person without authority, as it was held out by a person present at the apprehension, and who was acting in concurrence with the party who apprehended him, and they were keeping the prisoner in custody, no constable being present.' C. S. G.

(*h*) R. *v.* Cass, 1 Leach, 293, note (*a*).

(*i*) R. *v.* Partridge, 7 C. & P. 551. Greenleaf, Ev. 256, after citing this case, and Guild's case, *post*, p. 2182, observes, 'It is extremely difficult to reconcile these and similar cases with the spirit of the rule as expounded by Eyre, C.B., in Warickshall's case (*ante*, p. 2157), the difference is between confessions made voluntarily, and those "*forced* from the mind by the flattery of hope, or by the torture of fear." If the party has made his own calculation of the advantages to be derived from confessing, and thereupon has confessed the crime, there is no reason to say that it is not a voluntary confession. It seems that in order to exclude a confession, the motive of hope or fear must be directly applied by a third person, and must be sufficient, in the judgment of the court, so far to overcome the mind of the prisoner as to render the confession unworthy of credit.' In R. *v.* Green, 6 C. & P. 655, Taunton, J., said: 'I take it no man ever makes a confession without proposing to himself in his own mind some advantage to be derived from it,' *post*, p. 2170.

(*j*) R. *v.* Jones, R. & R. 152. But see R. *v.* Griffin, ibid. 151, *post*, p. 2199.

who had gone to him for the purpose of making some statements relating to the burglary, 'I dare say you had a hand in it; you may as well tell me all about it'; it was held that this excluded a statement then made (*k*).

Where a prisoner being in custody said to the officer who had the charge of him, 'If you will give me a glass of gin, I will tell you all about it,' and two glasses of gin were given to him, and he made a confession of his guilt; Best, J., considered it as very improperly obtained, and inadmissible in evidence (*l*). But where a prisoner made a statement to a constable in whose custody he was, but he was drunk at the time; and it was imputed that the constable had given him liquor to cause him to be so, and it was objected that what the prisoner said under such circumstances was not admissible; Coleridge, J., said, 'I am of opinion, that a statement being made by a prisoner while he was drunk, is not, therefore, inadmissible against him, and that, to render a confession inadmissible, it must either be obtained by hope or fear. This is matter of observation from me, upon the weight that ought to attach to this statement, when it is considered by the jury' (*m*).

If an inducement be held out to one prisoner to make a statement, which implicates another prisoner, such statement is inadmissible; for it can only be used as evidence against the prisoner who made it, and then it is evidence obtained by an inducement (*n*).

In R. *v.* Baldry (*o*), on an indictment for murder, a police constable said, 'I went to the prisoner's house. I saw the prisoner. I told him what he was charged with. He made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said *he need not say anything to criminate himself; what he did say would be taken down and used as evidence against him.*' Objection was made that what the prisoner then said was inadmissible. Campbell, C.J., thought that, although the caution of the constable differed from that directed by 11 & 12 Vict. c. 42, s. 18, to be given by the justice to the prisoner in the word 'will' instead of 'may,' it did not amount to any promise or threat to induce the prisoner to confess; it could have no tendency to induce him to say anything untrue; and that in spite of it, if he did afterwards confess, the confession must be considered voluntary. His Lordship, therefore, allowed the witness to give evidence of what the

(*k*) R. *v.* Croydon, 2 Cox, 67, Rogers, Q.C., after consulting Platt, B.

(*l*) R. *v.* Sexton, *post* p. 2180. Taylor, Ev. (10th ed.) s. 880. Roscoe, Cr. Ev. (13th ed.) 39.

(*m*) R. *v.* Spilsbury, 5 C. & P. 187. 'In a note to R. *v.* Spilsbury is observed, the facts of the case as reported do not warrant the marginal note, which is as follows: "*Semble*, if a constable give him (the prisoner) liquor to make him drunk, in the hope of his saying something, that will not render the statement inadmissible, but it will be matter of observation for the judge in his summing up." It is not to be inferred from the case that a confession —so immorally, not to say criminally, extorted—would be received.' 'The principle, however, on which the decision turned would seem to warrant the marginal note, as the mere giving liquor without any inducement in words could not operate as an inducement either by exciting hope of escape or fear of punishment. It is to be observed, also, that in all the cases where confessions have been excluded there has been an anticipation of benefit or injury *after* the confessing or non-confessing. Where liquor is given the benefit (if it can be called any) is received already, and nothing further is in expectation.' C. S. G.

(*n*) R. *v.* Enock, 5 C. & P. 539.

(*o*) 2 Den. 430; 21 L. J. M. C. 130.

prisoner then said, which amounted to a confession of his guilt; and upon a case reserved, after argument on behalf of the prisoner, the judges were unanimously of opinion that the confession was properly received. Lord Campbell, C.J., said: 'I adhere to the opinion which I formed at the trial. The rule is, that if there be any worldly advantage held out, or any harm threatened, the confession must be excluded. The reason is, not that the law supposes that the statement will be false, but that the prisoner has made a confession under a bias, and that therefore it would be better not to submit it to the jury.' Pollock, C.B.: said, 'A simple caution to the accused to tell the truth, if he says anything, it has been decided not to be sufficient to prevent the statement made being given in evidence (*p*); and although it may be put that where a person is told to tell the truth, he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. He is reminded that he need not say anything, but if he says anything, let it be true. But 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 (*q*). The true distinction between the present case and a case of that kind is, that it is left to the prisoner as a matter of perfect indifference whether he should open his mouth or not' (*r*). And where a constable on arrest told his prisoner that whatever he might say would be used against him, his subsequent statements have been held admissible (*s*).

After the prisoner had been committed on a charge of murder, a fellow-prisoner said to him, 'I wish you would tell me how you murdered the boy;—pray split.' The prisoner said, 'Will you be upon your oath not to mention what I tell you?' The other prisoner went upon his oath, that he hoped, if he told, that he might never stir out of that place again. The prisoner then made a statement. It was held that this was not such an inducement as to render the statement inadmissible, and that, although such oaths were very wrong and wicked, still they were not binding; and that every person, except counsel and attorneys, were bound to reveal what they might have heard (*t*).

Where a person said to a prisoner that he might say what he had to say to him, for it should go no further, and the prisoner thereupon made a statement, it was held that it was admissible (*u*).

A prisoner and his wife were both in custody on a charge of receiving bank notes, but in separate rooms, and a person said to him, 'I hope you will tell, because the prosecutrix can ill afford to lose the money;' and the constable said, 'If you will tell where the property is, you shall see your wife.' Patteson, J., said: 'I think that this is not such an

(*p*) See R. *v.* Court, 7 C. & P. 486. R. *v.* Holmes, 1 C. & K. 248.

(*q*) See R. *v.* Garner, 1 Den. 329; 18 L. J. M. C. 1, *post*, p. 2212.

(*r*) R. *v.* Furley, 1 Cox, 76; R. *v.* Harris, 1 Cox, 106; R. *v.* Drew, 8 C. & P. 140; and R. *v.* Morton, 2 M. & Rob. 514, were cited and disapproved of in this case, and can no longer be considered as authorities.

(*s*) R. *v.* Chambers, 3 Cox, 92. R. *v.* Attwood, 5 Cox, 322. But see R. *v.* Toole, 7 Cox, 244 (Ir. Rep.).

(*t*) R. *v.* Shaw, 6 C. & P. 372, Patteson, J. R. *v.* Hornbrook, 1 Cox, 54, seems also to be overruled.

(*u*) R. *v.* Thomas, 7 C. & P. 345.

inducement as will exclude the evidence of what the prisoner said: it amounts only to this, that if he would tell where the money was he should see his wife' (*v*).

A prisoner who had been cautioned not to criminate himself, as the witness would bring it all against him, was told by a constable that his father was charged with murder. He said he hoped no one would be charged with the murder but himself, and then made a confession. Doherty, C.J., having conferred with Torrens, J., admitted the confession, observing that, although such announcement was likely to act upon the feelings of the prisoner, he would not be warranted on that ground in refusing to receive it (*w*). So where the prisoner was indicted for concealing the birth of her child, a medical witness said that he examined the prisoner in custody, and found that her breasts were full of milk, and asked her whether she had not recently had a child, and added that if she refused to tell he would examine her person more closely; the prisoner then said, 'It is unnecessary to examine me, for I had a child.' Torrens, J., admitted this confession, on the ground that the witness was endeavouring to ascertain a fact within his own province, and not inconsistent with the prisoner's innocence, and that the declaration of the witness was not a threat within the rule which excludes confessions (*x*).

Upon an indictment for housebreaking, it appeared that the prisoner being in the shop of the prosecutor, handcuffed, some recommendations to confess had been, in the absence of the prosecutor, made to him by the person who had been left in charge of the house; and the prisoner said, that if the handcuffs were taken off he would tell where he put the property. He had expressed doubts whether, if he told where the property was, he could rely on being leniently dealt with, and, after the prosecutor came in, he was told that they would do all they could for him. It was objected that the statement was inadmissible, as it was made under duress, and to deliver himself from the confinement. The statement was received. Bosanquet, J., said: 'I do not think there is anything in the objection, but I will take a note of it.' Taunton, J., said: 'I take it no man ever makes a confession voluntarily, without proposing to himself in his own mind some advantage to be derived from it' (*y*).

It is no objection that the confession was made under a mistaken supposition that some of the prisoner's accomplices were in custody; not even though some artifice has been used to draw him into that supposition (*z*).

J. and T., two apprentices, were indicted for stealing from their master, who, suspecting T., told him that if he did not confess he would send for a constable. J. could hear what was said. T. said he had robbed the prosecutor, and that J. had robbed him too. J. said, 'You

(*v*) R. *v.* Lloyd, 6 C. & P. 393.

(*w*) R. *v.* Nolan, Joy, 16; 1 Crawf. & Dix (C. C. Ir.), 74.

(*x*) R. *v.* Cain, Joy, 16; 1 Crawf. & Dix (C. C. Ir.), 37.

(*y*) R. *v.* Green, 6 C. & P. 655. The statement did not amount to a confession, and Bosanquet, J., desired the jury to lay it out of their consideration. The case is obscurely reported. See Roscoe, Cr. Ev. (13th ed.) 39.

(*z*) R. *v.* Burley, 1 Phill. Ev. (7th ed.) 111; 2 Stark. Ev. (3rd ed.) 13 (*n*), confirmed by all the judges. Cf. R. *v.* Derrington, 2 C. & P. 418. This ruling is not accepted in the U.S. Cook *v.* State, 40 Amer. State Rep. 756.

are a liar; I have only taken one handkerchief.' It was held that the statement of J. was admissible; for an inducement or threat offered to one person cannot affect the admissibility of a confession made by another, although that other be present when the inducement is offered (*a*). The authority of this case is shaken if, not destroyed, by the ruling in R. *v.* Thompson (*b*).

Where a prisoner, while in gaol, asked the turnkey if he would put a letter into the post for him, and, after his promising to do so, gave a letter addressed to his father, to the turnkey, who instead of posting it, gave it to the visiting magistrates of the gaol, who gave it to the prosecutor, Garrow, B., held that the letter was admissible in evidence and said he remembered making an objection, when at the bar, to evidence under the same circumstances before Gould, J., who overruled it (*c*).

A confession made by the prisoner with a view and under the hope of being thereby permitted to turn King's evidence, has been held inadmissible (*d*). On an indictment for murder, it appeared that the prisoner was taken into custody on the charge on December 2, and that on December 11 he made certain statements, which were sought to be given in evidence. To prove one of these statements, a policeman was called, who said that he held out no inducement to the prisoner to make any statement, nor did he know that anyone else had down to December 11, when the statement was made; but on December 6 he knew that a reward of £100 had been offered by the Government, accompanied by a statement that the Secretary of State would recommend an accomplice, not being the person who actually committed the murder, for a pardon, but the witness could not state that this had come to the knowledge of the prisoner; and Cresswell, J., allowed this statement to be given in evidence. In a later part of the same case a policeman stated, that soon after the prisoner had been taken into custody, and before the 6th of December, the prisoner requested that he would let him know if any reward should be offered, or any papers published concerning the murder, and that he would bring any such papers to him as soon as they were printed. On December 6 it was generally known that the Secretary of State had offered a reward and a promise of free pardon to any of the offenders, except such as had struck the blow, and on December 13 the witness gave the prisoner one of the printed handbills, which offered £100 reward to any person who should give such information as should lead to the discovery and conviction of the murderers, and 'a pardon to an accomplice, not being the person who actually committed the murder, who shall give such information as shall lead to the same result.' Cresswell, J., after consulting Patteson, J., held that a statement made by the prisoner to the witness on December 11 was receivable. In a still later part of the same case, it appeared that on the evening of December 10 the prisoner said that he saw no reason why he should

(*a*) R. *v.* Jacobs, 4 Cox, 54. Cf. R. *v.* Bate, 11 Cox, 686, where a confession was received though an inducement had been held out to an accomplice of the prisoner.

(*b*) [1893], 2 Q.B. 12, *ante*, p. 2166.

(*c*) R. *v.* Derrington, 2 C. & P. 418.

(*d*) R. *v.* Hall, in note to R. *v.* Lambe, 2 Leach, 559. But where a person had been admitted King's evidence, and confessed, and upon the trial of his accomplices refused to give evidence he was convicted, upon his own confession. R. *v.* Burley, 2 Stark. Ev. (3rd ed.) 13 (*n*). Cf. R. *v.* Gillis, 11 Cox, 69, *ante*, p. 2158.

suffer for the crime of another, and as government had offered a free pardon to any one of the parties concerned, who had not struck the blow, he would tell all he knew about the matter. Cresswell, J.: 'It now appears, with sufficient clearness, that the prisoner in making the statements ascribed to him was influenced by the hope of pardon held out by authorised parties. I shall, therefore, reject the evidence of all statements made by him after the evening of December 10, and expunge from my notes such as have already been given in evidence' (*e*).

In R. *v.* Dingley (*f*), upon an indictment for murder, it appeared that the prisoner sent to the chaplain of the gaol, and said he thought it was very hard that some of the prisoners should have their lives taken away wrongfully, and asked the chaplain if any magistrate would come that day, as he wished to see a magistrate to make a statement respecting the charge; and then said, 'Has any proclamation been made, or any offer of pardon?' The chaplain said proclamation had been made some time, and an offer of pardon. The prisoner then said if any person should make known the circumstances, it would be impossible for him to go back to P. The chaplain said that any person who made such a statement would probably not think of going back to P., and that if he made a statement the chaplain hoped that he would understand that he could offer him no inducement, as it must be his own free and voluntary act. When the prisoner asked if there was a proclamation, there was something said that the reward would enable a person to go elsewhere. A magistrate came in about three-quarters of an hour, and what passed between him and the prisoner, before the latter made a statement, was reduced to writing as follows: 'The voluntary information and confession,' &c., 'who saith, in answer to questions put by the said magistrate: "I wish to make a statement of what I know. I have told the chaplain so, and desired him to send for a magistrate. No person has made any promise or held out any inducement; what I have said to the chaplain, and what I am about now to say, is my own free and voluntary act and desire." The said magistrate having read over to the said prisoner the foregoing statement, informed him he was at liberty to say anything he might wish, and that it would be the said magistrate's duty as a magistrate to take it down in writing. The said prisoner voluntarily said as follows,' [here followed the statement]. It was urged that this statement ought not to be admitted, as it was manifest that the motive which induced the prisoner to make it was the offer of pardon. It was clear he made it to save himself by means of the pardon. Pollock, C.B.: 'I collect from the decision in R. *v.* Boswell (*g*), that before a statement can be excluded on the ground that it was made in the hope of a pardon, it must appear that that motive was operating on the prisoner's mind, and in that case, up to the moment when that was shewn, my Brothers Patteson and Cresswell held the statements of the prisoner to be receivable, though the prisoner knew of the reward and the promise of a pardon having been offered by the

(*e*) R. *v.* Boswell, C. & M. 584.
(*f*) 1 C. & K. 637.
(*g*) *Supra.*

Secretary of State; but when it appeared that B. had made the communication, stating "he saw no reason why he should suffer for the crime of another, and that, *as* government had offered a free pardon to any of the parties concerned, who had not struck the blow, he would tell all about the matter," it was held that the statement was inadmissible, as it appeared that the prisoner was influenced by the hope of pardon held out by authorised parties. In the present case the chaplain said to the prisoner, after the pardon had been alluded to, that he hoped he would understand that he, the chaplain, could offer him no inducement; it must be his own free and voluntary act, and what the magistrate said to him is very nearly to the same effect. I think that the statement of the prisoner must be received.'

In R. *v.* Blackburn (*h*) M. and B. were tried for murder. The chief constable had received three anonymous letters: No. 1 on October 29, No. 2 on November 3, and No. 3 on November 8. On November 12, M. was examined as a witness against B. before the magistrates; and, on his leaving, the chief constable told him that he was not satisfied with the way he had given his evidence; M. said that he had more to state, and was desired to put it on paper, and the next day a paper was produced, which M. said he had written. The chief constable then said, 'I arrest you as the writer of several anonymous letters, shewing a guilty knowledge of the murder.' M. said he had written the letters Nos. 1 and 2, and the chief constable believed No. 3 to be in his handwriting. A large reward had been offered to anyone giving private information of the murder, and a reward and free pardon by government for any accomplice not the actual murderer; and a handbill had been circulated, dated November 4, stating these rewards and pardon. M. had received a shilling a day by the direction of the chief constable whilst he was a witness, as he stated he was starving. The chief constable told M. repeatedly, when he was treated as a witness, that he must speak the truth; but he never offered him any inducement to make any statement. It was held that these letters and statements were admissible; they were not confessions, but merely statements made to get others implicated. The governor of the gaol, from notes made at the time, afterwards deposed to a statement made by M. in the magistrate's room at the gaol, four days after he was charged with the murder; at this time a printed copy of the handbill offering rewards and pardon was hanging up in the room, and the contents were known to the prisoner, who frequently, both before and after this statement, asked the governor whether he thought he (the prisoner) could give evidence, but he never said that he made the statement in that expectation, or in hope of getting the reward, and the gaoler on all occasions told him, before he said anything, that his statements would be used against him. Talfourd, J., received the statement at the time; but the following morning stated that he had consulted Williams, J., and, upon mature consideration, they considered that all the statements were admissible, except that made to the gaoler. As it appeared that at the time it was made the handbill was in the room, and the prisoner had the notion that he would be admitted as a witness for the Crown, they were

(*h*) 6 Cox, 333.

of opinion, on mature consideration, that this statement was inadmissible, and he should therefore expunge it from his notes.

The prisoner, who was indicted with several others for burglary, sent for a magistrate to tell him he had something to communicate to him. The magistrate acted at the interview with great caution, and warned the prisoner not to say anything that would criminate himself, as what he said would be taken down in writing, and made use of against him on his trial. The prisoner replied he did not care, as he knew that the witness knew all. Upon cross-examination, it appeared that the prisoner had been confined, after his arrest, in the same cell with another person, charged with the same crime, who had confessed and been admitted queen's evidence; the prisoner was aware of this, and it was to that he alluded when he said that he knew the witness knew all, and that it was from the statement made by the person who had been admitted queen's evidence that the prisoner was examined, and his confession taken down. It was insisted that, under these circumstances the confession was not admissible, as the caution given by the magistrate did not appear to have had the effect of removing from the prisoner's mind all the influences which would have invalidated the confession, and that there was a reasonable cause to lead the prisoner to believe that if he made a confession he would be put in the same situation with the other person who had done so. Crampton, J., received the confession, observing that the magistrate stated that, as far as he knew, the prisoner came forward voluntarily; that a mere formal caution from a magistrate would not be sufficient to set up a confession, if it appeared that such confession was made under the distinct impression of a previous promise or threat but that it did not appear that there was any previous inducement whatever. If there were any threats made use of before, or any promises held out, the distinct caution given by the magistrate was sufficient to obviate them. It was in effect telling the prisoner that he would get no benefit from his confession, and that he should consequently dismiss from his mind all expectation of getting any, if any such he had (*i*).

The prisoner had been in the custody of several constables, one after another, and it was suggested on his behalf that one of them had improperly induced him to confess. This constable was called, and stated that the prisoner was in his custody on another charge, and was not suspected at that time of the offence for which he was on his trial, and that he made a statement. It was submitted that if a promise was held out to him, it was immaterial what the charge was. Littledale, J., said: 'I think not. If he was taken upon a particular charge, I think that the promise could only operate on his mind as to the charge on which he was taken up. A promise as to one charge will not affect him as to another charge.' The confession was admitted (*j*).

(*i*) R. *v.* Berigan, Joy, 27; 1 Crawford & Dix (Ir. C. C.), 177. In this case there were similar confessions made by all the prisoners, under circumstances precisely similar, and they were all admitted. 'It is not improbable,' observes Mr. Joy, 'that in this case the prisoner was induced to make the confession by what his fellow-prisoner had done, and by *his* having been admitted queen's evidence, but no promise, threat, or inducement was held out by any person in authority calculated to make his confession untrue.' Joy, 28.

(*j*) R. *v.* Warner and Morgan, Gloucester Spr. Ass. 1832. MSS. C. S. G.

But where several felonies form part of the same transaction, an inducement held out as to one will exclude a statement as to another (*k*).

In R. *v.* Gilham (*l*), upon an indictment for murder, it appeared that the prisoner and the deceased had been in the service of Mrs. C., at Bath. The deceased was murdered in the night of January 26, and the prisoner was apprehended on January 30, and some articles belonging to Mrs. C. afterwards found in a room hired by him. When in gaol, the prisoner had the Bible and the Whole Duty of Man by him; the gaoler pointed out several passages for him to read in the Prayer Book, particularly the opening sentences of the service, and told him if he wished to have a spiritual adviser he would endeavour to get him one; and after some conversation the prisoner expressed a wish to have the chaplain of the gaol. The chaplain went to the gaol, and asked the prisoner why he sent to him; the prisoner answered, to read and pray with him, as he could not do it himself, or make use of the books which were lying before him, which were the Bible, Prayer Book, and Whole Duty of Man. The prisoner said he knew he was a sinner, and should soon die. The chaplain asked him how he knew it; he replied, he had been told at the Hall he should be hanged for taking the goods of his mistress; and he then admitted that he had purloined a few things from her. The chaplain saw he was in a very perturbed and distressed state of mind, and asked him if there was not something still more heavy on his conscience; he said he knew he was a sinner as other men, and he knew he was suspected of the unhappy murder. The chaplain told him, if he was innocent to maintain his innocence; but if not, his own heart would tell him. The chaplain, as the minister of God, thought it was his duty to warn him not to add sin to sin, by attempting to dissemble with God. The chaplain then asked him, as he confessed himself a sinner, and as he thought he should soon die, whether he would not wish to repent of his sins; he answered in the affirmative. The chaplain then explained to him what he considered to be the nature of true repentance; and, amongst other things, that it was not a mere acknowledgment of sin, but a deep search into ourselves, and by the purity of the Gospel, whenever we found ourselves deep defaulters, to confess the same before God, with a deep contrition on our part for having violated the law of God. The chaplain told him, that before God it would be better for him to confess his sins. The chaplain also told him, that, next to confessing his sins before God, another most important part of the duty of repentance was to repair, by all possible means in his power, every injury of whatsoever nature he had done to his fellow-creatures; he enlarged very considerably on his repairing the injuries he had done his fellow-creatures, as forming a branch of true repentance; and he said he might say, and repairing any injury done to the laws of his country. The chaplain stated that the prisoner was then extremely agitated; he read to him part of the Commination Service, commenting upon it as he went along. He thought at one time that the prisoner was on the point of making some immediate communication to him, and he asked him if he should send for B. (the gaoler), meaning it with a view of the prisoner making a communication

(*k*) R. *v.* Hearn, C. & M. 109.

(*l*) 1 Mood. 136.

to B., because he considered he had made a great impression on the prisoner. The chaplain stated the prisoner's agitation and perturbed state of mind during the interview was so great that he could not help being aware that the prisoner had something pressing on his mind; and the chaplain said while that was the case he could tell the prisoner, and the prisoner would feel, that no services of his would afford him, what he wished they should do, real comfort; telling him also he must be aware that he, as a minister of God, had but one object in view, to bring him to a state of true repentance; and that he could not but himself feel sensible that he was more concerned in the dreadful deed than he had admitted; that he did not wish him to confess to him, but to bear in mind the subject on which he had talked to him and read to him. The prisoner was evidently so worked upon by what had been said, that the chaplain could not but observe it to him, and asked him whether his conscience did not bear witness to the truth of what he had advanced. The chaplain soon after left him, the prisoner having expressed a wish to see him again. He then went and reported to the magistrates what had passed between them; and having recovered himself a little from the agitation he was in from so painful an interview, went to the prisoner again a little before three on the same day, and resumed the tenor of his conversation upon repentance, and confessing his sins before God, and repairing, by every possible means, any injury he had done to his fellow-creatures. As the prisoner had himself alluded to the murder, the chaplain entreated him, if he knew himself guilty, to avail himself, by the means of general repentance and faith in Christ, to be reconciled with God. At one time, during this interview, the chaplain saw so evident an impression made on his mind, that he could not but tell him his fear, which he had expressed to the prisoner in the morning respecting his participation in the dreadful deed, was fully confirmed; and that while he was in that state of mind, he (the chaplain) could not afford him the consolation by prayer, which it was his earnest wish to do, and so that his prayers could be of any avail to him; and he soon after left the prisoner. The first interview lasted about two hours, and the second about an hour and a quarter, and during these interviews the chaplain enlarged upon the topics mentioned to the prisoner. The chaplain said he could almost take upon himself to say, that he always used the terms, 'confessing his sins before God'; but he afterwards said that he could not say that he mentioned 'before God' every time he used the word 'confessing.' After the second interview, the gaoler saw the prisoner, and told the prisoner what had passed between him, the gaoler, and the prisoner's wife; and he also told the prisoner, that he was perfectly satisfied that what he, the gaoler, said in the morning was correct. The prisoner then said he would tell the gaoler all about it. The gaoler said to him: 'Don't tell me anything but what you would wish the mayor and magistrates to know, for whatever you tell me I must inform them of.' The prisoner then related to the gaoler the particulars of the murder, and the way in which he had committed it. The gaoler then said to him: 'Now I shall tell all this to the mayor and magistrates.' The prisoner then said: 'That is what I wish'; he said he had endeavoured to make up his mind to confess before; he had a great mind on Monday.

He then requested the mayor should come and hear what he had to say: and particularly wished to see the clergyman again. The next morning (Saturday) the gaoler saw him again, and read to him two prayers and a psalm; he said he felt himself a good deal easier in his mind. The mayor of Bath and town clerk came about ten o'clock. The prisoner, before he saw them, told the gaoler that some part of what he had stated the night before was not correct, as to what part of the house he met the deceased in when he first struck her, and he said it was in another part of the house. When the mayor saw the prisoner in the gaoler's room, he said: 'I am come to see you, as I understand you wish to make some communication to me.' The mayor then said to him: 'Before you say anything, I think it necessary to apprise you, as I have done several times during your examination, that it will probably be given in evidence against you. You are, therefore, to use your own discretion, and say little or nothing, as you may think best; and if you have changed you mind since you sent to me, and do not choose to say anything, I will retire, and shall not feel at all angry with you for having brought me down unnecessarily.' The prisoner said something; what he said was taken down in writing, in his own words; it was read over to him by the town clerk, and the clerk asked him if he had any objection to sign it: he said he had not any, but his hand shook so much he could not write his name, but it was all true. The mayor then signed the examination, but it was not signed by the prisoner. This examination of the prisoner was read; and it contained a confession of his having committed murder, and the circumstances attending it. It appeared that the prisoner had undergone five or six examinations, including the coroner's inquest. In the course of the same morning, after the mayor was gone, one of the mayor's officers saw the prisoner, and in answer to a question how he was, the prisoner told him he was better since he had eased his mind; and in the conversation they had, he told the officer that he had committed the murder, and related some of the particulars. The next morning (Sunday) the prisoner was taken from Bath to the county gaol by another of the mayor's officers, and in answer to an inquiry how he felt, he said he felt a good deal better since he had relieved his mind; and in the course of their journey he told this last-mentioned officer that he had committed the murder, and stated some of the particulars. It was contended on the part of the prosecution that, even supposing the confession made to B., the gaoler at Bath, immediately after the chaplain's interview with the prisoner, were not receivable in evidence, still that the confession made to the mayor was receivable, inasmuch as the mayor cautioned him against saying anything, unless he thought it right, and that what he said would probably be given in evidence against him. But Littledale, J., thought that, after what the chaplain had said to him, nothing that the mayor said could do away the effect which the chaplain had produced in his mind, and that it differed from those cases where a confession having been made under circumstances which prevented its being received in evidence, if a magistrate has cautioned a prisoner not to say anything against himself, a subsequent confession made before a magistrate has been admitted in evidence. The learned judge received the confessions in evidence, and the prisoner was found guilty. But the point was reserved for the consideration of the

judges; before whom it was argued (*m*). The judges were of opinion that the confessions had been properly received, and that the conviction was right; upon the ground, it is understood, that there were no temporal hopes of benefit or forgiveness held out, and that such hopes, if referable merely to a future state of existence, are not within the principle on which the rule for excluding confessions obtained by improper influence is founded (*n*).

(c) *What Threats and Menaces will exclude a Confession.*

It would seem that fear alone, without threats, will not render a confession inadmissible (*o*). Saying to a prisoner that it would be worse for him if he did not confess, is sufficient to exclude a confession (*p*). So a confession induced by saying, 'Unless you give me a more satisfactory account, I will take you before a magistrate,' or (*q*) by saying, 'That unfortunate watch has been found, and if you do not tell me who your partner was I will commit you to prison as soon as we get to Newcastle; you are a damned villain, and the gallows is painted in your face' (*r*), cannot be given in evidence.

A boy between eight and nine years old was thus questioned by a policeman: 'Have you ever been to school?' He said, 'Yes.' 'Do you know what will become of you if you tell a falsehood?' 'Yes; I shall go to hell.' 'Do you think God knows everything that is done?' 'Yes.' 'Do you think He knows who set fire to the hay-stack?' The boy did not answer, but began to cry. The policeman then asked whether he could give any information about the fire, and told him, before he made any statement, he should apprehend him upon a charge of setting fire to W.'s ricks. After that the boy made a statement. Cresswell, J., after consulting Williams, J., said: 'It seems to us both too hazardous to admit this evidence. It is impossible not to say that what passed may have acted upon the boy's mind as a threat' (*s*).

Prior to the examination of the prisoner on a charge of sheep-stealing,

(*m*) The following authorities were cited: R. *v.* Radford, tried at Exeter Summer Assizes, 1823, where a clergyman had prevailed on the prisoner to confess a murder, by dwelling on the heinousness of the crime, and the denunciations of Scripture against it, without giving him any caution that it would be used in evidence against him, and Best, C.J., refused to allow the clergyman to state the confession; saying that he thought it dangerous after the confidence thus created, which would throw the prisoner off his guard, and the impression thus produced, to allow what he then said to be given in evidence against him. But it is said that this case was not determined on this ground; but that Best, C.J., thought that it was improper in the clergyman to violate the confidence reposed in him by the prisoner, and expressed a strong opinion to that effect; and as the evidence was not wanted for the Crown, it was not pressed, and the prisoner was convicted without it. R. *v.* Sparkes, cited Peake, 78. Williams *v.* Williams [1798], 1 Hagg. (Consist.) 304.

(*n*) The case does not expressly decide that a chaplain was a person in authority; but unless he was assumed to be so as regards the confessions made to him, there was no ground for arguing most of the case.

(*o*) Phipson, Ev. (4th ed.) 244, citing R. *v.* Rome, 137 Cent. Cr. Ct. Sess. Pap., 220, Darling, J.

(*p*) 2 East, P. C. 659. Cf. R. *v.* Coley, 10 Cox, 536, where the words were: 'If you don't tell me you may get yourself into trouble, and it will be the worse for you.'

(*q*) R. *v.* Thompson, 1 Leach, 291.

(*r*) R. *v.* Parratt, 4 C. & P. 570, Alderson, J.

(*s*) R. *v.* Day, 2 Cox, 209. R. *v.* Griffiths, *post*, p. 2185, and R. *v.* Hearn, C. & M. 109, were cited.

his wife volunteered a confession of the particulars of the robbery; and on the prisoner being brought up for examination, the justice told him that his wife had already confessed the whole, and that there was quite case enough against him to send a bill before a grand jury, and then asked him what he had to say. The prisoner immediately confessed his guilt, and stated several facts which had been previously deposed to by his wife. It was objected that this confession could not be received, inasmuch as the magistrate's address to the prisoner when he was brought before him to be examined was in the nature of a menace. But Parke, J., overruled the objection, saying he considered it rather as a caution (*t*).

The words, 'I must know more about it,' said by a police constable to a prisoner in the course of a conversation between them respecting the subject matter of the charge, immediately before apprehension, were held not to exclude an admission (*u*).

Prosecutrix lost her purse, containing £1 4*s*., in a market, and asked the prisoner, who had been standing near her, whether he had seen the purse or seen anyone pick it up. He replied that he had not. She, however, suspecting that he had robbed her, gave information to the police. A policeman a short time after went in search of prisoner, and having found him told him that the prosecutrix had lost her purse, and that it was supposed that he had picked it up, and added, 'Now is the time for you to take it back to her.' He denied it, and went with the policeman. As they walked along he commenced making a statement, but the policeman told him to say nothing until they saw the prosecutrix. Having met the prosecutrix after they had walked about six hundred yards, some conversation took place, and the prisoner was searched, and on a half a sovereign being found, the prisoner said to the prosecutrix that he would make it all up to her. Twenty minutes had elapsed between the time of the policeman's remark, 'Now is the time to take it back to her,' and the prisoner's statement, 'that he would make it all up to her.' It was held, that there was no inducement held out to the prisoner, and that his statement or confession that he would make it all up to her was admissible in evidence against him (*v*).

If the words used to a prisoner be such that he might consider them as a threat, a confession is not admissible. The prisoner being in custody on a charge of arson, he was told that 'he ought to tell whatever was the truth, but he must be very careful as he was sure to be committed,' on which he made a statement. Taunton, J., doubted whether the words used might not be construed as a threat, and having consulted Littledale, J., said: 'We think as the words were so ambiguous that they might be considered by the prisoner as a threat, the evidence ought not to be given' (*w*).

Where a prisoner has been taken into custody by a constable without a warrant, and detained by him in durance for four days, and during his confinement a confession was obtained under certain promises and on the part of the prosecution it was attempted to be shewn that the confession was voluntary, and not made under such promises; Holroyd, J.,

(*t*) R. *v.* Wright, 1 Lew. 48. See R. *v.* Long, 6 C. & P. 179.

(*u*) R. *v.* Reason, 12 Cox, 228.

(*v*) R. *v.* Jones, 12 Cox, 241.

(*w*) R. *v.* Williams, Gloucester Spr. Ass. [1832], MSS. C. S. G.

said: 'Even if that were so, the fact of its having been made while in unlawful custody renders it unavailing'; and there being no sufficient evidence without it, he directed an acquittal (*x*).

(d) *Confession made after former one unduly obtained, or after Inducements once made.*

If a confession has been obtained from the prisoner by undue means, any statement afterwards made by him under the influence of that confession is inadmissible.

Where an inducement which would exclude a confession has been held out to a prisoner, there ought to be clear evidence to shew that the impression caused by it has been removed before a subsequent confession, made at a different time, is admitted as evidence (*y*). The cases upon this subject are conflicting. But certain general rules and principles can be deduced from the following cases. The question whether the confessions can be received in evidence is for the judge, and each case must be determined upon its own facts.

In R. *v.* Nute (*z*), the prisoner was suspected of setting fire to an outhouse; her mistress pressed her to confess, and told her, among other things, if she would repent and confess, God would forgive her, but she concealed from her that she would not forgive her herself: she confessed. The next day, another person, in her mistress's sight, though out of her hearing, told her her mistress said she had confessed, and drew from her a second confession. Lord Eldon, C.J., allowed the confessions in evidence, and the prisoner was convicted. The jury, on having the confessions put to them, said they thought the first confession made under a hope of favour here, and second under the influence of having made the first. On a case reserved, the judges held that these points were not for the jury, but if Lord Eldon agreed with the jury, which he did, the confessions were not receivable; but many of them thought the expressions not calculated to raise hope of favour here, and if not, the confessions were evidence (*a*).

(*x*) R. *v.* Ackroyd, 1 Lew. 49. This decision has been questioned, and it has been observed that 'if the prisoner were to believe the apprehension unlawful, that would make him careful not to disclose anything against himself; if he should suppose it lawful, that also would make him careful not to make his situation worse, nor in any respect to prejudice himself.' 1 Phill. Ev. 407, and see R. *v.* Thornton, 1 Mood. 27.

(*y*) See 2 East, P. C. 658. R. *v.* Bell, Joy, 71.

(*z*) 1 Burn's 'Justice' (30th ed.), 973.

(*a*) In R. *v.* Sexton (MS. Chetw. 1 Burn's 'Justice,' ed. Doyle and Williams, tit. 'Confessions,' p. 1086), a confession had been improperly obtained by giving the prisoner two glasses of gin. The officer to whom it had been made read it over to the prisoner before the committing magistrate, who told the prisoner the offence imputed to him affected his life, and a confession might do him harm. The prisoner said, that what had been read to him was the truth, and signed the paper. Best, J., considered the second confession, as well as the first, inadmissible; saying, that had the magistrate known the officer had given the prisoner gin, he would no doubt have told the prisoner that what he had already said could not be given in evidence against him, and that it was for him to consider whether he would make a second confession. If the prisoner had been told this, what he afterwards said would be evidence against him; but for want of this information he might think that he could not make his case worse than he had already made it, and under this impression might sign the confession before the magistrate. This case has been (it would seem justly) doubted, see Deacon Cr. L. 424; Joy, 17; Taylor, Ev. (10th ed.) s. 880. Roscoe, Cr. Ev. (13th ed.) 39. In the first place the offer to confess was volunteered on the part

Upon an indictment for murder it appeared that the prisoner worked at a colliery, and some suspicions having fallen upon him, the overlooker charged him with the murder. The prisoner denied having been near the place. Presently the overlooker called his attention to certain statements made by his wife and sister, which were inconsistent with his own; and added, 'There is no doubt thou wilt be found guilty; it will be better for you if you will confess.' A constable then came in, and said to the overlooker, in a tone loud enough for the prisoner to hear, 'Robert, do not make him any promises.' The prisoner then made a confession. Patteson, J. said: 'That will not do. The constable ought to have done something to remove the impression from the prisoner's mind.' The overlooker, in about ten minutes, delivered the prisoner to the constable of the township. The constable stated, that when he received the prisoner, the overlooker told him (but not in the prisoner's hearing) that the prisoner had confessed. That he took the prisoner to his house, and there said, 'I believe S. has murdered a man in a brutal manner.' That the wife and brother of the prisoner were there, and said to the prisoner, 'What made thee go near the cabin?' That the prisoner in answer made a statement similar in effect to the one he had made before. That he used neither promise nor threat to induce the prisoner to say anything. But that he did not caution him. That it was not more than five minutes after he received the prisoner into his charge that the prisoner made the statement. That he was not aware that the overlooker had held out any inducement. That the overlooker was not present when the statement was made. For the prisoner it was submitted that the second confession must be taken to have been made under the same influence as the first. Patteson, J., said: 'There ought to be strong evidence to shew that the impression under which the first confession was made was afterwards removed, before the second confession can be received. I am of opinion, in this case, that the prisoner must be considered to have made the second confession under the same influence as he made the first; the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination'; and the statement was rejected (*b*).

A. was charged with the murder of B.'s child. On being asked by B. whether he had anything to do with it, A. cried and said, 'If you won't send for the police, I will tell the truth.' B. promised not to hurt A. nor to send for the police if she confessed, and she then confessed. Afterwards C., a neighbour of B., took A. into a room where she repeated the confession. It was held that the first confession was inadmissible, and that the confession to C., though he was not in authority, was so closely connected with the first as not to be admissible (*c*).

of the prisoner; secondly, there was no promise or threat at all used by the constable, nor was the prisoner in any way led to believe that by confessing he would escape from the charge, or be let out of custody; thirdly, there was no inducement to state anything but the truth. In 1 Burn's 'Justice,' Doyl. & Wms. 1081, note (*a*), it is said: 'The authority of this decision seems doubtful; for it is not every hope of favour held out to a prisoner that will render a confession afterwards made inadmissible; the promise must have some reference to his escape from the charge.'

(*b*) R. *v.* Sherrington, 2 Lew. 123. R. *v.* Meynell, 2 Lew. 122. R. *v.* Hewett, C. & M. 534.

(*c*) R. *v.* Rue, 13 Cox, 209; 34 L. T. 400, Denman, J. Phipson, Ev. (4th ed.) 251.

In an American case where the prisoner had been induced by promises of favour to make a confession, which was for that cause excluded, but about five months afterwards, and after having been solemnly warned by two magistrates that he must expect death, and prepare to meet it, again made a full confession, this latter confession was admitted in evidence (*d*). In this case, upon much consideration the rule was stated to be that, although an original confession may have been obtained by improper means, yet subsequent confessions of the same or of like facts may be admitted, if the Court believes, from the length of time intervening or from proper warning of the consequences of confession, or from other circumstances, that the delusive hope or fears, under the influence of which the original confession was obtained, were entirely dispelled (*e*). In the absence of any such circumstances the influence of the motives, proved to have been offered, will be presumed to continue, and to have produced the confession, unless the contrary is shewn by clear evidence, and the confession will therefore be rejected (*f*).

Although such improper inducements may have been held out to a prisoner as would exclude a confession made under their influence, yet if the Court, taking into consideration all the circumstances of the case, should be of opinion that at the time a confession was made such inducements had ceased to operate upon the mind of the prisoner, such confession will be admissible. In determining whether an inducement has ceased to operate, it will be material to consider the nature of such inducement, the time and circumstances under which it was made, the situation of the person making it, the time which has intervened between the inducement and the confession, and whether there has been any caution given, and if so, whether that caution has been given generally, or expressly and specifically with reference to the inducement held out. Thus where it appeared that the prisoner, on being taken into custody, had been told by a person who came to assist the constable that it would be better for him to confess, but that, on his being examined before the committing magistrate on the following day, he was frequently cautioned by the magistrate to say nothing against himself, a confession under these circumstances before the magistrate was held to be clearly admissible (*g*).

A constable told the prisoner he might do himself some good by confessing; and the prisoner afterwards asked the magistrate if it would benefit him to confess; on which the magistrate said he could not say it would, and the prisoner then declined confessing. But afterwards, on his way to prison, he made a confession to another constable; and confessed again in prison to another magistrate. The judges held that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised (*h*). Nor is it any objection to a confession made before a magistrate, that the prosecutor who was

(*d*) Guild's case, 5 Halst. 166, 168. Taylor, Ev. (10th ed.) s. 878.

(*e*) Taylor, Ev. (10th ed.) s. 878, citing Guild's case, 5 Halst. 180.

(*f*) Taylor, Ev. (10th ed.) s. 878, citing Roberts' case, 1 Devereux, 259, 264.

(*g*) R. *v.* Lingate, 1 Phill. Ev. (7th ed.) 414, Bayley, J. See R. *v.* Howes, 6 C. & P. 404, Denman, C.J.

(*h*) R. *v.* Rosier, 1 Phill. Ev. (10th ed.) 414.

present first desired the prisoner to speak the truth, and suggested that he had better speak out, provided the magistrate or his clerk immediately checked the prosecutor, desiring the prisoner not to regard him, but to say what he thought proper (*i*).

Where the prisoner has been duly cautioned by the magistrate, in pursuance of 11 & 12 Vict. c. 42, s. 18, anything said by him thereupon is admissible in evidence against him, although there may have been a previous promise or threat held out to him to induce him to confess (*j*).

In a case before the above Act it appeared that, before a prisoner was asked what he had to say, he was particularly cautioned by the magistrate not to say anything that would injure himself, for whatever he said would be taken down, and given in evidence against him. But it also appeared that a constable, who had previously induced the prisoner to make a confession to him by telling him it would be better to confess, had been examined before the magistrate, and in his examination had stated that he had told the prisoner that it would be better to confess, and had also stated all the prisoner had said to him in consequence. All this had been taken down, and read over to the prisoner, before he made his statement; Littledale, J., refused to allow the statement to be given in evidence, as the caution given by the magistrate was not sufficient to obviate the effect of the inducement used by the constable (*k*). But where a constable proved that he had given the prisoner a handbill, offering a reward to any accomplice who would give information on the subject of the robbery, and the handbill was read over to the prisoner, who made a statement, which the constable took in writing (*l*); when the prisoner was examined before the magistrate this statement was incorporated into the constable's deposition. The prisoner was then told that anything he said would be taken down, and might be used against him, and the prisoner said that the statement to the constable was quite true. It was objected that the recognition by the last statement of a former inadmissible statement could not make that statement admissible. Tindal, C.J.: 'The impression made by the constable was afterwards removed by the caution given by the committing magistrate; and that the prisoner adopts his former statement. It is just the same as if the prisoner had repeated it or written it down *de novo* after the caution, and then its admissibility could not have been questioned' (*m*).

Where a policeman said to the prisoner, who was charged with the murder of a bastard child, 'You had better tell all about it; it will save trouble'; and then put questions to her; Erle, J., held that her answers were inadmissible. A superintendent of police had afterwards, about the same time, gone to the prisoner, and without cautioning her, put certain

(*i*) R. *v.* Edwards, 1 Phill. (ibid.).

(*j*) R. *v.* Bate, 11 Cox, 686.

(*k*) R. *v.* Smith, Worcester Spr. Ass. 1830. MSS. C. S. G. Not only was there no express caution given not to rely on the promise made, but by receiving the previous confession in evidence the magistrate treated it as if it had been properly obtained and the prisoner might therefore well conceive that a subsequent confession could do him no injury, and might possibly *be better* for him; and see R. *v.* Gilham, *ante*, p. 2175.

(*l*) Tindal, C.J., rejected this statement.

(*m*) R. *v.* Horner, 1 Cox, 364. 'No notice was taken of the statement having been incorporated in the deposition of the constable, and therefore treated by the magistrate as lawfully obtained; and R. *v.* Smith, *supra*, was not cited, though a decision directly in point the other way.' C. S. G.

questions to her; but it did not appear that he had referred to her statements to the policeman; she had, however, said when she saw him, 'Ah, I expected you'; and the questions related to the number of her children, and especially what had become of the youngest, with whose murder she was charged, and whether she had been at Colchester on a particular day. Erle, J., after consulting Wightman, J., held that the answers to the superintendent were admissible (*n*).

Where a person in superior authority holds out an inducement to a prisoner to confess, a confession made to a person in inferior authority is not admissible, especially if such person do not give the prisoner any caution. Upon an indictment for arson it appeared that the committing magistrate had told the prisoner that, if he would make a disclosure, he would do all that he could for him. The prisoner, after he was committed, made a statement to the turnkey of the gaol, who had held out no inducement to him to confess, and had not given him any caution not to confess. Parke, J., said: 'I think I ought not to receive the evidence, after what Mr. S. (the committing magistrate) said to the prisoner, more especially as the turnkey did not give any caution to the prisoner' (*o*).

Where upon an indictment for murder it appeared that the prisoner had sent for the coroner, desiring to make some statement; the coroner told him that any confession that he made would be produced against him on the trial, and that no hope or promise of pardon could be held out to him, either by the government or by anyone else. Previous to this time a magistrate had had an interview with the prisoner, and had told him that if he was not the man that struck the fatal blow he would use all his endeavours to prevent any ill consequences from falling on him, if he would disclose what he knew of the murder, and that there were so many persons concerned in the transaction that it would be made known by some or other of them. The magistrate wrote a letter to the Home Secretary, to which he received an answer, stating that mercy could not be extended to the prisoner, for reasons that were therein mentioned; which answer he communicated to the prisoner. All this occurred before the prisoner sent for the coroner. It was objected that, although the inducement that the magistrate would interest himself with the government had been removed, yet there were two other inducements: first, the hope that would arise from the personal endeavours of the magistrate; and, secondly, the fear that if the prisoner did not confess, some one else would tell before him. Littledale, J., said:

(*n*) R. *v.* Cheverton, 2 F. & F. 833. The prisoner's statement was that the father of the child had written for it, and that she had sent it to him by a woman at the railway station at Colchester. The prisoner was acquitted, or the point would have been reserved; and the point deserves reconsideration.

(*o*) R. *v.* Cooper, 5 C. & P. 535. The Reporters observe: 'If a person of inferior authority cautions a prisoner not to confess, after an inducement held out by a person of superior authority, it is important to consider whether a statement made by a prisoner under such circumstances would be receivable; as it seems to be but a fair conclusion that what was said to the prisoner by the magistrate would be much more likely to operate on his mind than anything subsequently said by a constable.' 'It may be added, that as the inferior can have no control over the superior, it is difficult to see how any caution by the inferior could do away with the effect of the inducement by the superior, as the prisoner must be aware that the inferior could have no power to prevent the superior from carrying his promise into effect. See the ruling of Littledale, J., in R. *v.* Gilham, *ante*, p. 2175.' C. S. G.

'I think that this declaration is clearly admissible. I think that the conversation with the magistrate, after he received the Secretary of State's letter, and the caution given by the coroner, must be taken to have completely put an end to all the hopes that had been held out' (*p*).

Where a prosecutrix said to her servant-girl, who was in custody of a private person in her house at night, on a charge of administering poison, 'Jane, now you see the effects of your wickedness; you will be to go from here to-morrow morning to S., to the magistrates, and not return again'; on which the girl said, 'Sooner than I will go from here, or anywhere else, I will tell the truth'; to which the prosecutrix answered, 'That is all I want.' A statement then made was held inadmissible. On the following morning a constable came to the house, and while there, without giving her any caution, said to the girl, 'My dear girl, where did you get the stuff from that you put in the tea and coffee?' It was held that what was then said must be considered as being under the influence of what was said the night before, because she was still in the house, and still in the hopes that she might not be taken before the magistrates. The constable afterwards took her to S., and while on the way thither she made a statement, without any caution having been given or any inducement having been held out to her, and this was held admissible, because the only hope was that she should not be taken away from the house, and this must have been at an end when she was taken away by the constable (*q*).

(e) *Confessions elicited by Questions.*

A justice who is holding a preliminary inquiry as to an indictable offence is not entitled to interrogate the accused unless he is sworn as a witness, and then only within the limits prescribed by the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), *post*, p. 2271.

Where M., the chief officer of the police at Liverpool, stated, that on November 18, the prisoner, a boy of fourteen years of age, was apprehended by his directions, without any warrant, between twelve and one o'clock, and that he was carried to the police office about one o'clock. The magistrates were then sitting at a very short distance, and continued sitting till between two and three, and till the business presented to them was finished; but the prisoner was not carried before them, because the police officer was engaged elsewhere. The officer ordered the prisoner to Bridewell on his own authority, between four and five o'clock; and between five and six o'clock he told the prisoner that, in consequence of the falsehoods he had told, and the prevarications he had made, there was no doubt that he had set the premises on fire; and he therefore asked him if any person had been concerned with him, or induced him to do it? The prisoner said he had not done it. The police officer replied that he would not have told so many falsehoods as he had if he had not been concerned in it, and he again asked him if anybody had induced him to do it? The prisoner then began to cry, and made a full confession. In

(*p*) R. *v.* Clewes, 4 C. & P. 221. See R. *v.* Bryan, Joy, 73; Jebb, C. & P. C. (Ir.) 157.

(*q*) R. *v.* Griffiths Worcester Summer Assizes, 1832 (MSS. C. S. G.), Bosanquet, J.: less fully reported in R. *v.* Richards, 5 C. & P. 318.

speaking of the falsehoods, the police officer referred to an examination of the prisoner he had himself made. The prisoner was taken before he had dined, and had had no food from the time he was apprehended till after his confession. Bayley, J., thought it deserved consideration, whether a confession so obtained, when the detention of the prisoner was perhaps illegal, and when the conduct of the officer was calculated to intimidate, was admissible in evidence, and reserved the point for the opinion of the judges, a majority of whom held the confession rightly received, on the ground that no threat or promise had been used (*r*).

Where rumours had been afloat that the prisoner had been delivered of a child, but the only ground for such suspicion was that she had been observed up to a certain time to increase in size, and had afterwards recovered her usual form; and in consequence of these rumours a police officer went to her, charged her with having been recently delivered, and with having murdered the child, or at least concealed its birth. The result of his questioning was that she made a statement, which he detailed. Erle, J., made strong observations on the impropriety of questioning the prisoner at the time when there was no proof of any crime having been committed, but the evidence was left to the jury (*s*).

Expressions or statements made to a police officer *before* arrest are admissible (*t*). Judicial opinion has been divided as to the admissibility of confessions or admissions made in answer to questions by the police (*u*) without caution after arrest (*v*). But in R. *v.* Best (*vv*) it has been held that such confessions or statements are not rendered inadmissible merely by the fact that they are made in reply to questions put *after* arrest.

A confession obtained by questions put by the prosecutor's wife (*w*), or by persons who are neither constables or officers (*x*), or by a fellow prisoner (*y*), is admissible. So where it was proposed on the part of the prosecution to prove what had been said by the defendant in his examination before a committee of the House of Commons, which the defendant

(*r*) R. *v.* Thornton, 1 Mood. 27, Best, C.J., Bayley, J., and Holroyd, J., *dissentientibus*. R. *v.* Kerr, 8 C. & P. 176. Gibney's case, Joy, 36. R. *v.* Hughes, ibid. 39. Although there can be no doubt that confessions elicited by questions put by officers are admissible, still there can be equally little doubt that it is no part of the duty, or rather that it is a breach of the duty of an officer to put questions to prisoners in their custody, and learned judges have in many cases reprobated such conduct in the strongest terms; and where it appeared that a constable was in the practice of interrogating prisoners in his custody, Patteson, J., threatened to cause case [1838], Rose. Cr. Ev. (12th ed.) 44. him to be dismissed from his office. Hill's R. *v.* Hassett, 8 Cox, 511.

(*s*) R. *v.* Berriman, 6 Cox, 388. It should, however, be borne in mind in these cases, that every peace officer is justified in apprehending on reasonable suspicion, though no felony has been committed; and that in cases of suspicion it may frequently be perfectly right for a peace officer to ask questions of a suspected person not in custody, provided such questions be fair and adapted to the particular circumstances.

(*t*) R. *v.* Dougal, 67 J. P. 325. R. *v.* Kershaw, 18 T. L. R. 357.

(*u*) *Against admitting such confessions.* See R. *v.* Bodkin, 9 Cox, 403 (Ir.). R. *v.* Gavin, 15 Cox, 656, A. L. Smith, J. R. *v.* Male, 17 Cox, 689, Cave, J. R. *v.* Histed, 19 Cox, 16, Hawkins, J. R. *v.* Knight, 20 Cox, 711, Channell, J. *For admitting such confessions.* R. *v.* Brackenbury, 17 Cox, Day, J. R. *v.* Miller, 18 Cox, 54, Hawkins, J. Rogers *v.* Hawken, 67 L. J. Q. B., 526, Russell, C.J., and Hawkins, J. R. *v.* Johnson, 15 Ir. C. L. Rep. 60. See also the Canadian cases. R. *v.* Kay, 9 Canada Cr. Cas. 403. R. *v.* Ryan, ibid. 347.

(*v*) As to caution, see R. *v.* Coote, L. R. 4 P. C. 605, and *ante*, p. 2168.

(*vv*) [1909], 1 K.B. 692.

(*w*) R. *v.* Upchurch, *ante*, p. 2161.

(*x*) R. *v.* Wild, *ante*, p. 2167.

(*y*) R. *v.* Shaw, 6 C. & P. 372.

had been compelled to attend; and on the part of the defendant it was objected that, since this statement had been made under a compulsory process from the House of Commons, and under the pain of incurring punishment as for a contempt of the House, the declarations were not voluntary, and could not be admitted for the purpose of criminating the defendant; Abbot, J., overruled the objection and admitted the evidence (*z*).

(f) *Evidence given on Oath by Prisoner—when admissible.*

Except in cases in which the prisoner is a competent witness (*a*), his examination *on oath* before a justice on a charge then made against him of committing an indictable offence is not admissible in evidence against him on his trial for that offence (*b*), either as a deposition or as a confession (*c*).

There are numerous decisions on this point beginning with R. *v.* Smith (*d*). In that case an examination of a prisoner taken before a magistrate was written under the following words, which except as to the name were printed, 'The examination of — Hornage, taken on oath before me,' &c., and was signed by the magistrate; and Le Blanc, J., rejected the examination, because it purported to have been taken on oath, and would not permit a witness to be examined for the purpose of showing that no oath had in fact been administered to the prisoner, saying that he could not allow that which had been sent in under the hand of the magistrate to be disputed.

(*z*) R. *v.* Merceron, 2 Stark. (N. P.) 366. On this case being cited in R. *v.* Gilham, 1 Mood. 186, Tenterden, C.J., said: 'I think there must be some mistake in that case; the evidence must have been given without oath; and before a committee of inquiry, where the witness would not be bound to answer.' See also R. *v.* Garbett, 2 C. & K. 474, 483, for further remarks on this case. So if a witness answers questions to which he might have demurred, as subjecting him to penalties, his answers may be used against him for all legal purposes; and therefore, in an action on 5 Geo. II. c. 30, s. 21, the defendant's examination before the commissioners was allowed to be given in evidence, to shew that by his own confession he had concealed the property of the bankrupt. Smith *v.* Beadnell, 1 Camp. 30. See also Stockfleth *v.* De Tastet, 4 Camp. 10.

(*a*) R. *v.* Bird, 19 Cox, 180; 62 J. P. 760.

(*b*) 2 Hawk. c. 46, s. 37. The judges' orders in Kel. (J.) 2, direct that 'all justices of the peace do take examinations of the felonies without oath.' Cf. Buller (N. P.) 242. 'There is no doubt that an examination of a prisoner taken on oath is irregular, and therefore inadmissible as an examination under the Indictable Offences Act, 1848. The magistrate has, except as above stated, no authority to administer an oath to the accused: and the accused has a right to refuse to be sworn,' and until the Criminal Evidence Act, 1898, was not a competent witness except under a few statutes (*post*, pp. 2269 *et seq.*). 'Perhaps, the rejection of the examination of prisoners on oath altogether may have originated in not distinguishing between an examination admissible under the statute, and one admissible as evidence at common law. The point seems to have been taken for granted in all the cases decided before the passing of the Act, and never solemnly discussed.' C. S. G.

(*c*) An oath imposed on a prisoner in custody is likely to operate as a kind of constraint or compulsion. 1 Phill. Ev. 402. Mr. Greaves suggested (3 Russ. Cr. (6th ed.) 513 *n.*) that the fact that a prisoner was examined on oath should be considered as merely creating a presumption that his statements were not voluntary, and referred to a statement by Abinger, C.B., in R. *v.* Wheater, 2 Mood. 45. 'I understand if a prisoner's examination be on oath, it shall not be received in evidence without reference to a duress or threat. *I see no reason for it:* in principle the answer may be quite voluntary.' That case related to an examination in bankruptcy, after the examinee had been cautioned, and permitted to elect what questions he would answer. Cf. Archb. Cr. Pl. (22nd ed.) 299.

(*d*) 1 Stark. (N. P.) 242. See *post*, p. 2189.

In R. *v.* Lewis (*e*), upon an indictment for administering poison, it appeared that on the day on which the prisoner was committed she and several others were summoned before a magistrate, and at a time when she was under no charge, and when there was no specific charge against any person, she and the other persons were examined upon oath touching this poisoning, and their statements taken down in writing; but on the conclusion of the examination, the prisoner was committed for trial on this charge. It was proposed to put in the examination of the prisoner, and R. *v.* Tubby (*f*) was cited. Gurney, B., said: 'This case is quite distinguishable from the case cited. Under the circumstances of that case I should have been disposed to agree with my brother Vaughan. I remember in the case of R. *v.* Walker, which was a case of forging a will, I gave in evidence an affidavit made by one of the prisoners in the suit in Doctors Commons, and the prisoner was convicted and executed. But this being a deposition made by the prisoner at the same time as all the other depositions on which she was committed, I think it is not receivable. I do not think this examination was perfectly voluntary' (*g*).

Upon an indictment against a father and daughter for receiving stolen goods, it appeared that the daughter had been examined upon oath as a witness before the committing magistrate, and it was proposed to ask what she then said in the presence of her father. Gurney, B., said: 'I think you cannot do that. We cannot hear anything she said before the magistrate when she was a witness; if after having been a witness you make her a prisoner, nothing of what was said then can be admitted in evidence' (*h*).

The prisoner being in Bridewell sent for a magistrate, and asked what was the charge against him, which the magistrate told him. Nothing further passed. About an hour afterwards the prisoner again sent for the magistrate, and made an information, which was produced. The magistrate made no threat, and held out no inducement to the prisoner, and did not caution him against criminating himself. He was sworn, and put his mark to it. The magistrate did not inform the prisoner that his information would be used against him. The magistrate thought the prisoner would be admitted as a Crown witness, and the prisoner might have been under that impression also. The prisoner 'was in as

(*e*) 6 C. & P. 161, and MSS. C. S. G.

(*f*) 5 C. & P. 530, *post*, p. 2190.

(*g*) It is said (1 Phill. Ev. 403) that, 'when she was summoned to appear, suspicion attached to her; and the case bears a strong resemblance to that of an individual examined on oath under a charge.' This is inaccurate, and neither warranted by the report in C. & P. nor my note of the case, and I was counsel in it. The prisoner was summoned in the ordinary way as a person who could give some evidence touching the matter, and not because any suspicion attached to her. See the note (*h*) *infra*. C. S. G.

(*h*) R. *v.* Davis, 6 C. & P. 177, and MSS. C. S. G. 'It does not appear from the report that this individual was taken as a prisoner before the magistrate; but there were circumstances sufficient to raise a suspicion of guilt, and sufficient also to shew that the statement was not perfectly voluntary.' 1 Phill. Ev. 404. It should seem, from the fact of her being examined as a witness, that she was not taken before the magistrates as a prisoner; and as to the circumstances sufficient to raise a suspicion of guilt, none such are stated to have been proved before the magistrate, either before or at the time when her examination was taken; and assuming that such suspicion might exist in the minds of the magistrates or others, or even that the prisoner might be aware that there was such suspicion, that was not the ground of the decision, but that the prisoner had been examined on oath as a witness. C. S. G.

a Crown witness.' The prisoner swore his information again, but not in the presence of the other prisoners, but he refused to support his information, or appear as a witness. The magistrate had refused to admit the prisoner to bail. It was objected that the information was inadmissible as a confession, because the usual caution was not given, and an inducement was used; and, further, that its being on oath rendered it inadmissible; and upon a case reserved, it was held that the information ought not to have been received in evidence (*i*).

It would seem that statements made by a prisoner without oath before a justice if taken regularly in accordance with the Indictable Offences Act, 1848, are not rendered inadmissible because as returned with the depositions they purport to have been made under oath (*j*); and that in such cases if it can be shewn that the accused was not in fact put on oath, the statement reduced to writing may be received against him, or if need be, oral evidence be given of what the accused said. And where the accused is sworn and examined on oath by mistake and on discovery of the mistake the deposition is destroyed and the statement of the accused taken in the regular manner it is admissible.

On an indictment for arson against two prisoners, it appeared that, when one of the prisoners was first brought before the magistrate, it was thought that he had appeared as a witness, and by mistake he was sworn; but it being discovered that he was one of the accused persons, the deposition, which had been commenced, was torn, and the prisoner subsequently made a statement, after having been cautioned by the magistrate; and that statement was offered in evidence. It was objected that the whole examination before the magistrate was but one transaction, and that the oath was binding during the whole inquiry. Garrow, B., 'What was first taken down and afterwards destroyed does not prejudice the prisoner. We do not know what he said: it is as if it never existed': and the statement was received (*k*).

Statements by Accused on Oath when not under Accusation.—The rule above stated (*ante*, p. 2187) does not apply to a statement made by a prisoner, in an examination before a magistrate, when he was not in custody, but examined against another person on a distinct charge; provided, of course, there has been no inducement given to confess, and no promise of favour or of a reward for information. A statement so made by one in his capacity of witness, who was perfectly free to refuse to answer any questions that had a tendency to expose him to a criminal charge, seems to be clearly admissible (*l*). And it may be laid down

(*i*) R. *v.* M'Hugh, 7 Cox, 483. See R. *v.* Gillis, 11 Cox, 69.

(*j*) In R. *v.* Shellswell (Oxford Spr. Ass. 1828, Park, J., MSS. C. S. G.), an examination beginning 'this deponent saith' is said to have been rejected as implying that the statement was made upon oath. *Sed quære.*

(*k*) R. *v.* Webb, 4 C. & P. 564. Taylor, Ev. (10th ed.) s. 899A.

(*l*) In R. *v.* Coote, L. R. 4 P. C. 599, after reference to many cases on the subject, it is said: 'From these cases, to which others might be added, it results, in their lordships' opinion, that the depositions on oath of a witness legally taken are evidence against him should he be subsequently tried on a criminal charge, except so much of them as consists 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.' In another

generally that a statement upon oath by a person not being a prisoner, and when no suspicion attached to him, the statement not being compulsory, nor made in consequence of any promise of favour, is admissible in evidence against him on a criminal charge (*m*). Thus where, upon an indictment for forgery, it appeared that, before the prisoner was either charged with or suspected of having committed any offence, one Shearer had been examined on a charge of forgery, and that the prisoner was called as a witness against Shearer on that occasion, and sworn to a deposition, which was proposed to be read against the prisoner; and it was objected that the deposition being a statement made upon oath, could not be received as evidence against the prisoner; Parke, J., said, 'I think I ought to receive this evidence. The prisoner was not, at the time when he made this deposition, charged with any offence: and he might on that, as well as on any other occasion, when called as a witness, have objected to answer any questions which might have a tendency to expose him to a criminal charge; and not having done so, his deposition is evidence against him' (*n*). So where on an indictment for burglary it was proposed to read a statement made upon oath by the prisoner, at a time when he was not under any suspicion, and it was objected that it was a violation of the rule of law that a prisoner should not be sworn, Vaughan, B., said: 'I do not see any objection to its being read, as no suspicion attached to the party at the time. The question is, is it a statement of a prisoner upon oath? Clearly it is not, for he was not a prisoner at the time when he made it' (*o*).

So where, on an indictment for threatening to accuse of an infamous crime, it appeared that the prisoners had made a charge against the prosecutor, and been examined before the magistrate as witnesses against the prosecutor, and their depositions contained both their examinations and cross-examinations; their answers on cross-examination were not only contradictory in themselves, but quite inconsistent with each other. It was held that the examinations were admissible, but that the cross-examinations were not, as there was not any such connection between these answers and the particular charge in the indictment as to make them relevant (*p*). So where Chidley and Cummins were indicted for maliciously wounding, and at the examination before the magistrates,

part of the judgment it is said: 'With respect to the objection that Coote, when a witness, should have been cautioned in the manner in which it is directed by statute that persons accused before magistrates are to be cautioned, it is enough to say that the caution is, by the terms of the statute, applicable to accused persons only, and has no application whatever to witnesses.'

(*m*) Ibid. See R. *v.* Colmer, 9 Cox, 506. R. *v.* Bateman, 4 F. & F. 1068.

(*n*) R. *v.* Haworth, 4 C. & P. 254: Greenw. Coll. Stat. 138 (*n*).

(*o*) R. *v.* Tubby, 5 C. & P. 530. The deposition was not read, but withdrawn by the counsel for the Crown, as it did not contain anything material. In R. *v.* Wheater, 2 Mood. 45, Vaughan, J., said: 'In R. *v.* Tubby, what reason is there for saying that there was any restraint on the person making the statement?' and Alderson, B., said, 'it does not appear there (in R. *v.* Tubby) that the oath was a lawful one.'

(*p*) R. *v.* Braynell, 4 Cox, 404, Williams, J. The particulars of the cross-examinations are not stated. 'It may be added that the examination and cross-examination formed one document and, according to the general rule, the whole ought to have been read. See Goss *v.* Quinton, 3 M. & Gr. 825, where an examination of a bankrupt contained his examination in chief and cross-examination and in the latter a copy of an agreement was incorporated, and it was held that the examination was one entire thing, and that the whole must be put in evidence, including the cross-examination and copy of the agreement.' C. S. G.

Chidley alone was charged with committing the offence, and Cummins came forward voluntarily, and gave evidence exculpating Chidley, and confessed that he had inflicted the injuries upon the prosecutor, and upon this he and Chidley were committed; it was held that Cummins's deposition was admissible (*q*).

Statements on oath in civil proceedings or on inquiries before competent officers or tribunals are admissible in subsequent criminal proceedings against the witness, if made voluntarily, *i.e.* with the power of refusing to answer the criminating question. This rule is particularly applicable to affidavits (*r*).

The prisoner was indicted for having made a false declaration, the statements in which subsequently became the subject of an inquiry before one of the poor law inspectors, under the authority of the Poor Law Act, 1847 (10 & 11 Vict. c. 90) (*s*), and the prisoner was examined on oath respecting the declaration, and her answers were reduced to writing in a minute-book, and she had affixed her mark; she was not cautioned that what she said would be used against her; and her statement was held inadmissible, on the ground that the answers were given by an illiterate person, who had not been cautioned, under the compulsion of an oath (*t*).

On an indictment for forging the acceptance of a bill of exchange, 'Accepted, payable at Masterman and Co.'s, London, William Booth,' it appeared that the prisoner had been called as a witness for Booth in an action brought against him on that bill, and in cross-examination he made several statements tending to shew that the acceptance was a forgery without objection, and afterwards either put himself in the hands of the court or declined to answer questions put to him, but he was compelled to answer these questions, and this examination of the prisoner was proposed to be given in evidence on the trial for forgery; the counsel for the prisoner objected to those parts of the cross-examination being read which followed the prisoner's declining to answer, and applying to the court for protection. The objection was overruled, and, on a case reserved, was held that if a witness claims the protection of the court, on the ground that the answer would tend to criminate himself, and there appears reasonable ground to believe that it would do so, he is not compellable to answer; and, if obliged to answer notwithstanding, what he says must be considered to have been obtained by compulsion, and cannot be given in evidence against him; and that it made no difference in the right of the witness to protection that he had chosen to answer in part, as he was entitled to it at whatever stage of the inquiry he chose to claim it, and that no answer forced from him by the presiding judge, after such claim, could be given in evidence against him (*u*).

(*q*) R. *v.* Chidley, 8 Cox, 365, Cockburn, C.J.

(*r*) See R. *v.* Goldshede, 1 C. & K. 657. R. *v.* Walker, 6 C. & P. 161 *cit.*

(*s*) S. 19 authorises the commissioners or inspectors to summon any person they think fit, and administer an oath, &c. S. 20 makes every person giving false evidence guilty of perjury, and every person who refuses to give evidence guilty of a misdemeanor.

(*t*) R. *v.* Murtagh, 6 Cox, 447 (Ir.), Pennefather, C.B., and Moore, J.

(*u*) R. *v.* Garbett, 1 Den. 236; 2 C. & K. 474. This was the ruling of nine judges (Parke, B., Alderson, B., Coltman, J., Maule, J., Rolfe, B., Wightman, J., Cresswell, J., Platt, B., and Williams, J.), against six (Denman, C.J., Wilde, C.J., Pollock, C.B., Patteson, J., Coleridge, J.,

Upon an indictment for forging a deed, the answer and deposition in chancery of the prisoner were tendered in evidence against the prisoner, and were objected to on the ground that they were upon oath; but Vaughan, B., was clearly of opinion that they were admissible, being made before any charge was made against the prisoner. The amended bill in the same suit in chancery was put in and read; it contained a charge of forging the deed against the prisoner, on which it was again objected that the answer and deposition of the prisoner were not admissible, upon the ground that the bill contained such charge of forgery. Vaughan, B., 'The argument would go the length of not admitting depositions in the case of perjury. If the party chooses voluntarily to answer, he is bound by it, and the answers are admissible' (*v*). So on an indictment for a conspiracy, the answers in chancery of the defendants, which had been made by them upon oath, in a suit which had been instituted by the prosecutor, are admissible in evidence (*w*).

In certain civil or quasi civil proceedings a witness may be compelled to answer criminating questions.

Examinations in Bankruptcy.—The prisoner was indicted for mutilating one of his trade books, and his examination before the Court of Bankruptcy was given in evidence against him. In this examination questions were put, and answers obtained (under threat of committal), relating to the prisoner's trade books. Upon a case reserved it was held that, as all the questions touched matters relating to his trade dealings or estate, the bankrupt was bound to answer them, although by his answers he might criminate himself: that the questions, though tending to criminate the bankrupt, are made lawful, and if he refuses to answer them he is liable to be committed as upon a refusal to answer any other lawful question: that the statute has taken away the privilege that a party is not bound to accuse himself, and has enacted that he must answer questions by answering which he may be criminated; and that one of the consequences is that what may be stated by a person in a lawful examination may be received in evidence against him: and that examination, therefore, was properly received (*x*).

Where the bankrupt's examination in the Court of Bankruptcy was not respecting matters relating to his trade dealings or estate, it was held that the examination was properly received, upon the trial of an indictment against the bankrupt for uttering a forged letter with intent to obtain goods. The proper test is whether the party *may* object to

and Erle, J.). The nine judges did not decide, as the case did not call for it, whether the mere declaration of the witness on oath, that he believed that the answer would tend to criminate him, would or would not be sufficient to protect him from answering, where other circumstances did not appear in the case to induce the judge to believe that it would not. The nine judges did not think Dixon *v.* Vale, 1 C. & P. 278, and East *v.* Chapman, 2 C. & P. 573, binding authorities. See *post*, p. 2348.

(*v*) R. *v.* Highfield, Stafford Sum. Ass. 1828, MSS. C. S. G. As to affidavits in a usit in an Ecclesiastical Court, see R. *v.* Lewis, 6 C. & P. 161.

(*w*) R. *v.* Goldshede, 1 C. & K. 657. Denman, C.J., said: 'the very oath on which an answer in chancery is given is the foundation of these indictments for perjury which we are trying almost daily.'

(*x*) R. *v.* Scott, D. & B. 47; 25 L. J. M. C. 128. Coleridge, J., dissented. R. *v.* Cross, Dears. 68. R. *v.* Widdop, L. R. 2 C. C. R. 3; 42 L. J. M. C. 9. R. *v.* Robinson, L. R. 1 C. C. R. 80; 36 L. J. M. C. 79. R. *v.* Hillam, 12 Cox, 174. See R. *v.* Wheater, 2 Mood. 45; 2 Lew. 157. R. *v.* Britton, 1 M. & Rob. 297. R. *v.* Cherry, 12 Cox, 32.

answer. If he may, and he does not do so, he voluntarily submits to the examination to which he is subjected, and such examination is admissible against him. This examination was not touching any matters relating to the trade dealings or estate of the bankrupt; he might have objected to the examination, but he did not do so; the examination therefore was voluntary and admissible (*y*).

The following cases deal with the use in criminal proceedings of evidence on oath obtained by compulsory examination.

By sect. 85 of the Larceny Act, 1861, it is provided that nothing in sects. 75–84 of that Act (*z*) shall enable or entitle any person to refuse to make complete discovery by answer to a bill in equity, or to answer any question or interrogatory in any civil proceeding, any court, or in any matter of bankruptcy or insolvency. But no person was liable to be prosecuted for any of the misdemeanors in the above sections if he first declared the act on oath in consequence of any compulsory process of any court of law or equity in an action, suit, or proceeding *bonâ fide* instituted by a person aggrieved. . .

The Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 27, repealed so much of sect. 85, as provided that no person should be liable to be convicted of misdemeanors created by sects. 75–84 of the Larceny Act, 1861 (*z*), if he should have first disclosed the same in any compulsory examination in bankruptcy (*a*), and enacted by subsect. 2, '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 of the misdemeanors referred to in the said sect. 85' (*b*).

This provision does not exclude proof of the bankrupt's admission by other modes (*c*), and does not apply so as to exclude admissibility of a statement of affairs made under sect. 16 of the Act of 1883 on a charge of misappropriating court moneys (*d*).

(*y*) R. *v.* Sloggett, Dears. 656; 25 L. J. M. C. 93. In R. *v.* Darby, 2 Cox, 316, a bankrupt had been examined before a commissioner, not so much with a view to oppose his certificate as to this prosecution, which was for false pretences, and he had not been cautioned; but his solicitor was present; and the Recorder held that, as he had been examined for the purpose of this prosecution, and not with reference to the bankrupt laws, his examination was inadmissible. But this decision can hardly be considered as an authority after R. *v.* Sloggett, and R. *v.* Scott, *supra*, and there is no weight in the fact that the prisoner had been examined with a view to the prosecution; that is done every day in cases of perjury, and it cannot affect the admissibility of the evidence. See Stockfleth *v.* De Tastet, 4 Camp. 10.

(*z*) *Ante*, pp. 1407 *et seq.*, relating to frauds by agents, factors, and bankers. Ss. 75, 76 are repealed and replaced by the Larceny Act, 1901 (*ante*, p. 1407), which for the purposes of s. 85 is read as if included in the Larceny Act, 1861.

(*a*) By s. 17 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which regulates the public examination of debtors, subs. (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.' As to examination of other persons as to dealings with the bankrupt, *vide* s. 27.

(*b*) See *ante*, p. 1414.

(*c*) R. *v.* Erdheim [1896], 2 Q.B. 260; 18 Cox, 355. R. *v.* Hirschfield, 61 J.P. 520.

(*d*) R. *v.* Pike [1902], 1 K.B. 552; 71 L. J. K. B. 287: 20 Cox, 164.

By the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 59, subsects. 1–6, an answer by a person to a question put to him by or before an election court shall not, except in the case of any criminal proceeding for perjury in respect of such evidence, be in any proceeding, civil or criminal, admissible in evidence against him (*e*).

By the Explosive Substances Act, 1883 (46 Vict. c. 3), s. 6, 'A witness examined on an inquiry ordered under the section by the Attorney-General shall not be excused from answering any question on the ground that it will incriminate him, but any statement made by him in answer to any question put to him in such inquiry shall not, except in the case of an indictment or other criminal proceeding for perjury, be admissible in evidence against him.'

By the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 19, 'Nothing in this Act shall 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 shall not be admissible in evidence against such person in any prosecution for an offence against this Act.'

See also the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 103.

Examinations before Coroner.—A difference of opinion has existed whether the examination of a person upon oath as a witness before a coroner, is admissible in evidence against such person on his trial. Where it appeared that a coroner's inquest had been held on the body of A., and, it not being suspected that B. was at all concerned in the murder of A., the coroner had examined B. as a witness; Park, J., would not allow the deposition of B., so taken on oath, on the coroner's inquest, to be read in evidence on the trial of an indictment against B. for the same murder (*f*). Upon an indictment for rape against O., E., and T., it appeared that an inquest had been held upon the body of the woman alleged to have been ravished, and the coroner stated that at the inquest O. made four statements; that he had been sworn before each statement; that each of the statements was taken down in writing, and signed by O. E. made and signed a statement, and so did T.; they were sworn before the statements were made. No inducement of any kind was held out to either of the prisoners to make any statement; neither threat nor promise; they were all three brought before the coroner in custody. It was objected that these statements were not receivable in evidence, as they were on oath. These persons were in custody; and in R. *v.* Wheeley (*g*), Alderson, B., rejected the statement of the prisoner, which had been taken at the inquest, because it was on oath, and taken while he was in custody. Williams, J.: 'I know that my brother Alderson did so, but I also know

(*e*) This provision has been extended to municipal elections and elections to certain offices, *ante*, Vol. i. pp. 651, 652.

(*f*) Anon., 4 C. & P. 255, note (*b*), tried at Worcester. In R. *v.* Clewes, reported as to other points in 4 C. & P. 221, the grand jury asked Littledale, J.: 'Can the evidence of a prisoner, who was examined on oath before the coroner as a witness, be admitted as evidence against the same person, when subsequently indicted for the murder of the person on whose body the inquest was held?' Littledale, J.: 'Whatever any prisoner says at any time against himself is evidence, and therefore such a statement is admissible.' The preceding case was then mentioned, on which the learned judges seemed to entertain doubts upon the point, but directed the grand jury to receive the evidence, and leave the point for discussion upon the trial. MSS. C. S. G.

(*g*) 8 C. & P. 250.

that since that there has been a reaction of opinion (if I may be allowed the expression); I shall therefore receive the evidence, and reserve the point if it should become necessary' (*h*).

But where, upon an indictment against the same prisoners for the murder of the same female, whom they had been charged in the preceding case with ravishing, the same depositions of the prisoners, taken on oath on the coroner's inquest held on the body of the deceased (*i*), were tendered in evidence; Gurney, B., said: 'I am not aware of any instance in which an examination on oath, before a coroner or a magistrate, has been admitted as evidence against the person making it. I have known depositions before magistrates, made by prisoners on oath, and they have been uniformly rejected. In my own experience I do not recollect a case of a deposition before a coroner.' After mentioning R. *v.* Wheater (*j*), the learned Baron added: 'I confess that I do not, on principle, see the distinction between that and some of the other cases; still I am of opinion that in the present case I ought to reject the evidence' (*k*).

Upon an indictment for the murder of E. S., it appeared that no suspicion arose that her death had been caused by poison until after the death of M. A. S.; but the parents having insinuated that M. A. had been poisoned by R., she was taken into custody upon the charge, and on the examination before the coroner as to the cause of M. A.'s death the mother was examined on oath as a witness, and her deposition was taken in writing, and read over to her, and she put her mark to it. In the course of that examination questions were put to her relative to the death of E., and in consequence of her answers, and other circumstances, the body of E. was disinterred, examined, and found to contain arsenic in the stomach. The parents were thereupon taken into custody, and brought before the coroner, in custody, separately. The mother was told that she was charged with having poisoned her two children, and that that was the time when she might make any statement that she liked to the jury, and that what she said would be taken down in writing. Her former deposition made by her as a witness was then read over to her, and she said that she had a further statement to make, which she made, and what she said was written down, and afterwards read over to her; she was asked to sign it, and refused. The coroner signed it, and it was produced and offered in evidence against the mother, together with her original deposition. It was objected that as the greater part of the statement had been made by the prisoner when under examination before the coroner upon oath, it could not be read in evidence against her. Erskine, J., received the evidence, but reserved the point (*l*). So on an indictment for murder, Parke, B., received in evidence a deposition

(*h*) R. *v.* Owen, 9 C. & P. 83. The report then proceeds—Mr. Tooke (the coroner) recalled: 'I asked Owen if he was desirous of giving his evidence, and he said: Yes: he was sworn, and gave evidence. I asked each of the other prisoners if he wished to give evidence, and each said that he did.' Alderson, B., was the other judge at Stafford when this case was tried.

(*i*) This is the whole statement in the report.

(*j*) 2 Mood. 45; 2 Lew. 157.

(*k*) R. *v.* Owen, 9 C. & P. 238.

(*l*) R. *v.* Sandys, C. & M. 345; 2 Mood. 229. As the mother was acquitted the judges thought it unnecessary to determine the question.

made by the prisoner on oath as a witness before the coroner (*m*). So also on a trial for manslaughter, Martin, B., after consulting Willes, J., admitted as evidence against the prisoner his deposition on oath taken by the coroner upon the inquest held on the deceased (*n*). And where the prisoner was indicted for administering poison with intent to murder her husband, the coroner stated that he had held an inquest on his body, which was adjourned, and that the prisoner was present as a witness on the second occasion; no charge had at that time been made against her; she made a statement on oath, which the coroner took down in writing. Campbell, C.J., after consulting Parke, B., admitted the statement, and the prisoner was convicted and executed (*o*).

The results deducible from the cases seem to be that the mere fact of a party having been examined upon oath will not exclude a statement made by him (*p*). It is obvious that such a statement may be just as voluntary as if it were not upon oath, as where a party tenders himself as a witness, and requests to be sworn, of his own mere motion. And it is clear that if a party is examined upon oath, and has an opportunity of objecting to answer any questions which he thinks may tend to criminate himself, but he answers such questions without objection, his answers are admissible in evidence against him in a criminal proceeding (*q*). By not objecting when he is entitled so to do he is taken to have answered the questions voluntarily. And in such a case it is not necessary that the witness should have been cautioned or put upon his guard as to the tendency of the questions, in order to render his answers admissible. But if the witness objects to answer any question as tending to criminate himself, but the Court improperly compels him to answer it, the answer is not admissible against him (*r*).

(g) *Discoveries made and Acts done in consequence of Confession unduly obtained.*

Although confessions improperly obtained are not admissible, yet any facts or documents brought to light in consequence of such confessions may be received in evidence (*s*). Thus where a prisoner was indicted as an accessory after the fact for having received property, knowing it to be stolen, and had, under promises of favour, made a confession, and

(*m*) R. *v.* Haworth, Greenw. Coll. Stat. 137; Archb. Cr. Pl. (23rd ed.) 327. See R. *v.* Colmer, 9 Cox, 506.

(*n*) R. *v.* Bateman, 4 F. & F. 1068.

(*o*) R. *v.* Sarah Chesham, Chelmsford, March 6, 1861. MSS. C. S. G. This note was submitted to Lord Wensleydale, who replied that he had no doubt the note of the decision was correct; though he did not recollect that he was consulted by Lord Campbell, yet he could not doubt that he was. The evidence was not sufficient to prove that the husband died of poison, and therefore the prisoner was indicted for administering it, as Lord Campbell informed the Editor. C. S. G.

(*p*) See R. *v.* Coote, L. R. 4 P. C. 599; 42 L. J. P. C. 45. The case turned on the law of the province of Quebec, which, as regards criminal law, is based on that of England.

(*q*) R. *v.* Garbett, 1 Den. 236, *ante*, p. 2191.

(*r*) Ibid. R. *v.* Coote, *ubi sup.* By 9 Geo. IV. c. 54, s. 2 (I.), which was framed on 7 Geo. IV. c. 64, s. 2, as to taking the examinations of witnesses in felony, it was provided that 'no such examination shall subject the party examined to any prosecution or penalty, or be given in evidence against such party, save on any indictment for having committed wilful and corrupt perjury in such examination'; which seems to shew that otherwise such an examination might have been given in evidence in any case.

(*s*) R. *v.* Leatham, 8 Cox, 498.

in consequence of it the property had been found in her lodgings, concealed between the sackings of her bed; it was held that the fact of finding the stolen property in her custody might be proved, although the knowledge of it was obtained by means of an inadmissible confession (*t*). So where a prisoner indicted for stealing a number of diamonds and pearls had been improperly induced to confess that he had disposed of part of them to a certain person; the prosecution were allowed to call that person to prove that he had received the property from the prisoner (*u*). There can be no difficulty as to the propriety of these decisions, because the bare fact of the property being found in the possession of the prisoner in one case, and of his dealing with it as his own in the other, would, unconnected with any confession, have been clear evidence in support of the prosecution. But the cases have gone further, and it has been held that, on a prosecution for receiving stolen goods, where a confession had been improperly drawn from a prisoner, in the course of which he described the place where the goods were concealed, evidence might be given that he did so describe the place, and that the goods were afterwards found there (*v*). In this case the bare fact of finding the goods would be no evidence against the prisoner, unless coupled with a part of the improperly obtained confession. And some have accordingly doubted whether any part of such a confession can properly be used for such a purpose. Thus, in R. *v.* Harvey (*w*), Eldon, C.J., said, that where the knowledge of any fact was obtained from a prisoner under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal, unless the fact itself proved would have been sufficient to warrant a conviction without any confession leading to it; and he so directed the jury in that case. But the rule, established by later authorities, is, that so much of the confession as relates *strictly* to the fact discovered by it may be given in evidence; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been induced to say what is false; but the fact discovered shews that so much of the confession as immediately relates to it is true (*x*). Thus it is proper, and is now usual, to leave to the consideration of the jury, where a confession has been improperly obtained, the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly, but not the acknowledgment of the prisoner having stolen or put them there, which is to be collected or not from all the circumstances of the case (*y*). So where on an indictment for burglary it appeared that the prisoner

(*t*) R. *v.* Warickshall, 1 Leach, 263. R. *v.* Mosey, 1 Leach, 265 *n.* So in R. *v.* Harris, 1 Mood. 338, *post*, p. 2221, after the prisoners had been before the magistrate, one of the prisoners went with one of the prosecutors to a field, and said he could find the skin buried, and shewed the place, which was dug up and the skin found. So in Thurtell's case, cited in Alison's Cr. L. of Scotland, p. 584, and Joy, 84, although a confession obtained by means of promises or hopes of impunity held out was not used in evidence against him, yet the fact that the goods were recovered or the corpse found, in consequence of the confession, at the place mentioned in the confession, was held receivable in evidence.

(*u*) R. *v.* Lockhart, 1 Leach, 386.

(*v*) R. *v.* Grant, R. *v.* Hodge, 2 East, P. C. 658.

(*w*) 2 East, P. C. 658. See also R. *v.* Mosey, 1 Leach, 265, in note to R. *v.* Warickshall.

(*x*) R. *v.* Butcher, 1 Leach, 265, note (*a*) to R. *v.* Warickshall, 1 Leach, 263; 2 East, P. C. 658.

(*y*) 2 East, P. C. 658.

had made a statement to a policeman, under some particular circumstances, which induced the counsel for the prosecution, with the approbation of the Court, to decline offering it in evidence; but in consequence of the statement containing some allusion to a lantern, which was afterwards found in a particular place, the policeman was asked whether, in consequence of something which the prisoner had said, he made a search for the lantern; Tindal, C.J., and Parke, B., ruled that the words used by the prisoner, with reference to the thing found, ought to be given in evidence, and the policeman accordingly stated that the prisoner told him that he had thrown a lantern into a pond in Pocock's Fields (*z*).

But where on a trial for concealing the birth of a child it appeared that, after the prisoner had been cautioned in the usual manner, and had stated that she had nothing to say, the magistrate, before committing her, asked her where she had put the body of the child; Erle, J., refused to receive the statement in evidence. It was then proposed to ask whether, in consequence of the answer she had given to the magistrate, the witness had made a search in a particular spot, and had found a certain thing. Erle, J., said: 'No; not in consequence of what the said. You may ask him what search was made and what things were found, but under the circumstances, I cannot allow the proceeding to be connected with the prisoner' (*a*).

So it has been determined, that, although a confession improperly obtained cannot be received in evidence, yet that any *acts* done afterwards may be given in evidence, even though they were done in consequence of such confession (*b*).

What the prisoner says when such acts are done may also be received in evidence. The prisoner was charged with stealing a guinea and two promissory notes, one of which was a Bank of England note for five pounds, and the other a Reading bank note for the like sum. The prosecutor had told the prisoner that he had better confess. Chambre, J., held that, although the prosecutor could not be allowed to prove a confession made after this admonition, he might be permitted to give evidence that the prisoner brought to him a guinea and a five pound Reading bank note, which he gave up to the prosecutor as the guinea and one of the notes that had been stolen from him. The note thus produced the prosecutor could not identify otherwise than by its corresponding with the stolen note in the sum for which it was given, and in being a note of the same bank. Upon a case reserved, the majority of the judges (*c*)

(*z*) R. *v.* Gould, 9 C. & P. 364. The other parts of the statement were not given in evidence. In Phill. Ev. vol. i. p. 412, after stating this case, it is said: 'But the judge in such case would direct the jury, and so it is understood did direct the jury in that case, that his statement must not be taken as proof that *he concealed*, but merely as evidence that he knew of or was privy to the concealment, from which, together with the rest of the evidence, they would consider whether it was probable that he concealed it himself.'

(*a*) R. *v.* Berriman, 6 Cox, 388.

(*b*) R. *v.* Warickshall, 1 Leach, 265, after consideration by all the judges.

(*c*) Lord Ellenborough, C.J., Sir J. Mansfield, C.J., Macdonald, C.B., Heath, Grose, Chambre, JJ., and Wood, B. But Lawrence and Le Blanc, JJ., were of opinion that the production of the money was alone admissible, and not his saying at the time he produced one of the notes 'that it was one of the notes stolen from the prosecutor.' And see R. *v.* Jones, R. & R. 152. *Ante*, p. 2167.

agreed with Chambre, J., in thinking the conviction right and the evidence admissible (*d*).

But not only are confessions excluded when obtained by means of improper inducements, but also the acts of the prisoner done under the influence of such inducements, unless confirmed by the finding of the property; for the same influence which might produce a groundless confession might produce groundless conduct. A prisoner was indicted for larceny, and had been induced by a promise from the prosecutor to confess his guilt. After that confession he carried the officer to a particular house as and for the house where he had disposed of the property, and pointed out the person to whom he had delivered it; that person, however, denied knowing anything about it, and the property was never found. It was held that not only the confession, but the fact of the prisoner's carrying the officer to the house as above mentioned, was inadmissible in evidence. The confession was excluded because, being made under the influence of a promise, it could not be relied upon, and the acts of the prisoner, under the same influence, *not being confirmed by the finding of the property*, were open to the same objection. The influence which might produce a groundless confession might also produce groundless conduct (*e*).

(h) *Against whom Confessions and Statements Evidence.*

A statement or confession made by an accused person made out of court is evidence against himself, but not against other persons not present when he made it (*f*). The confession of one prisoner before a magistrate is only evidence against himself, and cannot be used against others, whom he there confessed to be engaged with him in committing the offence (*g*); and even if such confession were made before a magistrate in the hearing of another prisoner, it would not be evidence against such prisoner; on the ground that there is a regularity of proceeding adopted before a magistrate, which prevents a prisoner from interposing when and how he pleases, as he would in a common conversation, and the prisoner is brought to answer the charge and evidence given against him, and not the statement made by another prisoner. Thus where the confession was made before a magistrate in the presence and hearing of the accomplice, who did not deny it, Holroyd, J., held (*h*)

(*d*) R. *v.* Griffin, R. & R. 151.

(*e*) R. *v.* Jenkins, R. & R. 492. In Phill. Ev. vol. i. p. 413, it is said that 'It was held that the evidence of what passed between the prisoner and the officer ought not to have been received, that is, *it was not receivable as evidence against the third person.*' This is clearly an error; there was only one prisoner indicted, and he for the larceny, and the only question was, whether the evidence was admissible against him. If the person pointed out had been indicted as the receiver, the fact of the prisoner pointing him out as the person, in his presence, and his denial, would undoubtedly have been admissible in evidence against such person. See R. *v.* Cox, 1 F. & F. 90, *post*, p. 2202. C. S. G.

(*f*) R. *v.* Hevey, 1 Leach, 232. This must be read subject to the rules of evidence on charges of committing concerted crimes, *ante*, p. 2097. But these rules will not let in statements made after the common design has been frustrated or abandoned. R. *v.* Shakespeare, 34 L. J. (Newsp.) 615.

(*g*) Tonge's case, Kel. (J.) 18; 6 St. Tr. 225. Cf. R. *v.* Boroski, 9 St. Tr. 1.

(*h*) R. *v.* Appleby, 3 Stark. (N. P.) 33. In Child *v.* Grace (2 C. & P. 193), an action of assault, the defendant offered evidence of what was said by the magistrate before whom the matter had been investigated, in the presence of both plaintiff and defendant; but Best, C.J., refused to admit it.

that these circumstances were not evidence against the latter, and said that it had been so ruled by several of the judges in a similar case, which had been tried at Chester (*i*). So where a confession of the principal, made before a magistrate in the presence of the receiver, in which she stated various facts implicating the receiver, and others as well as herself, was tendered in evidence; Patteson, J., refused to receive in evidence anything that was said by her respecting the receiver (*j*).

Upon similar grounds the deposition of a witness examined against a person before a magistrate in summary proceedings is inadmissible. Where in an action for malicious prosecution, it was proposed to prove what a witness, called for the defendant, had said in the plaintiff's presence before the magistrate on the hearing of the information, on the ground that he had had the opportunity of cross-examining the witness, and commenting on his testimony. Parke, J., said: 'I think it is the safer course to refuse it, and to hold that the deposition of a witness taken in a judicial proceeding is not evidence, on the ground that the party against whom it is sought to be read was present, and had the opportunity of cross-examining. It clearly would not be admissible against a third person, who merely happened to be present, and who, being a stranger to the matter under consideration, had not the right of interfering; and I think the same rule must apply here. It is true that the plaintiff might have cross-examined or commented on the testimony; but still, in an investigation of this nature, there is a regularity of proceeding adopted which prevents the party from interposing when and how he pleases, as he would in a common conversation. The same inferences, therefore, cannot be drawn from his silence or his conduct in this case, which generally may in that of a conversation in his presence; and as it is only for the sake of these inferences that the conversation can be admitted, I think it better to refuse the evidence now offered' (*k*).

But where to an action for false imprisonment the defendant pleaded that the plaintiff had been guilty of embezzlement, and it appeared that the depositions of the plaintiff and his witnesses had been taken on that charge in the presence of the plaintiff before a magistrate, and that the plaintiff had then said, 'I submit that there is no case against me'; Denman, C.J., held that the depositions must be read, and the plaintiff's answer to them; but that the depositions were not any evidence of that which was stated in them, except in so far as the plaintiff had admitted them to be true by anything that he had said (*l*).

But if the prisoner in his examination before a magistrate makes an express reference to the examination of another prisoner, taken in his

(*i*) As to when the declarations of one conspirator are evidence against all his comrades, *vide ante*, p. 2097.

(*j*) R. *v.* Turner, 1 Mood. 347. R. *v.* Swinnerton, C. & M. 593.

(*k*) Melen *v.* Andrews, M. & M. 336. See Finden *v.* Westlake, ibid. 461, Tindal, C.J., and see Child *v.* Grace, *ante*, p. 2199.

(*l*) Jones *v.* Morrell, 1 C. & K. 266. In Simpson *v.* Robinson, 12 Q.B. 511, Denman, C.J., speaking of Melen *v.* Andrews, *supra*, said: 'We do not understand that case as deciding that under no circumstances can such evidence be admitted; though the learned judge thought it in that case safer and better to exclude it, and the plaintiff's counsel acquiesced; for cases might certainly be conceived in which a party, by not denying a charge so made, might possibly afford strong proof that the imputation was just.'

presence before the magistrate, the examination of such prisoner may be given in evidence against the prisoner so referring to it (*m*). If a prisoner, when before a magistrate on a charge of an assault, makes a statement in answer to what the person charging him with the assault stated, the statement made by such party and the answer of the prisoner to it are admissible. Upon an indictment for murder, it appeared that the deceased made a complaint to a magistrate of the prisoner having struck him a blow (which ultimately occasioned his death), and the prisoner was in consequence brought before two magistrates for the assault, and convicted and fined. On the examination of the charge of assault the deceased made a statement, and the prisoner made a statement in answer to it (*n*). Tindal, C.J., held that evidence of what was said by the deceased on the examination, and also what the prisoner said in answer, was admissible; but added, 'I shall not hold that what the deceased said is evidence as proving the facts he stated, as it would be if it were a deposition taken under 7 Geo. IV. c. 64 (*o*), but only evidence as producing an answer from the prisoner, like any other conversation; and I do not think it is the less evidence because it is on oath. I shall therefore admit it as a conversation' (*p*).

Where one prisoner makes a statement in the presence of another prisoner, when not before a magistrate, such statement is admissible against the prisoner in whose presence it was made, if it was made under circumstances giving the accomplice an adequate opportunity of contradicting it so far as it relates to him. In such cases a confession may be collected or inferred from the conduct and demeanor of a prisoner on hearing a statement affecting himself (*q*). So the confession of a thief made to a constable in the presence of the receiver is evidence

(*m*) Several instances have occurred where this has been done, and the case is similar to R. *v.* John, 7 C. & P. 324, and R. *v.* Dennis, 2 Lew. 261, where the prisoner's examinations referred to the depositions of particular witnesses, and such depositions were held to be admissible in explanation of the prisoner's statement. In such a case it should seem that it would depend on the manner in which the reference was made to the other prisoner's examination whether the facts stated in such examination were admitted or not. It might be that the prisoner's examination stated that the other prisoner's statement was correct, and if so that would be an admission of the facts stated in it; or the reference might be such as merely to require the reading of the other examination as explanatory of the prisoner's statement, without admitting any fact stated in it. In 2 Stark. Ev. (4th ed.), it is said: 'In some instances the confession of one taken in the presence and hearing of another prisoner may be very material to explain the expressions and conduct of the latter upon that occasion; for any declarations of his, by which he assented to what was confessed by another to his own prejudice, would be admissible against him. The confession of the other may also, it seems, be evidence for the purpose of explaining such declarations.' C. S. G.

(*n*) This statement was not in writing, and objected to on that ground; but Tindal, C.J., held that, 'this being a summary conviction, is not a case in which magistrates are required to take down the evidence in writing.' And see Robinson *v.* Vaughton, 8 C. & P. 252.

(*o*) Repealed and replaced by 11 & 12 Vict. c. 42.

(*p*) R. *v.* Edmunds, 6 C. & P. 164. This decision has been doubted. Taylor, Ev. (10th ed.) s. 467, and Joy, 79, 80, but it would seem, without any sufficient reason. The decision is precisely in conformity with the distinction taken by Best, C.J., in Child *v.* Grace, 2 C. & P. 193, *ante*, p. 2199, note (*h*), and it is conceived that the evidence was admissible on the ground that *at common law* evidence of a deceased witness given upon oath in a judicial proceeding between the same parties is admissible in a subsequent proceeding, the party against whom the evidence is offered having had an opportunity to cross-examine in the former proceeding. See R. *v.* Carpenter, 2 Show. 47, and the cases cited, *ante*, p. 2084. C. S. G.

(*q*) 1 Phill. Ev. (7th ed.) 400.

against the latter that the property was stolen by the thief (*r*). But as such statements frequently contain much hearsay and other objectionable evidence, and as the demeanor of a person upon hearing a criminal charge against himself is liable to great misconstruction, evidence of this description ought to be regarded with much caution (*s*). Where B. and C. were charged together with stealing and receiving, on being charged C. said, 'Yes, it 's quite right, I sold them for B.' B. who was present said nothing. The police then read over to B. a statement previously made by C. in his absence. B. again made no reply, though he had an opportunity of denying or explaining the allegations made. It was held the statement was admissible to show B.'s conduct and demeanor on hearing it (*t*).

Not only what is said by a prisoner, but what is said *to* him, or *in his presence* (except when before a magistrate), is admissible in evidence, and it makes no difference that what was said was said by a person who cannot be called as a witness (*u*). On an indictment for murder, some observations made to the prisoner by his wife, to which he made an evasive reply, were about to be stated, when it was objected that the statement ought not to be made, as the wife, if she could by law be examined, would give direct contradiction to them; but Gaselee and Parke, JJ., ruled that the statement might be made to the jury; and that the circumstance of the observations being stated to have been made by the wife, who could not be called as a witness, did not vary the general rule that, whatever was said to a prisoner on the subject-matter of the charge, to which he made no direct answer, was receivable as an implied admission on his part (*v*). So where the wife of the prisoner, who was indicted for the murder of his wife's mother, came into the room where he was in custody, and said to him, 'Oh, Bartlett! how could you do it?' He looked steadfastly at her and said, 'Ah, what! you accuse me of the murder too?' She said, 'I do, Bartlett; you are the man that shot my mother.' The prisoner did not make any reply. She then turned to the witness and said, 'This was done for money.' It was objected, that as the wife could not be examined on oath, what she had then said could not be used as evidence against him; but the evidence was held clearly admissible (*w*).

In R. *v.* Welsh (*x*) a prisoner indicted for arson had made certain false statements, as that he had seen the fire from his bed-room window, and had got up to see it; and it was proposed to prove that the prisoner had said to his mother, 'You know I was at home;' on which she said,

(*r*) R. *v.* Cox, 1 F. & F. 90, Crowder, J.

(*s*) 1 Phill. Ev. 400.

(*t*) R. *v.* Bromhead [1906], 71 J. P. 102 (C. C. R.). Cf. R. *v.* Bexley, 70 J. P. 263.

(*u*) In R. *v.* McCraw, 9 Canada Cr. Cas., 253, it was held that a prisoner's statement that he has nothing to say when confronted, while in custody, with the statement of a witness charging him with a crime, could not be treated as an admission or quasi-admission of guilt, and that silence, when incriminating statements are made in his presence, does not afford a presumption of acquiescence where a prudent man would be justified in remaining silent, and particularly so if it is in his interest not to answer.

(*v*) R. *v.* Smithies, 5 C. & P. 332.

(*w*) R. *v.* Bartlett, 7 C. & P. 832. In R. *v.* Simons, 6 C. & P. 540, Alderson, B., held that what a person is overheard saying to his wife, or even saying to himself, is evidence against him. Cf. R. *v.* Bexley, 70 J. P. 263.

(*x*) 3 F. & F. 275.

'What's the use of denying it?' but it was objected that it would have the effect, in an indirect way, of giving evidence that the prisoner was not at home on the night in question; which ought to be proved by calling the mother. Martin, B., ruled the evidence inadmissible; for what was said in the presence of the prisoner was only admissible against him when admitted, whereas it was denied by him. But this case is of doubtful authority (*y*).

On an indictment for rape, a statement made by a relative of the prosecutrix to a relative of the prisoner in the presence of the prosecutrix about making up, was held admissible in favour of the prisoner (*z*).

A statement made in the hearing of a person, though not in his actual presence, may be evidence against him. Thus where the plaintiff was in the kitchen of the defendant's house, and the defendant's wife stood at the head of the kitchen stairs, what she said in a tone of voice loud enough for the plaintiff to hear was held admissible against the plaintiff (*a*).

The Court will not exclude a statement made in the prisoner's presence by another party to a third person, merely because some inducement has been held out to that party to make it; but very little weight ought to be attached to the fact of no answer being given to such statement by the prisoner, as he would not know whether it would be better for him to be silent or not (*b*).

On an information for a libel, a book containing imputations identical with those in the libel, which had been published some time previously to the application for the information, was held not admissible for the purpose of shewing that the prosecutor had tacitly acquiesced in the truth of the identical charges contained in the libel (*c*).

On a trial for murder a statement by a prisoner to a policeman on a charge of robbing the deceased with violence was tendered. It was objected that it was on another charge, before the charge of murder. Pollock, C.B.: 'That makes no difference; whatever a man says is evidence against him—in criminal cases as well as civil—at any time and on any matter. A policeman apprehends a man on a charge of highway robbery on a particular night, and he says, I cannot be guilty of that robbery, for on the same night and the same hour I was at a different place; and the policeman may, on that admission, apprehend

(*y*) 'The very ground of the objection shews that the evidence ought to have been admitted. Instead of being a statement made by the mother and denied by the prisoner, it was an assertion by the prisoner denied by the mother, which is a totally different thing, especially as no reply was made to what the mother said. It has been the constant practice to prove statements made by prisoners in the presence of persons who have denied them.' C. S. G.

(*z*) R. *v.* Arnall, 8 Cox, 439. Martin, B., said: 'In a civil case, what is said in the presence of either of the parties is admissible against him; because it is open to the party so present to express assent or objection to what is said, and that would be admissible against him. In criminal cases the prosecutor, although not in strict law a party to the case, is so in fact, and I think that the rule applicable to conversation in the presence of a party in a civil case might be fairly extended to a conversation in the presence of the prosecutor in a criminal case.' Such a statement as to making up the matter would tend to affect the credit of the prosecutrix in a case of rape; and its admissibility may be more satisfactorily rested upon that ground, but she ought to have been cross-examined as to it in the first instance. C. S. G.

(*a*) Neile *v.* Jakle, 2 C. & K. 709, Maule, J.

(*b*) R. *v.* Milton, 10 Cox, 364.

(*c*) R. *v.* Newman, 1 E. & B. 268: 22 L. J. Q.B. 156.

him on a charge of murder at the time and place so mentioned, and may offer that admission in evidence against him at the trial' (*d*).

In R. *v.* Abraham (*e*), upon an indictment for burglary, it appeared that, shortly after the robbery, four glass jars containing sweetmeats, which had been taken from the prosecutor's, were found in the prisoner's house, not being in any way concealed, and the prisoner's counsel urged that this was consistent with the account the prisoner had, as he was instructed, given of the way in which the jars had come into his possession; namely, that the prisoner had found them in a field. But no one was called to prove the statement. Alderson, B., told the jury that, if it had appeared that, before suspicion attached to the prisoner, he had given this account of the possession of the property to his neighbours, the property being there at the time, and before search made, he had not the slightest doubt that, *valeat quantum*, this would have been very competent evidence for the prisoner. But this case is of doubtful value (*f*).

Upon an indictment for burning bibles, it was proposed to prove, on the part of the defendant, that he had preached sermons relating to immoral publications previously to the alleged offence, and it was argued that it was a material part of the charge that the defendant had knowingly caused the bibles to be burnt, and therefore for the purpose of shewing his intention in getting books together, his directions given in the sermons to the persons who brought in the books were admissible; but the evidence was excluded. It was true that declarations accompanying acts are admissible to shew the intention at the time; and the question of intention was a very material one in the case; but it was to be inferred from legal evidence of facts, and not from declarations of the defendant on former occasions unconnected with the subject-matter of the trial (*g*).

Admissions by Agents.—How far the acts and words of one conspirator are evidence against the others, has already been mentioned in a former part of this work (*h*). In order to make a client criminally responsible for a letter written by his solicitor, it is not sufficient to shew that such letter was written in consequence of an interview, but it must be shewn that it was written in pursuance of the instructions of the client (*i*). With respect to the statements and acts of agents, it was decided, on the impeachment of Lord Melville, by the House of Lords, that a receipt given in the regular and official form by Mr. Douglas (who, it was proved, had been appointed by Lord Melville to be his attorney, to transact the business of his office of treasurer of the navy, and to receive all necessary sums of money, and to sign receipts for the same), was admissible in evidence against Lord Melville, to establish this single fact, that a person appointed by him, as his paymaster, did receive from the

(*d*) R. *v.* Lee, 4 F. & F. 63. See Fisher *v.* Ronalds, 12 C. B. 762, Maule, J.

(*e*) 2 C. & K. 550.

(*f*) 'I never have been able to discover any ground for this *obiter dictum*. Such a statement is not one accompanying an act; it is a mere declaration, and, instead of being against the interest of the prisoner it is directly in his favour, supposing the goods to have been stolen.' C. S. G.

(*g*) R. *v.* Petcherini, 7 Cox, 79 (Ir.), Crampton, J., and Greene, B.

(*h*) *Ante*, Vol. i. p. 191 *et seq.*, Vol. ii. p. 2097. See also Taylor Ev. (10th ed.) ss. 590–593.

(*i*) R. *v.* Downer, 14 Cox, 486.

Exchequer a certain sum of money in the ordinary course of business (*j*). In Queen Caroline's case (*k*), Abbott, C.J., in delivering the opinion of the judges, said that it would not be allowable on the part of the prosecution to give evidence that an agent, who had been proved to have been employed by the defendant to procure evidence for the defence, but who had not been examined as a witness, offered a bribe to some third person, who also had not been examined. This was not the question proposed by the House of Lords to the judges, but the converse of it, considered by the chief justice, for the purpose of shewing the grounds of the determination of the judges. The actual question proposed for their consideration was, as to the competency of proving, on the trial of a criminal prosecution, certain acts supposed to have been done by the agent of the prosecutor. And they determined that similar proof, as to the conduct of the prosecutor's agent in offering a bribe, was inadmissible. The question, Abbott, C.J., observed, regarded the act of an agent addressed to a person not examined as a witness in support of the indictment, the proffered proof not apparently connecting itself with any particular matter deposed to by the witnesses, who had been examined in support of the indictment, and leaving therefore those witnesses unaffected by the proposed proof, otherwise than by way of inference and conclusion. He concluded by observing that, notwithstanding the opinion he had delivered, he was by no means prepared to say, that in no case, and under no circumstances appearing at a trial, it might not be fit and proper for a judge to allow proof of this nature to be submitted for the consideration of a jury; and that the inclination of every judge was to admit, rather than exclude, the proffered proof.

(i) *Proof of Confessions and Admissions.*

1. **Extrajudicial.**—In order that evidence of an extrajudicial confession by a prisoner may be admissible, it must be affirmatively proved by the prosecution that the confession was free and voluntary, *i.e.* not preceded by any inducement to the prisoner to make a statement held out by a person in authority or that it was not made until such inducement had clearly been removed (*l*).

If it be left in doubt whether the confession were made in consequence of undue inducements, or threats, or hope or fear caused by a person in authority, it will be rejected (*m*).

A prisoner made a confession to an officer, who left the prisoner, and afterwards wrote down from recollection what the prisoner said to him. What the officer wrote was read over to the prisoner before the committing magistrate, and he said that what had been read over to him was the truth, and signed the paper. Best, J., said: 'We have not the confession of the prisoner; we have only the officer's recollection of it, put into writing when the prisoner was not present, and in the

(*j*) Lord Melvile's case, 29 St. Tr. 549, 746.
(*k*) 2 B. & B. 302.
(*l*) R. *v.* Thompson [1893], 2 Q.B. 12; 62 L. J. M. C. 93, in which case the chief authorities are cited and reviewed, and a contention that it was for the prisoner to shew that the confession was not voluntary was rejected.
(*m*) R. *v.* Thompson, *ubi supra*. R. *v.* Warringham, 2 Den. 447, note.

language of the officer, and not in the words used by the prisoner. If a confession be not taken in writing, we must be content with the recollection of the witness who proves it, because we cannot have any more certain account of it. I will receive nothing as a confession in writing that was not taken down from the mouth of the prisoner in his own words, nothing that he says that has any relation to the subject being omitted, nor anything added, except explanations of provincial expressions or terms of art. The reading this paper to the prisoner, and his acknowledgment that it was correct, does not remove the objection. By the change of language a very different complexion might be given to the story from what it had when it came from the mouth of the prisoner, and which he might not discover when it was read over to him. The lower orders of men have but few words to convey their meaning, and they know as little of expressions that they are not in the habit of using as if they belonged to another language. I will not receive this paper in evidence' (*n*).

Where the confession of a prisoner mentions the name of another prisoner tried at the same time, it seems, according to the later cases, that the whole of the confession, whether by parol or in writing, must be given in evidence. The judge will, however, in such cases, direct the jury that the confession is only to be taken as evidence against the prisoner who made it. It has been held in many cases that the proper course is to state or read all the names mentioned by the prisoner in his confession (*o*). Parke, B., however, expressed on several occasions a strong opinion that such a course was unfair (*p*). If, on the part of the prosecution, a confession or admission of the defendant, made in the course of a conversation with a witness, is brought forward, the defendant has a right to lay before the Court the whole of the conversation, not

(*n*) R. *v.* Sexton, Roscoe, Cr. Ev. (13th ed.) p. 39, and *ante*, p. 2180. As the paper was read to the prisoner, and he acknowledged that it was correct, it was evidence. In the same case it is said that Dallas, C.J., had refused to receive, at a former assizes, a confession, because it was not in the prisoner's own words.

(*o*) R. *v.* Hearne, 4 C. & P. 215. Littledale, J. R. *v.* Clewes, ibid. 221. R. *v.* Daniel, Monmouth Spr. Ass. 1831, MSS. C. S. G. Bosanquet, J., saying: 'The ground I go upon is, that I do not think I am authorised to direct the officer to read one word instead of another. I cannot tell the officer to read what is not written.' In R. *v.* Giles, Worcester Spr. Ass. 1830, MSS. C. S. G., where there was a parol confession, Littledale ,J., said: 'He was satisfied the proper way was to state the names uttered by the prisoner; as to state "another person" instead of the name used was not to state the truth, which a witness was sworn to do.' In R. *v.* Harding, Bailey, and Shumer, Gloucester Spr. Ass. 1830, MSS. C. S. G., where there was a written confession, Littledale, J., said: 'Suppose two men are indicted, one as principal, and the other as accessory, and the principal is named in the indictment, and the accessory makes a confession admitting himself to be accessory to the principal, how is it to be known that he is accessory to such principal if the name of the principal is not to be read? I have considered this case very much indeed, and I am most clearly of opinion that it is to be read as the prisoner made it, because otherwise the evidence is not read as it was given by the prisoner. I have no doubt upon it, and will not therefore reserve the point.' R. *v.* Walkley, 6 C. & P. 175, Gurney, B. R. *v.* Fletcher, 4 C. & P. 250; 1 Lew. 107, Littledale, J. R. *v.* Hall, 1 Lew. 110, Alderson, B. R. *v.* Forster, 1 Lew. 110, Denman, C.J. R. *v.* Fletcher, *supra*, was the case of a letter written by one prisoner, and implicating another.

(*p*) R. *v.* Maudsley, 1 Lew. 110, and R. *v.* Barstow, ibid. 'It would be extremely beneficial to prisoners in such cases to be tried separately, and such a course is nothing more than expedient in cases of difficulty, as it is almost beyond the power of a jury properly to discriminate between the evidence affecting different prisoners.' C. S. G.

only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relates to the subject matter of the proceeding; because it would not be just to take part of a conversation as evidence against a party without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion (*q*). But proof of a detached statement made by a party does not authorise proof by that party of all that he said at that time, but only of so much as can be in some way connected with the statement proved (*r*). The whole of the prisoner's statement must be taken into consideration by the jury, who are not bound to take what he has said in his favour to be true, because it is given in evidence by the prosecutor; but are to weigh it, with all the circumstances of the case, and determine whether they believe it or not (*s*). The jury may, therefore, believe one part of the prisoner's statement and disbelieve another (*t*). They may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing (*u*). In determining whether the statement is true or not, the jury should consider whether it be probable or improbable in itself, and whether it is consistent or inconsistent with the other circumstances of the case (*v*). If what he said in his own favour is not contradicted by evidence offered by the prosecutor, nor improbable in itself, it will naturally be believed by the jury; but they are not bound to give weight to it on that account, but are at liberty to judge of it like other evidence, by all the circumstances of the case (*w*). But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner, and the whole of the other evidence, must be left to the jury, precisely as in any other case, where one part of the evidence is contradictory to another (*x*).

The prisoner was indicted for stealing a piece of wood, and it appeared that on the piece of wood being found by a police-constable in the

(*q*) Queen Caroline's case, 2 B. & B. 297, Abbott, C.J.

(*r*) Prince *v.* Samo, 7 A. & E. 627. In this case a witness stated that the plaintiff, on the trial of an indictment, had proved that he had been remanded by the Court for the relief of insolvent debtors; and it was held that the opposite counsel could not ask whether the plaintiff had not also, on the same trial, said that an advance was a gift and not a loan; and the Court said that the dictum of Lord Tenterden, *supra*, was extra-judicial.

(*s*) R. *v.* Clewes, 4 C. & P. 221, Littledale, J. R. *v.* Steptoe, 4 C. & P. 397. R. *v.* Higgins, 3 C. & P. 603, Parke, J. R. *v.* Jones, Monmouth Sum. Ass. 1830, Park, J. MSS. C. S. G. R. *v.* Locker, Stafford Spr. Ass. 1831, Patteson, J. MSS. C. S. G.

(*t*) 1 Phill. Ev. (3rd ed.) 399. There were earlier rulings to the contrary. R. *v.* Jones, 2 C. & P. 629, Bosanquet, Serjeant. R. *v.* Lloyd, 1 Phill. Ev. (3rd ed.) 399.

(*u*) Taylor, Ev. (10th ed.) s. 870, citing R. *v.* Steptoe, *supra*. R. *v.* Clewes, *supra*. R. *v.* Higgins, *supra*.

(*v*) R. *v.* Steptoe, *supra*. R. *v.* Jones, *supra*.

(*w*) Taylor, Ev. (10th ed.) s. 871.

(*x*) R. *v.* Jones, 2 C. & P. 629. So in a civil case, if a person says 'that he did owe a debt, but that he had paid it,' such an admission would not be received as evidence to prove the debt, without being also evidence of the payment. Per Hale, C.J., Anonymous case, cited 12 Vin. Abr. *tit.* Ev. A. 23. What he has said in his own favour may perhaps weigh very little with the jury, while his admission against himself may be conclusive; however, it is reasonable that if any part of his statement is admitted in evidence, the whole should be admitted. 1 Phill. Ev. 399. See also Smith *v.* Blandy, Ry. & M. 257. Rose *v.* Savory, 2 Bing. (N. C.) 145.

prisoner's shop, about five days after it was lost, he stated that he bought it from N., who lived about two miles off. N. was not produced as a witness for the prosecution, and the prisoner did not call any witness. Alderson, B., in summing up, said: 'In cases of this nature you should take it as a general principle that where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecution to shew that that account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on him. Suppose, for instance, a person were to charge me with stealing his watch, and I were to say I bought it from a particular tradesman, whom I name, that is *primâ facie* a reasonable account, and I ought not to be convicted of felony unless it is shewn that that account is a false one' (*y*).

The prisoner was indicted for stealing a gun, which was found in his possession, and when taken into custody he stated to a policeman that he had bought the gun on the road from a tallyman for ten shillings and a gallon of beer; but when before the magistrate he stated that H., R., and himself had found the gun hidden in a hayrick, and that he had given them a shilling each and a pot of beer, and had taken possession of the gun. It was contended that H. and R. ought to be called for the prosecution, and R. *v.* Crowhurst and R. *v.* Smith (*z*) were cited; but Platt, B., held that as the prisoner had given two totally different accounts of the way in which he came possessed of the gun, it certainly could not be incumbent on the prosecutor to call persons whom the prisoner had referred to in one of two contradictory statements (*a*).

Where certain cloth had been cut and carried away from a church, and a knife, belonging to prisoner, was found on the floor of the church, and in the prisoner's house several remnants of cloth were found, which corresponded with the pieces still remaining in the church, and the prisoner being charged with the offence said he knew nothing of it, and had bought the cloth of L., who lived a mile off; it was contended on the authority of R. *v.* Crowhurst (*b*) that the prosecutor was bound to call L. as a witness. It was held, however, that that was not so; because the discovery of the prisoner's knife in the church went to shew that he himself was the thief, and therefore that the account he had so given was either not true, or not likely to be so. The prisoner, therefore,

(*y*) R. *v.* Crowhurst, 1 C. & K. 370. In R. *v.* Smith, 2 C. & K. 207, Denman, C.J., said: 'I quite agree with R. *v.* Crowhurst, which is very correctly reported. It was mentioned to me by Alderson, B., when it occurred.' And Lord Denman added that in a similar case the magistrate should send for and examine the person mentioned, as he might either exonerate the prisoner or prove his statement to be false. The prosecution are, however, not bound to call the person mentioned by the prisoner if they can shew by other means that the story told by him is false. R. *v.* Ritson, 15 Cox, 478. See also R. *v.* Evans, 2 Cox, 270, *ante*, p. 1310, as to the improbabilities of a prisoner's statement.

(*z*) *Supra.*

(*a*) R. *v.* Dibley, 2 C. & K. 818. Platt, B., added, 'I think it might be prudent in the prosecutor to have the witnesses in attendance, though he does not call them, to avoid the effect of the observation by the prisoner's counsel that those persons could have substantiated the prisoner's defence, but that he was too poor to procure their attendance.'

(*b*) *Supra.*

was properly left to reconcile the finding of his knife with his innocence, by shewing from L. that he had come honestly by the cloth notwithstanding the fact; the rule on this matter being that the prosecutor was not bound to call persons named by the prisoner, unless his account was evidently true, or there was good reason to believe it to be true till it was contradicted. Here there was no such reason, as the facts were at variance with the story; but still the story might be true, and it was for the prisoner to make out its truth by calling the man from whom he bought the stolen property (*c*).

Upon an indictment against the prisoner at quarter sessions for stealing and receiving two waistcoats and two pairs of trousers, it appeared that the articles were stolen on November 2, and that they were sold by the prisoner for twelve shillings in a public-house openly, without attempt at concealment, on November 4, when about thirty persons were in the room. To the constable, who charged him with the felony, the prisoner said: 'C. and D. brought them to my house, and the woman who keeps my house (Mrs. W.) will say so, and I, being on the spree, sold them and spent the money.' In consequence of this statement C. and D. were apprehended, and the former convicted of stealing articles taken at the same time from the prosecutor's house; but D. was discharged for want of evidence. The constable went to Mrs. W. and made inquiries as to the prisoner's statement, but no evidence of what transpired on those inquiries was received. It was urged that, as the prisoner had stated how he came into possession of the articles, and had mentioned the names of real persons from whom he had received them, it was incumbent on the prosecution to negative his statement if false, by calling C., D., and Mrs. W.; but the sessions overruled the objection, and the prisoner was convicted of stealing. Upon a case reserved upon the question whether, under the circumstances of the case, which rested solely on a recent possession of the stolen goods, it lay on the prosecution to call the persons to whom the prisoner referred, or some of them, to account for his possession, it was held that there was evidence for the jury upon which the prisoner might be convicted (*d*).

In R. *v.* Clewes (*e*), a trial for murder, it was proposed to give in evidence a statement of the prisoner, made in prison to a coroner, for whom the prisoner had sent. Before he did so, Mr. C., a magistrate, had had an interview with the prisoner, and it was suggested that he might have told the prisoner that it would be better to confess, and that, therefore, the counsel for the prosecution were bound to call him. Littledale, J., said: 'As something might have passed between the prisoner and Mr. C. respecting the confession, it would be fair in the prosecutors to call him, but I will not compel them to do so. However, if they

(*c*) R. *v.* Harmer, 2 Cox, 487, Pollock, C. B.

(*d*) R. *v.* Wilson, D. & B. 157, 26 L. J. M. C. 45. Pollock, C.B., said: 'I should be sorry that upon such evidence any prisoner should be convicted before me.' The chairman had told the jury that the constable, having made inquiries which satisfied him (but the case does not state this), it was not necessary for the prosecution to call the persons to whom the prisoner referred. 'On the contrary, however, it would rather seem that the fact that the constable did not think the persons named should be called for the prosecution, affords an inference that they would have supported the prisoner's statement.' C. S. G.

(*e*) 4 C. & P. 221.

will not call him, the prisoner may do so if he chooses' (*f*). It is submitted that under the rule laid down in R. *v.* Thompson (*ante*, p. 2205), it would be the duty of the prosecution in such a case to call the magistrate. In R. *v.* Williams (*g*), a prisoner being in the custody of two constables on a charge of arson, one B. went into the room, and the prisoner immediately asked him to go into another room, as he wished to speak to him, and they went into another room, when the prisoner made a statement. It was argued that the constables ought to be called to prove that they had done nothing to induce the prisoner to confess, as it was evident that the prisoner acted under some influence, as he first proposed going into another room: and R. *v.* Swatkins (*h*) was relied upon. Taunton, J., said: 'A confession is presumed to be voluntary unless the contrary is shewn; and as no threat or promise is proved to have been made by the constables, it is not to be presumed.' And after consulting Littledale, J., he added: 'We do not think according to the usual practice that we ought to exclude the evidence, because a constable may have induced the prisoner to make the statement; otherwise we must in all cases call the magistrates and constables, before whom or in whose custody the prisoner has been' (*i*).

But if there is any probable ground to suspect that an officer, in whose custody a prisoner has previously been, has been guilty of collusion in obtaining a confession, such suspicion ought to be removed, in the first instance, by the prosecutor calling the officer. Upon an indictment for arson, it appeared that a constable, who was called to prove a confession, went into a room in an inn, where he found the prisoner in the custody of another constable, and as soon as he went into the room, the prisoner said he wished to speak to him, and motioned the constable to leave the room, which he did, and left them alone. The prisoner immediately made a statement. The witness had not cautioned the prisoner at all, and nothing had been said of what had passed between the constable and the prisoner before the witness entered the room. It was contended that the other constable must be called to shew that he had used no inducement to make the prisoner confess. Patteson, J., said: 'I am inclined to think the constable ought to be called. This is a peculiar case, and can never be cited as an authority, except in cases where a man being in the custody of one person, another who has nothing to do with the case comes in, and the prisoner motions the first to go away. I think, as the witness did not caution the prisoner, it would be unsafe to receive the statement. It would lead to collusion between constables' (*j*).

(*f*) Counsel for the prosecution declined to call Mr. C., and he was called and examined by prisoner's counsel. See this case, *ante*, p. 2185, note (*f*).

(*g*) Gloucester Spr. Ass. 1832, MSS. C. S. G.

(*h*) 4 C. & P. 548.

(*i*) The statement was rejected on another ground, *vide ante*, p. 2179.

(*j*) R. *v.* Swatkins, 4 C. & P. 548, and MSS. C. S. G. It afterwards appeared that the prisoner had gone voluntarily before the magistrates at the inn, and then ran away, was brought back by the constable, and detained by him in the room for the purpose of being a witness, and that he was not charged with the offence till after the statement was made. Patteson, J., said: 'If he was not under any charge, that varies the case. As he was at that time attending as a witness, and was not in custody on any charge, I shall receive the statement in evidence, without putting the prosecutor to call the other constable.'

In order to induce the Court to call another officer in whose custody the prisoner had been, it must appear either that some inducement had been used, or some express reference made to such officer. A prisoner, when before the committing magistrate, having been duly cautioned, made a confession, in which he alluded to a confession which he had previously made to W., a constable; it was submitted that W. ought to be called to prove that he had not used any inducement. Littledale, J.: 'Although I do not think it necessary that a constable, in whose custody a prisoner has been, should be called in every case, yet as in this case there is a reference to the constable, I think he ought to be called.' W. was then called, and proved that he did not use any undue means to obtain a confession; but he had received the prisoner from M., another constable, and the prisoner had made some statement to M. It was then urged that M. should be called. Littledale, J.: 'I do not think it is necessary that a constable should be called, unless it appear that some promise was given, or some express reference was made to the constable. There was a distinct reference made to W., and therefore I thought he must be called; but there is no reference to M. It does not appear either that any confession was made to M. It only appears that a statement was made; that might be either a confession, a denial, or an exculpation' (*k*).

Upon an indictment for administering poison with intent to murder, it appeared that the prisoner had given her mistress some milk, in which a quantity of fag water had been mixed. Fag water is a mixture of arsenic, soft soap, and water, used for dressing sheep. In order to prove that the prisoner had put the fag water in the milk, that she knew the nature of it, and intended to murder her mistress, her own confession to Mr. G., a medical man, made in the presence of the prisoner's mistress and her husband, was offered in evidence. G. swore that he did not tell the prisoner that it would be better or worse for her to tell; that he used no threats or promises, nor did any one else: before G.'s arrival the prisoner had not made any confession, nor had any threats or promises been held out to her. Patteson, J., admitted the prisoner's statement to G., who said: 'I asked her if she had given the woman anything in her milk; she said she had mixed fag water with the milk; she had put in half a teacupful. I asked her if she was aware of the nature of it; she said she knew it was poison; she thought it would kill the woman; she had done it to be released from her service.' A woman was then called who was present at this conversation, and she swore that G. told the prisoner in the presence of her mistress and her husband, that it would be better for her to speak the truth. She could not tell whether

(*k*) R. *v.* Warner and Morgan, Gloucester Spr. Ass. 1832, MSS. C. S. G. 'The prisoner's counsel then proposed to call M., which was objected to as not being at the proper time, but Littledale, J. said: "It is much the more convenient time to do so. If it should afterwards turn out that the confessions were in consequence of what M. had said, they must all be struck out, but it would be very difficult to do away with the impression they might have made on the mind of the jury." M. was then called for the prisoner, and proved that when the prisoner was in his custody it was not for the offence for which he was then being tried. See this case, *ante*, p. 2174. This case was tried at the same assizes as R. *v.* Williams (*ante*, 2210), but after that case had been tried.' C. S. G.

he had told her so before he asked her what she had done; but it was before she answered. G., being recalled, said: 'I could not positively swear that I did not tell the prisoner that it would be better for her to tell the truth; I don't recollect that I did. It is very likely I might tell her it would be better for her to tell the truth.' Counsel for the prisoner contended that the confession ought to be struck out of the judge's notes, and not submitted to the jury; but after consulting Denman, C.J., Patteson, J., declined to strike out the evidence of the confession, and put the whole to the jury, feeling that it was impossible, after they had heard the confession, to expect that they could weigh and consider the other facts in the case without reference to the confession; and in truth those other facts by themselves would not have warranted a conviction. The jury convicted, and upon a case reserved upon the question whether the right course had been pursued, Patteson, J., said: 'I think if it had appeared in the first instance that the medical man had used the words "it would be better for you to speak the truth," I should have excluded the evidence of the confession. The only question is, whether, when that evidence had been properly admitted, which was the case here, I ought to have struck it out of my notes, after proof that the confession was not voluntary. The prisoner was certainly bound to shew that it was not so; but that being proved by the second witness, I think I should have treated the evidence of the confession as though it had been inadmissible in the first instance.' Pollock, C.B., said: 'We are all of opinion that the conviction cannot be sustained' (*l*).

Sect. II.—Depositions and Statements at the Preliminary Inquiry.

(a) *Statutes in force.*

Preliminary inquiries by justices as to all indictable offences *cognizable* in England and Wales (*m*) are regulated by the Indictable Offences Act, 1848 (*n*) and the Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35).

(*l*) R. *v.* Garner, 1 Den. 329; 2 C. & K. 920. 'All that is reported to have fallen from the judges on the point is stated, because, in the marginal note in Denison, it is stated to have been held "that although the confession was rightly admitted by the judge in the first instance, and taken down by him as evidence, it should be struck out of his notes after proof by the prisoner that it had been made under the above inducement." It is plain that the decision only warrants the marginal note I have above inserted, especially as the evidence besides the confession would not have warranted a conviction, and therefore was not enough to go to the jury. The marginal note in C. & K. is equally erroneous. Where a jury have heard a confession proved, which afterwards turns out to have been improperly obtained, the prisoner can hardly in any case be *fairly* tried, however much the judge may endeavour to induce the jury to throw the confession out of their consideration, and it deserves consideration, whether, in order to prevent the injury that might thus arise to a prisoner, the judge would not be well warranted in discharging the jury, in order that the prisoner might be tried by another jury. R. *v.* Newton, 13 Q.B. 716. It might be well in such a case to ask the prisoner whether he wished the jury to be discharged on that ground, and to discharge the jury upon his desiring it.' C. S. G.

(*m*) See R. *v.* Eyre, L. R. 3 Q. B. 487.

(*n*) 11 & 12 Vict. c. 42. The earliest enactments on this subject (1 & 2 Ph. & M. c. 13, s. 4, and 2 & 3. Ph. & M. c. 10) did not apply to high treason or misdemeanor. R. *v.* Paine, 1 Salk. 281; 1 Ld. Raym. 729, cited by Kenyon, C.J., in R. *v.* Eriswell, 3 T. R. 723, and see 1 Hale, 306, and R. *v.* Radbourne, 1 Leach, 457. These enactments were repealed and superseded by 7 Geo. IV. c. 64, which applied to felony and misdemeanor. That Act was as to

By the Act of 1848, s. 17, 'in all cases 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 (M.) 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 (*o*), and shall be signed also by the justice or justices taking the same (*p*); 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 (*q*), by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead (*r*), or so ill as not to be able to travel (*s*), 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* (*t*), it shall be lawful to read such deposition as evidence in such prosecution (*u*), without

this subject repealed by 11 & 12 Vict. c. 48, s. 34. 9 Geo. IV. c. 54, ss. 2, 3 (I) were repealed by 12 & 13 Vict. c. 69, which has been repealed and replaced by 14 & 15 Vict. c. 93 (I).

(*o*) This provision was not in the prior statutes; see R. *v.* Flemming, 2 Leach, 854.

(*p*) See *post*, p. 2229.

(*q*) Duke of Beaufort *v.* Crawshay, L.R. 1 C. P. 699; 35 L. J. C. P. 342. As to proof by affidavit, see per Willes, J.

(*r*) This was always the law, see 1 Hale, 305; Bull. (N. P.) 242 (*a*).

(*s*) Formerly the deposition was not admissible unless there was a *permanent* inability to attend, as if the witness were so ill that there was no probability that he would *ever* be able to attend. R. *v.* Edmunds, 6 C. & P. 164. R. *v.* Hogg, 6 C. & P. 176. R. *v.* Wilshaw, C. & M. 145.

(*t*) The words in italics do not appear in s. 18, *post*, p. 2214. Where a charge of wounding with intent to murder was made before a metropolitan police magistrate at Bow Street, but in consequence of the illness of a witness the prisoner was taken to Twickenham, and the deposition of the witness taken in the presence of the prisoner by two county justices, and signed by them, and after a further investigation at Bow Street the prisoner was committed; it was held that the deposition was admissible; for 11 & 12 Vict. c. 42, ss. 17, 18, do not confine the admissibility of a deposition to the case of a person examined before the magistrate before whom the charge was made, and who committed the prisoner. R. *v.* De Vidil, 9 Cox, 4, Blackburn, J. This case is doubted, Taylor Ev. (10th ed.), s. 412 *n*, and is discussed in R. *v.* Jackson [1906], 3 Australia C. L. R. 730, 746.

(*u*) It is not clear that the words 'in such prosecution' refer to proceedings before the grand jury. But where a witness is too ill to travel, his deposition may be read by the grand jury upon proof that it was duly taken in the presence of the prisoner, who had an opportunity of cross-examining the witness, and that the witness is too ill at the time to attend. R. *v.* Clements, 2 Den. 251; 20 L. J. M. C. 193. R. *v.* Philip, 1 F. & F. 105. R. *v.* Wilson, 12 Cox, 622. In this case evidence was given before the judge that the witness was too ill to attend to be examined, &c., and the judge directed the deposition to be sent in to the grand jury. In R. *v.* Bullard, 12 Cox, 353, Byles, J., is reported to have said that the grand jury are not bound by any rules of evidence. In R. *v.* Gerrans, 13 Cox, 158, Denman, J.,

further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same' (*v*).

'(M.) *Depositions of Witnesses.* (*vv*)

'To Wit. } The Examination of *C.D.* of [*Farmer*] and } *E.F.* of [*Labourer*], taken on [*Oath*] this Day of in the Year of our Lord at in the [*County*] aforesaid, before the undersigned, [*One*] of His Majesty's Justices of the Peace for the said [*County*], in the Presence and Hearing of *A.B.*, who is charged this Day before [*me*], for that he the said *A.B.* on at [*&c., describing the Offence as in a Warrant of Commitment*].

'THIS Deponent *C.D.* on his [*Oath*] saith as follows [*&c., stating the Deposition of the Witness as nearly as possible in the words he uses. When his Deposition is complete let him sign it*].

'And this Deponent *E.F.*, upon his Oath, saith as follows [*&c.*]

'The above depositions of *C.D.* and *E.F.* were taken and [*sworn*] before me at on the Day and Year first above mentioned. *J.S.*'

The object of this section was to ensure an authentic record of what the accused (on proper opportunity and after proper caution) said in answer to the charges against him, and also to enable the judge at the trial to see whether the evidence given is consistent with that given before the justices (*w*).

By sect. 18. 'After the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace, or one of the justices by or before whom such examination shall have been so completed, as aforesaid, shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial" (*x*); and whatever the prisoner shall then say in answer thereto shall be taken down in writing (N.), and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards, upon the trial of the said accused person, the same may, if necessary, be

and R. *v.* Lynch (K. B. D. 19 Dec. 1902), Alverstone, C.J., depositions were allowed to go before the grand jury without proof that the witness was ill. See R. *v.* Philip, 1 F. & F. 105, Erle, J. Where a witness *refuses* to go before the grand jury it would seem that his deposition cannot be submitted to them. R. *v.* Rendle (1861), 11 Cox, 299, Channell, B.

(*v*) The Irish Act, 14 & 15 Vict. c. 93, s. 14 is the same, but omits the words 'or so ill as not to be able to travel.'

(*vv*) Scheduled to the Act, *vide* s. 28.

(*w*) As to this, see R. *v.* Lambe, 2 Leach, 558, *cur. per* Grose, J.

(*x*) The provision as to caution is directory. No consequence is prescribed for failure to give the statutory cautions. A statement in the form N. signed by the committing justice is admissible. R. *v.* Sansome, 1 Den. 545; 19 L. J. M. C. 143. R. *v.* Bate, 11 Cox, 686. As to proof of statements made in Court without the statutory cautions, see *post*, p. 2219.

given in evidence against him (*y*) without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: provided always, that the said justice or justices before such accused person shall make any statement shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person.'

Since the passing of the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36, *post*, p. 2271), it has been usual, but is not essential, to inform the accused that he is free if he wishes to be sworn as a witness in his own behalf. If he elects to be so sworn the evidence which he gives is taken down in the form of a deposition and read over to and signed by him.

(N.) '*Statement of the Accused.* (*z*)

' : *A. B.* stands charged before the undersigned, [*One*] of His Majesty's justices of the peace in and for the [*county*] aforesaid, this day of in the year of our Lord for that he the said *A. B.* on at [*&c., as in the caption of the depositions*]; and the said charge being read to the said *A. B.*, and the witnesses for the prosecution, *C. D.*, and *E. F.*, being severally examined in his presence, the said *A. B.* is now addressed by me as follows: "Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial' (*a*); whereupon the said *A. B.* saith as follows:—

'[*Here state whatever the prisoner may say, and in his very words, as nearly as possible. Get him to sign it if he will.*]

'*A. B.*

'Taken before me at the day and year first above mentioned. *J. S.*'

By sect. 20, 'The several recognizances (of the prosecutor and witnesses together with the information (if any), the depositions, the statement of the accused, and the recognizance of bail (if any) in every such case, shall be delivered by the said justice or justices, or he or they shall cause the same to be delivered, to the proper officer of the Court in which the trial is to be had, before or at the opening of the said Court, on the first day of the sitting thereof, or at such other time as the judge, recorder, or

(*y*) See note (*x*), *supra*.

(*z*) This form is scheduled to the Act, *vide* s. 28.

(*a*) N.B.—This form contains the *first* and not the *second* of the cautions referred to in s. 18. R. *v.* Sansome, *ubi supra*.

justice, who is to preside in such Court at the said trial, shall order and appoint.'

By the Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), s. 3, 'And whereas complaint is frequently made by persons charged with indictable offences, upon their trial, that they are unable by reason of poverty to call witnesses on their behalf, and that injustice is thereby occasioned to them, and it is expedient to remove, as far as practicable, all just grounds for such complaint: Therefore, in all cases where any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, whether committed within this realm or upon the high seas, or upon land beyond the sea, and whether such person appear voluntarily upon summons, or has 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 for trial, or admit him to bail, shall immediately after obeying the directions of "sect. 18 of the Indictable Offences Act, 1848" demand and require of the accused person whether he desires to call any witness; and if the accused person shall, in answer to such demand, call or desire to call any witness or witnesses, such justice or justices shall, in the presence of such accused person, take the statement on oath or affirmation, both examination and cross-examination of those who shall be 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, and such witnesses, not being witnesses merely to the character of the accused, as shall in the opinion of the justice or justices give evidence in any way material to the case, or tending to prove the innocence of the accused person, shall be bound by recognizance to appear and give evidence at the said trial, and afterwards upon the trial of such accused person, all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the depositions of witnesses hereby directed to be taken.'

By sect. 4, all the provisions of the 'Indictable Offences Act, 1848,' relating to the summoning and enforcing the attendance and committal of witnesses, and binding them by recognizance and committal in default, and for giving the accused person copies of the examinations, and giving jurisdiction to certain persons to act alone, shall be read and shall have operation as part of this Act (*b*).

Under the Criminal Evidence Act, 1898 (*c*), the accused, instead of or in addition to making a statement under sect. 18 of the Act of 1848, may on his own application be sworn as a witness for the defence, in which event his deposition is taken in the same manner as that of the witnesses sworn before the justices.

(*b*) As to the examination of witnesses who are dangerously ill, see 30 & 31 Vict. c. 35, ss. 6, 7, *post*, pp. 2246 *et seq.*

(*c*) *Post*, pp. 2271, 2272.

(b) *Statements made by the Accused before examining Justices.*

Statements made by accused persons before justices fall into three classes :—

(1) Unsworn statements made, after the completion of the evidence for the prosecution, and after being called on, and cautioned by the justice under sect. 18 of the Act of 1848 (*supra*) ;

(2) Unsworn statements voluntarily made before a justice at some stage of the proceedings but not recorded and authenticated in the manner prescribed by sect. 18 ; and

(3) Statements made on oath by the accused at the preliminary inquiry by virtue of the Criminal Evidence Act, 1898 (*d*), or some other statute enabling him to give evidence.

The proper time for taking the statement of the accused is after the examination of witnesses against him has been completed (*e*), and after giving the caution specified in sect. 18, and informing him of his right to be sworn in his own defence. It ought to be left entirely to the accused whether he will make any statement or not ; he ought not to be dissuaded from making a perfectly voluntary confession, because that is to shut up one of the sources of justice (*f*). A prisoner is not to be entrapped into making any statement ; but when a prisoner is willing to make a statement, it is the duty of the magistrate to receive it (*g*).

In cases prior to 1848 statements made by a prisoner in answer to a question put by the committing magistrate were admitted in evidence (*h*).

In R. *v.* Pettit (*i*), decided in 1850, a prisoner indicted for murder was apprehended on that charge, and immediately taken before the magistrates. The brother of the justices' clerk took notes of what passed, but they were not signed by any one. The prisoner was asked one or two questions by the magistrates, to which he gave certain answers, after which he was remanded. On a proposal to put these statements in against the prisoner, it was objected that the magistrates were debarred by sects. 17, 18, *supra*, from putting these questions. In answer, it was contended that this matter fell within the proviso in sect. 18. Wilde, C.J., refused to receive the evidence, saying that if such examinations were received in evidence it was hard to say where it might stop. A person in custody, or in other imprisonment, questioned by a magistrate, who had power to commit him and power to release him, might think himself bound to answer for fear of being sent to gaol. The mind in such a case would

(*d*) *Post*, p. 2271. In R. *v.* Humphries, 67 J. P. 396, Wills, J., said that where a defendant was about to be committed for trial the justices should impress on him the advisability of giving evidence in defence, if he intends to set up a defence, at the earliest possible stage, and where the defence is reserved there is less chance of a certificate for legal aid under the Poor Prisoners' Defence Act, 1903, *ante*, p. 2048. See also R. *v.* Nicholson, 73 J.P. 347 Jelf, J.

(*e*) *Vide* s. 18, *ante*, p. 2214. R. *v.* Fagg, 4 C. & P. 566, Garrow, B. R. *v.* Bell, 5 C. & P. 162. R. *v.* Spilsbury, 7 C. & P. 187.

(*f*) R. *v.* Green, 5 C. & P. 312, Gurney, B.

(*g*) R. *v.* Arnold, 8 C. & P. 621, Denman, C.J.

(*h*) R. *v.* Jones, Carr. Supp. 137, C. & P. 239 *n.* R. *v.* Bartlett, 7 C. & P. 832. R. *v.* Rees, 7 C. & P. 568. R. *v.* Ellis, Ry. & M. 432. *Contra*, R. *v.* Wilson, Holt (N. P.), 597.

(*i*) 4 Cox, 164.

be likely to be affected by the very influences which render the statements of accused persons inadmissible (*j*).

And in R. *v.* Berriman (*k*), decided in 1854, where on the hearing before the magistrate on a charge either of the murder or concealing the birth of her child, after the prisoner had been cautioned in the usual manner, and had stated that she had nothing to say, the magistrate, before committing her, asked her where she had put the body. Erle, J., refused to allow the answer to be given in evidence, holding that the question ought never to have been put, and it would be very unfair towards the prisoner to receive in evidence an answer so irregularly elicited, and justices now limit their questions to such as will elicit an explanation of his statements, unless he is sworn, in which case he is liable to answer any question not excluded by sect. 1 of the Criminal Evidence Act, 1898 (*post*, p. 2271).

The statement of a prisoner ought to be taken down in his very words as nearly as possible (*l*).

The statement of a prisoner must not be taken upon oath (*n*) except in cases where he tenders himself as a witness for the defence.

The statement of a prisoner, when reduced into writing, ought to be read over to him, and tendered to him for his signature, and the magistrate is expressly required to subscribe it (*o*). The signature of the prisoner is not required by the statute, but he is to be got to sign it if he will (*p*).

Where the prisoner gives evidence it is taken down as a deposition, and may be put in against him at the trial (*q*).

Proof of Prisoner's Statement.—By sect. 18 (*ante*, *p.* 2214), where a prisoner's unsworn statement is returned with the depositions, and is in the proper form, it is admissible without any proof of the prisoner's or magistrate's signature (*r*), subject to the right of the accused to impeach it as inaccurate. It is read by the officer of the court (*s*). It is now the invariable practice at the trial to put in any statement made by the

(*j*) In this case the proceedings of the magistrates were clearly irregular, as no witness had been examined, &c.

(*k*) 6 Cox, 388.

(*l*) See *post*, p. 2231. A statement taken down before 1848, which appeared to be in language not used by the prisoner, was held inadmissible. R. *v.* Sexton, 1 Burns' Just. (ed. Doyl. & Wms.) 1086. In R *v.* Mallet, 1830, Gloucester Spring Ass., where it was proved that the examination of the prisoner before the magistrate was read over to her, and that she signed it, but there was no evidence that it was taken down from what she said or in the words she used, and was in language she was not likely to have used, Littledale, J., refused to allow it to be read. C. S. G. Under s. 18 of the Act of 1848, if the statement is duly signed and returned, it would seem to be for the accused to impeach its accuracy. The proper course is to take the examination in the first person, *e.g.* 'I did so and so,' &c.

(*n*) 2 Hawk. c. 46, s. 37. Archb. Cr. Pl. (23rd ed.) 299. See *ante*, p. 2187 note (*b*).

(*o*) S. 18, *ante*, p. 2214.

(*p*) See the form in the schedule, *ante*, p. 2215.

(*q*) R. *v.* Bird, 19 Cox, 180. R. *v.* Boyle, 20 T. L. R. 192.

(*r*) *Ante*, p. 2213. As to proving the examination before 1848, see 2 Hale, 52, 284. R. *v.* Richards, 1 M. & Rob. 396. R. *v.* Chappell, 1 M. & Rob. 395. R. *v.* Smith, 2 Lew. 139. R. *v.* Christance, 1 Cox, 143. In the three latter cases the prisoner had put his mark to his examination. R. *v.* Hope, 1 M. & Rob. 396; 7 C. & P. 136. R. *v.* Taylor, 7 C. & P. 136 *n.* In the two latter cases there was an attesting witness who was called. R. *v.* Hobson, 1 Lew. 66. R. *v.* Priestley, 1 Lew. 74. R. *v.* Foster, 7 C. & P. 148. R. *v.* Spencer, 1 C. & P. 260. R. *v.* Rees, 7 C. & P. 568. R. *v.* Reading, 7 C. & P. 649. R. *v.* Hearn, C. & M. 109.

(*s*) R. *v.* Swatkins, 4 C. & P. 548.

prisoner before the justices (after the statutory caution), as part of the case for the prosecution, not as evidence, but as a statement made by the prisoner (*t*).

When a party charged with an indictable offence before a magistrate is asked by the magistrate, pursuant to sect. 18, whether he wishes to say anything in answer to the charge, and is told by the magistrate that he is not obliged to say anything unless he desires to do so, but that whatever he says will be taken down in writing, and may be given in evidence against him upon his trial (*the first caution*), and the prisoner thereupon makes a statement which is taken down in writing and duly returned to the Court of trial, and bears upon its face that such caution has been given, and purports to be signed by the magistrate, and there is no evidence that any threat or promise has been held out to induce a confession from the prisoner; the statement may, without further proof, be read in evidence against him on his trial, although the magistrate did not before the statement was made give the second caution in sect. 18, *i.e.* give the prisoner to understand that he had nothing to hope from any promise of favour, and nothing to fear from any threat which might have been held out, but that what he should then say might be given in evidence against him, notwithstanding such promise or threat (*u*).

After taking the examination of the witnesses on a charge of felony against the prisoner, the magistrate gave the prisoner the first caution under sect. 18, but did not, as directed by the first proviso, tell the prisoner that he had nothing to hope from any promise of favour, or to fear from any threat. The prisoner then made a statement, which was taken down, but was not signed by the prisoner or the magistrate. The prisoner, after a remand, being brought again before the magistrate, some questions were put to the witnesses by the prisoner's attorney, who then objected to the statement being treated as the prisoner's

(*t*) R. *v.* Gardner [1899], 1 Q.B. 150, 155; 19 Cox, 177; Russell, C.J.

(*u*) R. *v.* Sansome, 1 Den. 545; 19 L. J. M. C. 143. Campbell, C.J., said: 'In this case it appears that the deposition had been signed by the prisoner as well as by the magistrate. It is, therefore, clearly admissible in evidence at common law, unless there is some provision in the statute to exclude it. It has been argued that the statute makes it a condition precedent to its admissibility that the magistrate should have informed the prisoner that he had nothing to hope from favour, or to fear from any threat that might have been held out. There was no evidence here that any promise or threat had been held out by way of inducement. We think, therefore, that there was no necessity for shewing that there had been any caution to the prisoner in that respect; and we are of opinion that it never can be considered that the giving the second caution is a necessary condition precedent to the admissibility of the statement of the prisoner, when it has been read over to him in the manner prescribed by the former part of the section, and has been signed by him as this has been. The words of the first proviso seem merely directory on the magistrate. There is no clause in the statute excluding the confession if the magistrate omits the second caution, when the deposition has been signed by the prisoner, and it is otherwise admissible at common law. This deposition follows the form given in the schedule, which, it may be observed, contains the first caution, but not the second. Whether the giving that first caution is a condition precedent to admissibility, it is not necessary now to decide.' With regard to the general question as to the admissibility of examinations of prisoners under the Act, the Court are of opinion that where there is no evidence of any threat or promise having been held out to induce a confession, the examination of a prisoner may be read in evidence on his trial without further proof, if the deposition has been returned, and appears to be signed by the magistrate, and shews upon its face that the first caution has been given.' See R. *v.* Higson, 2 C. & K. 169. R. *v.* Kimber, 3 Cox, 223. R. *v.* Harris, 4 Cox, 147. R. *v.* Hunt, 4 Cox, 149.

statement, as an addition had been made to the evidence; and the prisoner being then asked if he wished to make any statement declined to do so. It was held, that the prisoner's statement was admissible in evidence against him at his trial (*v*).

The concluding proviso of sect. 18 expressly reserves the right of the prosecutor to prove admissions, confessions, or other statements of the accused made *at any time* which by law would be admissible in evidence against the accused. This proviso duly preserves the common law modes of proving such statements whether made before, or at, or after the magisterial inquiry. Consequently, if the statement was made before the magistrate, and was taken down in writing with such disregard of the directions of sect. 18, as not to be admissible in evidence under that section by putting in the statement signed by the prisoner and the magistrate, it may nevertheless be proved in the common law names by some one who was present and heard it made, and if he were the person who wrote it down he may refresh his memory by reference to the writing (*w*).

The magistrate is expressly enjoined to put the prisoner's statement into writing, and parol evidence of a prisoner's statement before him ought not to be received until it is clearly shewn that in fact such a statement never was reduced into writing (*x*). To render parol evidence of a prisoner's statement admissible, it is not sufficient for a witness to state that he did not see anything taken down in writing (*y*), or that no statement was taken in writing (*z*), but the justice's clerk must be called to prove that he did not take down in writing what the prisoner said (*a*).

But if in fact the statement was not taken in writing, parol evidence may be given of the prisoner's declarations. In 1790 H. and two others were tried for burglary. The evidence was clear against the two others;

(*v*) R. *v.* Bond, 1 Den. 517; 19 L. J. M. C. 138.

(*w*) R. *v.* Dewhurst, 1 Lew. 47. R. *v.* Hirst, 1 Lew. 47. R. *v.* Reed, M. & M. 403. R. *v.* Layer, 16 St. Tr. 215. R. *v.* Lambe, 2 Leach, 257. R. *v.* Telicote, 2 Stark. (N. P.) 483. R. *v.* Foster, 1 Lew. 46. R. *v.* Jones, 7 C. & P. 239. R. *v.* Thomas, 2 Leach, 637. R. *v.* Pressly, 6 C. & P. 183.

(*x*) R. *v.* Jacobs, 1 Leach, 309. R. *v.* Fearshire, ibid. 202. R. *v.* Hinxman, ibid. 310, note (*a*). R. *v.* Fisher, ibid. 311, note (*a*). R. *v.* Hollingshead, 4 C. & P. 242. Phillips *v.* Wimburn, 4 C. & P. 273. R. *v.* M'Govern, 5 Cox, 506.

(*y*) Phillips *v.* Wimburn, 4 C. & P. 273, Tindal, C.J.

(*z*) R. *v.* Isaac Packer, Gloucester Spr. Ass. 1829, MSS. C. S. G. In this case the witness stated that no examination was taken in writing, and Parke, J., said: 'As all things are to be presumed to be rightly done, I must have the magistrate's clerk called to prove that no examination of the prisoner was taken in writing, and unless you can clearly shew that the magistrate's clerk did not do his duty, I will not receive the evidence.' So in R. *v.* Phillips, Worcester Sum. Ass. 1831, MSS. C. S. G., where a witness stated that he believed that what the prisoner said before the magistrate was not taken down in writing, but he was not quite certain that that was so; Bosanquet, J., said that the justice's clerk ought to be called to shew whether anything had been taken in writing, as it must be presumed that he had done his duty; and the clerk was accordingly called, and proved that nothing was taken in writing, and then parol evidence was received of what the prisoner said before the magistrate.

(*a*) See Taylor, Ev. (10th ed.) s. 892. It would seem on the same ground that where there is no magistrate's clerk present, the magistrate should be called to prove that he did not take the examination in writing. See R. *v.* Harris, 1 Mood. 338, *post*, p. 2221, where this course was adopted. C. S. G. But it seems, although there are cases to the contrary, that parol evidence might be given to show what the prisoner's statement was. R. *v.* Wheeley, 8 C. & P. 250; R. *v.* Owen, 9 C. & P. 83; R. *v.* Rivers, 7 C. & P. 177; R. *v.* Bentley, 6 C. & P. 148, and MSS. C. S. G.

but, excepting one or two slight circumstances, certainly not sufficient of themselves to have put H. on his defence. The only evidence against him was his examination before the magistrate, which was not taken in writing, either by the magistrate or by any other person, but was proved by the *viva voce* testimony of two witnesses who were present, and which amounted to a full confession of his guilt. On a case reserved on the question whether this evidence of the confession was properly received, all the judges (except Gould, J.), were of opinion that the conviction was right (*b*). A statement made before a magistrate and reduced to writing will not exclude evidence of a previous parol declaration not reduced into writing (*c*).

Before the Act of 1848 the prisoner was always at liberty, either by cross-examination or otherwise, to shew that his statement was not admissible; and although sect. 18 of the Act of 1848 says that the statement may be given in evidence unless it shall be proved that the justice did not sign it, this cannot be construed as debarring the prisoner from proving that the statement was induced by promises or threats, or improperly and untruely taken down. The utmost effect that can reasonably be given to the section is that the statement, when produced, shall be in precisely the same position as if a witness had proved the handwriting of the justice to it.

The circumstance of some part of the prisoner's statement being omitted by the magistrate will not, it seems, render the examination inadmissible if it has been read over to the prisoner, and he has assented to its correctness (*d*).

The prisoner is not precluded from shewing, if he can, that omissions have been made to his prejudice; for the written statement is used against him as an admission, and admissions must be taken as they were made, the whole together, not in pieces, nor with partial admissions. Even the prisoner's signature ought not to stop him from proving, if he can, such omissions; if the truth is that omissions were made to his prejudice, the fact should be proved, and the prejudice suffered no longer to exist (*e*).

Parol evidence is admissible to add to the written record of statements made by the prisoner while before a magistrate, and which are not contained in such writing. Thus statements made by a prisoner while cross-examining witnesses at the preliminary inquiry if not put upon the depositions may be proved by parol evidence (*f*).

In R. *v.* Harris (*g*), upon an indictment against Butler, Harris, and Evans for stealing a ewe, the property of Bennett, it appeared that

(*b*) R. *v.* Hall, cited by Grose, J., in R. *v.* Lambe, 2 Leach, 559. R. *v.* Huet, 2 Leach, 821. R. *v.* Shillcock and Barnes, Stafford Spr. Ass. 1832, MSS. C. S. G.

(*c*) R. *v.* M'Carty, 2 Stark. Ev. 38. See also R. *v.* Reason and Tranter, 16 St. Tr. 1, 35, Eyre, J. R. *v.* Tarrant, 6 C. & P. 182.

(*d*) Joy, 93, citing Milward *v.* Forbes, 4 Esp. 170, where an examination of the defendant before commissioners of bankruptcy was admitted in evidence by Ellenborough, C.J., although it was proved that the defendant had said more than was taken down, the commissioners having taken down only what they considered relevant, upon the ground that the party, having signed it after he heard it so stated from his own words, and read over to him before he signed it, it must be taken to be a statement of facts admitted by him.

(*e*) Rosc. Crim. Ev. (13th ed.) 48.

(*f*) R. *v.* Taylor, 13 Cox, 77, Brett, J.

(*g*) 1 Mood. 338.

Harris, Butler, and Evans were taken before a magistrate about stealing three sheep of Bennett, Pennell, and Price; at the meeting Bennett, Pennell, and Price were all present. The magistrate identified the examinations, and said that was all that was taken down; that was what each of the prisoners said; it was all in his writing, he had no clerk; the informations were taken as to the three sheep before Evans and Harris were examined; he took down everything that they said that he heard. The paper produced contained everything as he believed that transpired before him, and he intended to take down all that was said to him, and he believed he did. The room was very full. The papers produced were the depositions of Pennell, Price, and Bennett, as to the stealing of their sheep respectively, and Butler's examination and confession as to each offence. The following were the examinations of Harris and Evans:—'J. Harris, being called upon for his defence, voluntarily saith that he was concerned in stealing a sheep, the property of J. Pennell, but that J. Butler was the foreleader in the business.' 'W. Evans voluntarily saith that he did not kill the sheep, but that he helped to carry it away.' A witness stated that Mr. C., the magistrate, examined Harris and Evans, and he wrote; that when Harris was asked about Bennett's sheep, Mr. C. was at the table with his paper and pen before him, but his hand was not going. What Harris said about Bennett's sheep was said to Mr. C. Mr. C. heard what Harris and also what Evans said about Bennett. He took down in writing what they said about Bennett's sheep (*h*); what they said they said to Mr. C. Harris said he was connected with the taking of Bennett's sheep. Harris said they took a neddy out of the road, and put the sheep upon him. Evans said he helped to take the sheep—Bennett's sheep; this was addressed to Mr. C. Another witness said that he heard Harris say that he helped to take Bennett's sheep; that he addressed Mr. C.; that Harris said to Evans, 'Speak the truth, you may as well speak the truth as not;' that Evans then said he helped to do it; he helped to take Bennett's sheep: what Evans said was addressed to Mr. C. The evidence of these two witnesses was objected to, but received; and, upon a case reserved upon the questions whether, as Harris and Evans had made a confession as to Pennell's sheep, which had been taken down in writing by the magistrate, any confession as to Bennett's sheep could be supplied by parol evidence; and whether, as the magistrate had taken down in writing everything he heard, and he intended to take down all that was said to him, and he believed he did, parol evidence could be given of anything else that was addressed to the magistrate; the judges were unanimously of opinion that the evidence, being precise and distinct, was properly received (*i*).

When the defendant in his statement at the preliminary inquiry (which at the trial was put in for the Crown), stated that the deposition of a witness, which had been taken at the same time, and before the same

(*h*) *Quære*, whether this should not be 'Pennell's sheep?' My MSS. note has no such statement of this witness, and 'Bennett' might easily be printed erroneously instead of 'Pennell.' C. S. G.

(*i*) Cf. Rowland *v.* Ashby, Ry. & M. 231. Venafra *v.* Johnson, 1 M. & Rob. 316. Jeans *v.* Wheedon, 2 M & Rob. 486. But see R. *v.* Walter, 7 C. & P. 267. R. *v.* Morse, 8 C. & P. 605. R. *v.* Lewis, 6 C. & P. 161.

magistrate, was correct, Patteson, J., held that the deposition of the witness might be put in and read as a part of the defendant's statement, although the witness had been examined on the trial as a witness for the prosecution, and although possibly his deposition might have the effect of contradicting his evidence on the trial (*j*). But unless the statement of a prisoner specifically refers to the deposition of a particular witness, putting such statement on the part of the prosecution will not entitle the prisoner to have any of the depositions read, although they were all taken before the prisoner made his statement (*k*).

Sect. 18, *supra*, does not apply to a voluntary statement made by a prisoner in the course of the preliminary inquiry, and before the conclusion of the case for the prosecution. Such a statement is admissible against the prisoner at the trial and may be proved by anyone who heard it (*l*); and it is immaterial whether it is made before, during, or after remand (*m*). Where a policeman took a prisoner before a magistrate, and applied to have her remanded, and produced a cash-box and iron chisel, stating his belief that it was with that instrument that the prisoner had opened the box; upon which the prisoner spontaneously, and without any question having been put to her, said that she had not opened the box by means of the chisel, but by a hammer; and no examination was taken before that magistrate, who merely granted a remand; it was held that the statement of the prisoner was admissible against her, although she had not been cautioned before she made it, and might be proved by the policeman (*n*).

One of two prisoners was committed before the other was apprehended, and the depositions against the one prisoner were read over before the magistrate to the other prisoner, and after they were read that prisoner went across the room to a witness, who was called, and said something to him so loud that it might have been heard by the magistrate if he had been attending, and the magistrate proved the examination of the prisoners before himself, and the statement to the witness was not contained in it. Parke, J., held that what the prisoner had said to the witness might be given in evidence (*o*). 'An incidental observation made by a prisoner in the course of his examination before a magistrate, but which does not form a part of the judicial inquiry so as to make it the duty of the magistrate to take it down in writing, and which was not so taken down, may be given in evidence against him at the trial' (*p*). A woman was before the magistrates on a charge of burglary, and in the course of the examination of a witness a glove was produced, which had been found on the man with part of the stolen property in it, on which the man said, 'She gave me the glove, but she knew nothing of the

(*j*) R. *v.* John, 7 C. & P. 324. The report does not state at whose instance the deposition was put in.

(*k*) R. *v.* Pearson, 7 C. & P. 671. Law, Recorder, after consulting Patteson and Williams, JJ.

(*l*) R. *v.* Watson, 3 C. & K. 111. R. *v.* Bell, 5 C. & P. 162.

(*m*) R. *v.* Stripp, Dears. 648, Jervis, C.J. R. *v.* Bell, *ubi sup.* R. *v.* Lambe, 2 Leach, 552.

(*n*) R. *v.* Stripp, *ubi sup.* R. *v.* Watson, *ubi sup.*

(*o*) R. *v.* Johnson and Spiers, Gloucester Spr. Ass. 1829. MSS. C. S. G. This case was relied upon at the trial of R. *v.* Harris, *ante*, p. 2221, by counsel for the Crown. MSS. C. S. G.

(*p*) R. *v.* Moore, Matth. Dig. Cr. L. 157, Parke, B.

robbery.' The depositions having been put in at the trial, and the clerk to the magistrates having proved them, and there being no such statement in the depositions or examination of the prisoner, Erskine, J., held that what the man said might be proved by parol evidence (*q*).

On the examination of a prisoner on a charge of murder, a witness stated that she had bought a pot of the prisoner, upon which one of the magistrates asked what sort of a pot it was, and the prisoner, although the question was not particularly addressed to him, made an answer. It was submitted that no evidence could be given of what passed before the magistrate except the depositions. Coleridge, J., said: 'What the magistrate himself said would not be taken down. That may certainly be asked.' It was then submitted that the statement made by the prisoner and signed by the magistrate must be put in before it could be asked what the prisoner said. Coleridge, J., said: 'There seems to be no necessity for putting in the written examination. It is not what the prisoner says when called upon for his defence that is asked, but an observation made in the course of the case, and as that would not be put down as part of his statement, I am clearly of opinion that it is receivable.' The clerk to the magistrate then proved that he took down the examination of the witnesses, and that he took down what the prisoners said when they were asked what they had to say for themselves, but that he did not take down anything which either of the prisoners said before the witnesses had been all examined. Coleridge, J., said: 'At the close of the evidence for the prosecution the prisoner is asked if he wishes to say anything, and if he does, it is taken down, and the evidence of that statement is the written examination; but if a prisoner says something while the witnesses are under examination that does not stand on the same ground, I shall receive the evidence' (*r*).

Statements made by a prisoner while cross-examining a witness before the magistrate and reduced to writing as part of the depositions, must be proved by the depositions and not by the witness cross-examined (*s*).

The prisoner was indicted for receiving goods knowing them to have been stolen. There was a second indictment against him for breaking into and stealing from a church. When examined before the magistrate on this second charge, he made a confession as to the first charge. This was taken down in the usual manner, read over to the prisoner, and signed by the magistrate; but the prisoner refused to sign it. It was objected that 7 Geo. IV. c. 64 (rep.) only made these confessions evidence, on the authority of the magistrate's signature, when the confession was made on an examination having reference to the charge in support of which the confession was sought to be given in evidence. Erle, J., held that it mattered not for what purpose the confession was made; if it were made before a magistrate, taken down in the regular manner, and received the magistrate's signature, it thereby became valid evidence

(*q*) R. *v.* Hooper, Gloucester Sum. Ass. 1842. The clerk to the magistrates could not remember the observation, and it was proved by two policemen. MSS. C. S. G.

(*r*) R. *v.* Spilsbury, 7 C. & P. 187. Two cases bearing the other way are reported, but they cannot be supported. See R. *v.* Weller, 2 C. & K. 223. R. *v.* Carpenter, 2 Cox, 228.

(*s*) R. *v.* Taylor, 13 Cox, 77, Brett, J.

against the prisoner upon the trial of any other charge than that upon the examination in reference to which such confession had been made (*t*). Where the prisoner gives evidence before the magistrates the prosecution may at the trial put in the deposition containing such evidence (*u*).

Where the prisoner calls witnesses whose evidence is inconsistent with his statement before the magistrate, his statement may be put in evidence in reply. On an indictment for robbery the prisoner's coat was proved to have been bloody, and a witness for the prisoner stated that on the day before the robbery he had observed that the prisoner's coat was bloody, and the prisoner gave an account of how it became so; and it was held that the prisoner's statement before the magistrate, in which he accounted for the blood on his coat in a different manner, was admissible in reply to the evidence given by the prisoner (*v*).

The prisoner's statement is evidence against him, but not for him; and therefore it cannot be put in evidence on his behalf (*w*).

(c) *Taking Depositions.*

It is a general principle of the law of evidence that a deposition is not admissible against any person in a criminal (or civil) case unless (i) it was taken on oath in a judicial proceeding and (ii) the person against whom it is to be used had an opportunity of cross-examining the defendant (*x*). The mode of taking depositions on a criminal charge is regulated by the enactments set out *ante*, pp. 2213, 2214. Sect. 17 does not apply to the unsworn evidence of children (*y*). Under sect. 17 the oath must be administered before the witness is examined, and the deposition must be taken in the presence of the justice and of the prisoner, and the prisoner must have an opportunity of cross-examining the defendant in the presence of the justice (*z*).

In R. *v.* Watts (*a*) it was proved that a deposition was taken in accordance with the invariable and long-established practice of the magistrate's Court at Liverpool, and that when the prisoner was before the magistrate he was defended by an attorney, who had a full opportunity of cross-examining, and did cross-examine, the witnesses. A note of the evidence given before the magistrates, consisting of the names of the witnesses, and the heads of what each could prove, was taken by the magistrate's clerk. Afterwards the prisoner and the witnesses were taken into a room, and there another clerk, who had not been present at the examination before the magistrate, examined the witnesses from the note, and there wrote down the answers, and the witnesses then signed the papers so written by the last-mentioned clerk. The prisoner's attorney was not there, though he might have been if he liked; and

(*t*) R. *v.* Pomeroy, 1 Cox, 231. The constable proved the facts in this case.

(*u*) R. *v.* Boyle, 20 T. L. R. 192, Jelf, J.

(*v*) R. *v.* White, 2 Cox, 192. Pollock, C.B., after consulting Coleridge, J.

(*w*) R. *v.* Haines, 1 F. & F. 86, Crowder, J.

(*x*) Att.-Gen. *v.* Davison, 1 M'Clel. & Y. 169, Hullock, B. R. *v.* Smith, 2 Stark. (N. P.) 211, note (*a*). R. *v.* Woodcock, 1 Leach, 500. R. *v.* Dingler, 2 Leach, 561. R. *v.* Paine, 1 Salk. 281; 5 Mod. 163, cited by Kenyon, C.J., in R. *v.* Eriswell, 3 T. R. 722. R. *v.* Errington, 2 Lew. 142, Patteson J. R. *v.* Radbourne, 1 Leach, 457.

(*y*) R. *v.* Pruntey, 16 Cox, 344. As to taking unsworn depositions of children, see the Children Act, 1908 (8 Edw. VII. c. 67), s. 30, *ante*, Vol. i. p. 919, and *post*, pp. 2268, 2294.

(*z*) See Phipson, Ev. (4th ed.) 442.

(*a*) L. & C. 339.

the prisoner was not asked if he would then cross-examine the witnesses, and did not cross-examine them. Afterwards the prisoner and the witnesses were again taken before the magistrate, and the evidence so taken down by the clerk in the room in the absence of the magistrate was read over to them; the prisoner was not then asked if he would cross-examine the witnesses, and his attorney was not then there, though he might have been if he had liked; the magistrate then cautioned the prisoner, who then signed his own statement, and the magistrate then signed the papers so written as last aforesaid. The deposition thus taken was admitted at the trial, but on a case reserved was held not to have been taken in conformity with the statute and not to be admissible at the trial.

The whole of the depositions must be taken in the presence of the accused that he may hear and cross-examine on all that is sworn against him (*b*).

Where mere minutes of what each witness said before the magistrate were taken down, and the minutes were afterwards written out in the shape of depositions by a clerk in the presence of the witnesses, but in the absence of the prisoners and magistrate, and afterwards read over in the presence of the prisoners and magistrate, it was objected that the depositions were not taken according to this section. Wilde, C.J., said 'the prisoner had a right to compare the verbal statements made with the written statements produced, which he could not do unless all the written statements produced had been made verbally in his presence.' And Maule, J., said: 'That section 17 makes the depositions receivable in evidence, upon its being first proved that they were taken in the presence of the person accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness. Therefore you would say that such full opportunity did not exist in the present case. Suppose a question to be put to the witness in the absence of the prisoner, which question involved two alternatives, and the answer to be "[illegible];" the magistrate's clerk might think the answer applied to a different alternative from that to which the prisoner would have applied it, had he been present, and had an opportunity of fixing it to such alternative by cross-examination; and the magistrate's clerk might have taken down the answer in such a form as to make it seem applicable to the wrong alternative. You contend that what they call minutes would have been the depositions had they been signed, and that the minutes not being signed, there are no depositions at all.' It, however, was unnecessary to decide the point, as the case was determined in favour of the prisoners on another ground (*c*).

(*b*) See Phipson, Ev. (4th ed.) 422.

(*c*) R. *v.* Christopher, 1 Den. 536; 2 C. & K. 994. In R. *v.* Smith [1817], R. & R. 339; 2 Stark. (N. P.) 208; Holt (N. P.) 614, the greater part of the deposition of the deceased, in a case of murder, had been reduced into writing in the absence of the prisoner, but the deceased was afterwards resworn in the prisoner's presence, and the deposition read over and stated by the deceased to be correct, and the rest of the deposition taken in the ordinary way, in the presence of the prisoner, who was asked whether he chose to put any questions. It was held by Richards, C.B., that the deposition was admissible, and a great majority of the judges, upon a case reserved, were of opinion that the evidence had been properly received. Cf. R. *v.* Hake, 1 Cox, 226. In R. *v.* Forbes, Holt (N. P.) 599, where the constable stated, upon producing the deposition, that the prisoner was not

On a trial for murder, Mr. Cooke, a magistrate, produced an information, and stated that he went to the house of the deceased, and found him on a pallet in a very weak state, and that the prisoner was brought to the house where the deceased was; in consequence of the state in which the deceased was, he could say but very little at a time, and Mr. Cooke first took his information without the prisoner being present, and swore the deceased to it. Mr. Cooke then had the prisoner, who was handcuffed, brought in, and had the handcuffs taken off. Owing to the exhausted state of the deceased, the prisoner had to be brought close to the bed to hear what he said. Having then slowly read over the information to the deceased in the presence of the prisoner, and asked the deceased if it was true, and having been answered in the affirmative by him, Mr. Cooke then *reswore the deceased to his information* in the presence of the prisoner, and read over the information of the deceased to him, and while he was reading it the prisoner asked him to stop at some statement contained in it: but Mr. Cooke told him he had better read it over to the end, and that he would then read the information paragraph by paragraph distinctly to him, and that the prisoner could then put any question he wished to the deceased on each paragraph as read; that, having so read over the information, he read it over again paragraph by paragraph to the prisoner in the hearing of the deceased, and that part of it was read a third time to the prisoner; that the prisoner, having been previously duly cautioned by him, asked several questions with reference to the matters sworn in the information, and Mr. Cooke took down each question and answer as nearly as possible in the very words of the parties. The deposition was received in evidence; but, upon a case reserved, it was held that it ought not to have been received (*d*).

present till a certain part of the deposition, distinguished by a cross, at which period he was introduced and heard the remaining part of the examination; and when it was concluded, the whole of the deposition was read over to the prisoner. Chambre, J., refused to admit that part of the deposition previous to the mark. In R. *v.* Beeston [1854], Dears. 405, Alderson, B., said: 'In R. *v.* Smith (*ubi sup.*), I contended, on the authority of R. *v.* Forbes, that the deposition was not admissible, as the prisoner had not a sufficient opportunity of cross-examination; that he had no opportunity of hearing the witness give his answers, and seeing his manner of answering; and that so much of the evidence as had been taken in the prisoner's absence was inadmissible; and I still think I was right in that objection.' See R. *v.* Calvert, 2 Cox, 491. In R. *v.* Johnson [1846], 2 C. & K. 394, on an indictment for robbery, the depositions were not written either in the presence of the magistrate or of the prisoner, but the clerk to the magistrate examined all the witnesses, and took down what they said, neither the magistrate nor the prisoner being present; but that when the magistrate and the prisoner arrived, the depositions were read over to the witnesses in the presence of the magistrate and the prisoner, and the prisoner was then asked if he had any question to put to any of the witnesses. Platt, B., said: 'This is a very irregular and improper mode of taking depositions, and very unfair to the party accused. The prisoner ought to hear all the questions put and answered, for then he may very possibly explain the circumstances; but it is monstrous that he should have a long bead roll of statements read over to him, and then be asked on the sudden if he has any question to put, and then probably, unable on the instant to extract from his accuser or the witnesses an explanation of every apparently criminating circumstance, be told that he is committed. Such a mode of proceeding does not afford to the party accused that fair play which the due administration of the law requires.' It does not appear whether any deposition was tendered in evidence.

(*d*) R. *v.* Walsh [1850], 5 Cox, 115 (Ir.). There was considerable difference of opinion among the judges in this case. Monahan, C.J., was of opinion that 'what the Act of Parliament requires is, not that a witness shall depose to a written statement, but

The prisoner and prosecutor were present before the magistrate, and the prosecutor made a statement to the magistrate, which was not taken down in writing, and the prisoner's attorney asked the prosecutor a few questions in cross-examination, which were not taken down in writing. The case was then adjourned to the next day, when the prisoner was brought up before the same magistrate. The prosecutor was again sworn, and the magistrate's clerk read over to him a written deposition which had been taken previously to the second hearing. The prisoner's attorney cross-examined the prosecutor, and that cross-examination, or some part of it, was taken down by the clerk, and from his notes afterwards a fair copy of the cross-examination was taken down on the copy which had been previously read. Hill, J., held the deposition admissible (*c*).

A witness had been examined before a magistrate, who had asked the prisoner whether she had any questions to put, but it seemed uncertain whether she was so asked with reference to the particular examination of the witness, or after all the depositions had been read over; and the examinations of the witnesses had been taken in writing before the arrival of the magistrate; and were then read over in the presence of the prisoner, when the prisoner was asked if she had any questions to put. The deposition was held inadmissible; (i) because it was the duty of the magistrate to ask the prisoner whether she would put any questions with reference to the particular witness; (ii) the examination of the witness having been put in writing before the arrival of the magistrate, the reading

shall, in the presence of the accused, give a statement on oath, which the magistrate shall afterwards reduce into writing, and that the accused shall have an opportunity of cross-examining him, under the sanction of the same oath, whereby he swears to the information,' that the present case and R. *v.* Smith agreed in this point, that in both the witness was originally sworn in the absence of the accused; but the place where the present case failed was that, when the prisoner was brought in, the information was not taken on oath in his presence. Secondly, on the evidence of Mr. Cooke, the inference plainly arose that the oath was merely an oath to the truth of the information which had been sworn, and therefore did not extend to the answers given on cross-examination. Perrin, J., agreed with Monahan, C.J., on the first point; but added: 'The prisoner was kept handcuffed in another place, and here, deliberately and designedly, the magistrate proceeded, contrary to the fair import of the statute, to take the deposition of a party not on his oath, in the absence of the prisoner, who was within call, and who was designedly kept back and not called.' Ball, J., gave no opinion on the first point, but agreed with Monahan, C.J., on the second. If the magistrate had been silent as to the form of the oath which he administered, it would have been assumed that the oath was in the usual form; but here the magistrate stated that he reswore the deceased to the truth of his information, thus confining the oath to the truth of the information; and, if this were so, the subsequent questions and answers were not under oath. Torrens, J., was of opinion that R. *v.* Smith, R. & R. 339, governed the first point, and that the oath extended to the whole, and therefore the deposition was rightly admitted. Pennefather, B., agreed with Torrens, J., on the first point, but entertained very serious doubts upon the second point. This case was tried in 1850, after 12 & 13 Vict. c. 69, had come into operation, though Perrin, J., states that 9 Geo. IV. c. 54, was then in operation. C. S. G.

(*c*) R. *v.* Bates [1860], 2 F. & F. 317. Hill, J., said: 'In the London Police Offices, where a great number of charges were daily heard, it was the constant practice to have the abbreviated notes taken during the examination of a witness by the magistrate's clerk, fair copied in full in an adjoining room, and that copy afterwards read over in the presence of the prisoner and signed by the witness. He thought such a practice not only convenient, but within the spirit and intention of the Act, as the prisoner had full opportunity as well as the witness of objecting if the evidence were put down incorrectly.' See *ante*, p. 2226.

it over in her presence did not give the prisoner a proper opportunity of cross-examination; for she had a right to hear the evidence given step by step, and so to have time to consider what questions to put (*f*).

A magistrate's clerk proved that he had taken down the examination of a witness before the magistrate, and he had no doubt that the attorney, who attended before the magistrate on behalf of the prisoner, had cross-examined the witness, but he had not taken down anything as cross-examination; but had taken down everything the magistrate considered material. Erle, J., held that the deposition was admissible; as all the requisites of the statute had been complied with. He did not think it the duty of the magistrate to take down every word; for then it would be necessary to conduct the examination by question and answer (*g*).

Where it is proved that the prisoner was present when the depositions were taken, although the law will presume that, as he was present, he had a 'full opportunity' of cross-examining the witness within section 17, *ante*, p. 2213, evidence may nevertheless be offered to prove that he had not such full opportunity, so as to render the depositions inadmissible (*h*).

When the deceased was examined before the magistrate she was in a rapid decline, and stated the facts of the assault upon her by the prisoner very concisely. On a question being put to her by the clerk, she said, 'I can't answer,' and was evidently in a sinking state. Down to this period she had answered the questions satisfactorily. The clerk then said he should not put any further questions; and it being stated that the prisoner's attorney, who was present, must have an opportunity of cross-examining the witness, he said, 'I shall decline putting any question; the child is evidently not in a fit state to answer.' The deposition was then signed by the witness with her mark. There was no subsequent examination, and the child died soon afterwards. Platt, B., inclined to think the deposition ought not to be received (*i*).

(d) *Form of Deposition—Signing Same.*

Upon an indictment for murder the deposition of a witness, examined before the committing magistrate, and since dead, was tendered in evidence. There was a caption or heading at the commencement of the body of the depositions, but there was no caption at the head of this particular deposition; and it was objected that the deposition was, on this account, inadmissible. Alderson, B., said: 'All that is necessary in this case is to shew that the deposition in question was regularly

(*f*) R. *v.* Day [1852], 6 Cox, 55, Platt, B.

(*g*) R. *v.* Hendy [1850], 4 Cox, 243. See discussion of this case in R. *v.* Jackson, 3 Australia C.L.R. 740.

(*h*) R. *v.* Peacock, 12 Cox, 21, Brett, J. The prisoner's counsel gave evidence to shew that at the time the deposition was taken the prisoner was insane. But see Taylor, Ev. (10th ed.) s. 482. Roscoe, Cr. Ev. (13th ed.) 60.

(*i*) R. *v.* Hyde [1848], 3 Cox, 90. Platt, B., however, received the deposition, and would have reserved the point; but the prisoner was acquitted. There seems no reason to doubt that if by any insuperable obstacle the prisoner is prevented from having a full cross-examination, the deposition is inadmissible, and the only question in such a case seems to be whether or not in fact the prisoner was prevented from having such full cross-examination.

taken under the statute; the heading applies to all the depositions.' And the deposition was admitted (*j*).

The prisoner was indicted for obtaining by false pretences a promissory note for £50. Upon the trial the deposition of Mary Rowe was put in, after proof that it was taken by the committing justice in the presence of the prisoner, and that she had a full opportunity of cross-examining M. Rowe; that it was signed by the justice, and that M. Rowe was, at the time of the trial, so ill as not to be able to travel. The charge preferred before the justice was that the prisoner had obtained the promissory note and other valuable securities by means of false pretences, and of this charge the prisoner was informed by the justice. The caption of the deposition of M. Rowe was 'Devon to wit. The examination of M. Rowe, wife of W. S. Rowe, of, &c., taken on oath this 14th day of February, A.D. 1849, at, &c., before the undersigned, one of Her Majesty's justices of the peace for the said county, in the presence and hearing of H. L. (the prisoner), who is now charged before me this day for obtaining money and other valuable security for money from the said M. Rowe,' &c. It was objected that the charge set forth in the caption is obtaining money and valuable securities, but whether legally or illegally is not stated; and no offence was therefore shewn, and the said deposition consequently was not receivable in evidence. The objection was overruled; and, upon a case reserved, Wilde, C.J., delivered judgment as follows: 'The judges are unanimously of opinion that the objection is not valid, and that the deposition was properly received in evidence. The objection is not that the evidence as set forth in the examination did not sufficiently appear to relate to the charge, upon which the prisoner was being tried, so as to warn and apprise her of the matter to which her cross-examination should be directed, but only that the title of the examination did not with sufficient distinctness state the charge against her. The title of the deposition states the occasion of its being taken, and the matter to which it refers, and there is no authority requiring any title, or as it is called caption, to the examination; and it is sufficient if it be described as the examination of the witness, and the evidence refers to the charge upon which the prisoner may be upon his trial; and as no objection was raised that the deposition was defective in that respect, we think the deposition was properly received in evidence. It may, however, not be improper to observe that the case states that the charge preferred against the prisoner was that of obtaining the promissory note and securities by means of false pretences, and that the prisoner was informed of that charge by the committing justice, and that she had a full opportunity of cross-examining the witness' (*k*).

Where a woman, having been violated, cut her throat, and a magistrate was sent for, and in the presence of the prisoners, who were brought into the room, she made a statement on oath, which was taken down, read over, and signed by her. The prisoners did not in fact cross-examine her. The depositions of the other witnesses were taken before another magistrate on a charge of rape on the deceased a few days afterwards.

(*j*) R. *v.* Johnson [1847], 2 C. & K. 354. Cf. R. *v.* Young, 3 C. & K. 106.

(*k*) R. *v.* Langbridge [1849], 1 Den. 448: 2 C. & K. 375.

There was no caption to the deposition of the deceased; but it was found attached to the depositions of the other witnesses, and there was a caption to these depositions, stating them to have been taken before the other magistrate. It was urged that the want of a proper caption could be supplied by parol evidence; but it was held that sect. 17, *ante*, p. 2213, authorized taking depositions in a particular way; and unless it appeared upon the caption that the prisoners were charged with an indictable offence, the document was inadmissible (*l*).

Under sect. 17, the magistrate is to take 'the statement' of the witness in writing, and the form in the schedule directs the deposition to be taken as nearly as possible in the words the witness uses. It is not necessary to take down immaterial and wholly irrelevant statements (*m*). If the prisoner or his counsel cross-examines the witnesses when before the magistrate, the answers of the witness to the cross-examination ought to be taken down by the magistrate, and returned to the judge (*n*).

The statute requires the deposition to be signed by the person making it (*o*). But where a deposition had been read over to and assented to by a witness who could not sign by reason of injuries to her hands it was admitted on proof of her death (*p*). In such a course, the justice, before himself signing the deposition, should make an entry explaining why the signature of the witness is absent.

On a trial for manslaughter, the deposition of the deceased purported to have been made in the presence of the prisoner, and was signed by the deceased with a cross, he being a marksman. By mistake the clerk wrote the prisoner's name to the mark, so that it *primâ facie* appeared to be the deposition of the prisoner. On a case reserved it was contended that this was a patent ambiguity, which could not be explained by oral testimony. It was answered that the document was complete when the deceased put his mark to it, and that signature could not be vitiated by what another person wrote: and it was held that the deposition was properly received in evidence (*q*).

(*l*) R. *v.* Newton [1859], 1 F. & F. 641. Hill, J., after consulting Watson, B. A document inadmissible under the statute as a deposition, might be used to refresh the memory of a person who wrote it upon hearing the evidence given, and he might prove what the deceased stated. Even if there were no writing at all, the evidence given by the witness in the presence of the prisoners might be proved; for the general rule is, that 'where a witness already examined in a judicial proceeding between the same parties is since dead, his former examination is admissible as secondary evidence'; 1 Stark. Ev. 61; and although the new statute clearly makes a deposition taken in pursuance of it the best evidence of what the witness stated, yet, if through the neglect of the justice or his clerk no deposition, or an irregular deposition, be taken, there is nothing in that statute to exclude the proof of the statement of the witness by other means. See R. *v.* Galvin, 10 Cox, 198 R. *v.* Clarke, 2 F. & F. 2.

(*m*) See R. *v.* Hendy, 4 Cox, 243, Erle, C.J., *ante*, p. 2229. 7 Geo. IV. c. 64, s. 2 (rep.), provided that magistrates shall take 'the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing.' R. *v.* Coveney, 7 C. & P. 667, Alderson, B. R. *v.* Thomas, 7 C. & P. 817. R. *v.* Grady, 7 C. & P. 650. R. *v.* Weller, 2 C. & K. 223, Platt, B.

(*n*) R. *v.* Potter, 7 C. & P. 650, note. Gaselee, J., and Vaughan, B.

(*o*) Before the Act such signature was not necessary to make a deposition admissible. See R. *v.* Flemming, 2 Leach, 854. R. *v.* Russell, 1 Mood. 356.

(*p*) R. *v.* Holloway, 65 J. P. 712. See Taylor, Ev. (10th ed.), ss. 482, 485. Phipson, Ev. (4th ed.) 449.

(*q*) R. *v.* Mullen, 9 Cox, 339 (Ir.). The deposition was headed, 'Deposition of James Brennan,' and began, 'Taken in the presence and hearing of Peter Mullen.'

The magistrate himself is required (by sect. 17) to subscribe the examinations and informations taken by him: and this he ought to do at each examination, and not to defer it till he determines on committing (*r*).

Where a deposition had 'Kent to wit' in the margin, and purported to be 'taken on oath before us of Her Majesty's justices of the peace for the said county,' and concluded, 'This examination was taken before us in the presence of (the prisoner) at Dartford, on the day and year first above mentioned—HUGH JOHNSON;' Maule, J., was of opinion that this document was inadmissible under sect. 17, as it did not purport to be signed by, or to have been taken before, any justice of the peace for the county in which the prisoner was examined, although it was offered to be proved that Hugh Johnson was a magistrate, and acting as such when the examination was taken; for such proof would not make the deposition purport to be signed otherwise than it did purport (*s*).

It is not necessary that the separate deposition of each witness should be signed by the justices, but it is sufficient if the depositions are signed as a body by the justices, according to the conclusion of schedule M. to the Act, provided that all the depositions are attached together when signed by the magistrate (*t*).

(e) *Deposition Admissible when Witness dead or so ill as not to be able to Travel.*

Where the witness is dead the deposition, if duly taken under sect. 17, is admissible (*u*).

The words of sect. 17, 'so ill as not to be able to travel,' mean 'not reasonably fit by reason of illness to travel to the Court.' It is not necessary to prove that travelling would be dangerous to life. The matter is one for the judge in his discretion to decide; and if to his mind, exercising his discretion on the facts proved, the evidence of illness is sufficient, his decision ought not to be interfered with (*v*). It would seem clearly within the powers of the judge instead of receiving the deposition to adjourn the trial till the witness can attend (*w*). The evidence of illness is usually and properly given by a medical man who has recently seen the witness: but medical evidence is not essential if other evidence of

(*r*) R. *v.* Mayor of London, 5 Q.B. 555, 1 Sess. Cas. 40.

(*s*) R. *v.* Miller [1850], 4 Cox, 166. This decision may be right if it be confined to deciding that such an informal document is inadmissible under the statute as a regular deposition; but the deposition might have been used to refresh the memory of the justice's clerk who took down the evidence, and he might have proved what the witness deposed to before the justices.

(*t*) R. *v.* Parker, L. R. 1 C. C. R. 225. R. *v.* Carroll, 11 Cox, 322. R. *v.* Young, 3 C. & K. 106. R. *v.* Osborn, 8 C. & P. 113. Where the depositions were on separate sheets, and were signed only at the end by the magistrate, the deposition of one of the witnesses who was dead, was admitted in evidence, although the sheets were not fastened together at the time of the signature by the magistrate, but had been afterwards attached together by the magistrate's clerk. R. *v.* Lee, 4 F. & F. 63, Pollock, C.B. Where the cross-examination was at a subsequent time to the examination in chief, and the whole deposition was held to be irregular, as the cross-examination was not signed by the magistrate. R. *v.* France, 2 M. & Rob. 207.

(*u*) See R. *v.* Katz, 64 J. P. 807. R. *v.* Holloway, 65 J. P. 712, *post*, p. 2248.

(*v*) R. *v.* Stephenson, L. & C. 165; 31 L. J. M. C. 136.

(*w*) See R. *v.* Tait, 2 F. & F. 553, Crompton, J.

equal value is offered (*x*), *e.g.* the husband (*y*), or brother (*z*) of the witness.

Where on a trial for larceny a surgeon proved that a witness was suffering from bronchitis, and that her life would be endangered if she were brought into Court, it was objected that she was not proved to be so ill as not to be able to travel; but it was held that, as it was sworn that her attendance would endanger her life, the deposition was admissible (*a*).

Where a witness had come to the assize town to attend a trial, and about half an hour before it came on was in the building where the Court sat, when a medical man advised him to return home, and swore that his remaining to give evidence would, in his opinion as a medical man, have been highly dangerous, and the witness was on his way home while the trial was going on; it was held that his deposition was admissible; for the witness was not able to travel to the place at and in which he was to give evidence. The journey was not over until he arrived at the Court, and as in the opinion of the medical man he could not without danger come to this Court, he was not able to travel to the place where his evidence must be given (*b*).

Where upon an indictment for larceny, a physician proved that he had seen the prosecutor on the morning of the trial, and that he was not able to attend in consequence of a second attack of paralysis; he could not speak, and could not be made to hear, and if brought he would not be able to give evidence; but he might be brought without danger of his life, though he ought not to be permitted to roam abroad. He had been seen in the street the day before near his shop door. It was objected that the prosecutor was not so ill as not to be able to travel according to the words of the statute, and that an application ought to have been made to postpone the trial; but the sessions held that, as he was disabled from giving evidence at the trial by an attack of illness, not plainly appearing to be temporary, his deposition was admissible; and, upon a case reserved, it was held that this ruling was right (*c*). Where a witness was suffering from a tendency to softening of the brain, and the surgeon proved that he was not in a condition to give evidence, as the effect of giving evidence would be dangerous to his life; but he could go to the train in a cab and by the train; he was so ill and nervous, however, that if vigorously cross-examined he would soon get confused and could not be depended upon; and, though he could travel without material injury to his health, he could not complete the object of his journey; the deposition was admitted (*d*).

Depositions Rejected.—A material witness had gone before the grand jury on the first day of the session, and had gone home at night and returned in the morning for two days; but on the morning of the trial she had been seized with a bowel complaint, and when the policeman left Hounslow she was unable to travel; it was held that the deposition

(*x*) R. *v.* Stephenson, *ubi sup.* R. *v.* Welton, 9 Cox, 296, *post*, p. 2234. R. *v.* Ullmer, 4 Cox, 442, *post*, p. 2234.
(*y*) R. *v.* Wellings, 3 Q.B.D. 426.
(*z*) R. *v.* Stephenson, *ubi sup.*
(*a*) R. *v.* Day [1852], 6 Cox, 55, Platt, B.
(*b*) R. *v.* Wicker [1854], 18 Jurist, 252. Channell, Serjt., after consulting Parke, B.
(*c*) R. *v.* Cockburn [1857], D. & B. 203; 26 L. J. M. C. 136.
(*d*) R. *v.* Wilson [1861], 8 Cox, 453, 454 *n.*

was not admissible, as it was not satisfactorily proved that the witness was so ill as to be unable to travel (*e*). So where a constable proved that he saw a witness in bed at nine o'clock the evening before, and he had a cold and inflammation, and was attended by a medical man, and on inquiry that morning he heard the witness was very bad; it was held that the deposition was not admissible (*f*).

Where a witness had seen another witness, whose deposition was proposed to be given in evidence, in bed and apparently ill on March 18, and she was then attended by a surgeon, and the trial was on March 23; Patteson, J., said: 'I think that, in order to allow a deposition to be read in evidence under this enactment, the surgeon should be called, if there be one attending the witness. There, no doubt, may be cases where a person may be not in a state of health to be able to be present at a trial, and yet is not attended by a surgeon, and in such cases other evidence may be sufficient, especially when the inability of the witness is of such a nature as to prevent even the possibility of his attendance as a witness'; and rejected the deposition (*g*). Where the attorney for the prosecution proved that he had seen a witness a few days before, and found him ill of fever; Erle, J., refused to admit the deposition; as the witness, not being a medical man, could not speak as to the nature of the disease (*h*). So where a police constable proved that he saw King in bed on the morning of the trial. He had fever, and the divisional surgeon was attending him. Yesterday morning he was in bed, and is not able to get up yet. He had heard that King had been confined to his bed about a fortnight; and he produced a certificate. Byles, J., refused to admit King's deposition, saying, 'I am of opinion that, to make this deposition admissible, there should be evidence of a medical man on oath, or other evidence upon oath, which the Court might think of equal value to sworn medical evidence. The constable says he has been told King is suffering from fever; how can he know the illness is of such a nature as to render the witness "so ill as to be unable to travel"? A medical man is the proper witness of that fact' (*i*). But he is not the essential witness (*vide ante*, p. 2232).

Child-birth and pregnancy.—A material witness for the prosecution had been delivered of a child a week before, and was unable to travel. It was contended that the prosecutor knew the state in which the witness was, and ought to have applied to postpone the trial; but it was held that the deposition was admissible, as every requisition of the statute had been complied with (*j*). Pregnancy may be an illness within sect. 17 if it causes inability to travel (*k*); nervous prostration or extreme

(*e*) R. *v.* Harris [1850], 4 Cox, 440. It is not stated who proved the illness.

(*f*) R. *v.* Ullmer [1850], 4 Cox, 442.

(*g*) R. *v.* Riley [1851], 3 C. & K. 116.

(*h*) R. *v.* Philips [1858], 1 F. & F. 105.

(*i*) R. *v.* Welton [1862], 9 Cox, 296.

(*j*) R. *v.* Harney, 4 Cox, 441. In R. *v.* Marsella, 17 T. L. R. 164, Bruce, J., considered that R. *v.* Wilton, 1 F. & F. 309, and R. *v.* Walker, ibid. 534, were overruled by R. *v.* Goodfellow, 14 Cox, 326. Cf. Duke of Beaufort *v.* Crawshay, L. R. 1 C. P. 699; 35 L. J. C. P. 342. R. *v.* Huddersfield, 7 E. & B. 794.

(*k*) R. *v.* Wellings, 3 Q.B.D. 426, which appears to overrule R. *v.* Omant, 6 Cox, 466, and R. *v.* Parker, noted Archb. Cr. Pl. (22nd ed.) 342. Evidence by a doctor on Feb. 5, that he had seen the witness on Jan. 29, and that she was then daily expecting her confinement, was held sufficient to justify admission of her deposition. R. *v.* Heesom, 14 Cox, 40, Lush, J.

nervousness seems to have been accepted as an illness within the section (*l*).

A woman was daily expecting her confinement, and her brother stated that she was poorly otherwise, and that she was therefore too ill to travel from her residence to the place of trial, a distance of twenty-five miles. It was objected that the illness ought to have been proved by a medical man, and that the expectation of her confinement was not an illness within sect. 17; but the Court admitted the deposition; and on a case reserved, it was held that the deposition was properly admitted. The proposition that an approaching confinement was not such an illness as was contemplated by that section could not be sustained. There might be incidents attending an approaching parturition of such a nature as to bring it within the statute (*m*).

Where a husband stated that his wife was pregnant and unable to attend; but he was unable to state how far advanced she was, and she was about the house attending to her household duties as usual, and had prepared breakfast for him that very morning as usual, and had not yet been confined to bed; but a fortnight before she had suffered somewhat in consequence of being driven to the assize town; Bramwell, B., permitted the deposition to be read (*n*).

'There must be actual illness (*o*); old age, and nervousness, and inability to stand a cross-examination, are not a sufficient foundation for the reading of the deposition, and that it would raise a dangerous latitude in practice if we were to admit it upon such grounds' (*o*). Evidence of illness should be given by a person who has seen the witness very recently before giving evidence as to his condition (*p*).

(f) *Other Cases in which Depositions Admissible.*

Witness kept away.—A deposition of a witness, who has been kept away by the procurement of the defendant, is admissible. Scaife, Smith, and Rooke were tried for robbery, and the deposition of one G. which had been regularly taken before a magistrate, in the presence of the defendants, was tendered in evidence. Due search had been made for the witness on the part of the prosecution, but she could not be found, and did not appear on the trial, and there was evidence that she had been kept away by the procurement of Smith; but this evidence did not implicate the other defendants. The reading of this deposition was objected to on the part of Smith; but the learned judge admitted it, being of opinion that the procurement by Smith was proved; and in summing up he left G.'s statement, among the other evidence, to the jury, not telling them that the deposition could affect Smith only. Upon

(*l*) R. *v.* Stewart, 1 Cr. App. R. 57.

(*m*) R. *v.* Stephenson, L. & C. 465.

(*n*) R. *v.* Croucher [1862], 3 F. & F. 285. See R. *v.* Goodfellow, 14 Cox, 326, Bowen, J., and after consulting Lush, J., where medical evidence was given that confinement was imminent, that there were signs of approaching labour. The evidence of a police constable as to the imminence of confinement was rejected in R. *v.* Butcher [1900], 64 J. P. 808, Darling, J.

(*o*) R. *v.* Farrell [1874], L. R. 2 C. C. R. 116; 12 Cox, 605. See R. *v.* Thompson, 13 Cox, 181, Lush, J., and R. *v.* Stewart, *supra*.

(*p*) R. *v.* Bull, 12 Cox, 31. Blackburn, J., declined to admit a deposition, where the evidence was that the witness was recovering from a severe pain in the bowels, but no one could depose to having seen him within the forty-eight hours before the trial.

a motion for a new trial after a verdict of guilty against Scaife and Rooke, it was held that the deposition was rightly admitted in evidence against Smith; for if it be proved that a witness is kept away by the procurement of the defendant, the deposition of that witness is admissible; but that the deposition was erroneously left to the jury against the other defendants; for a deposition is not admissible on the ground that the prosecutor, after using every possible endeavour, cannot find the witness; and the deposition is only evidence against the defendant who procured the absence of the witness (*q*).

Insanity.—Before the Act of 1848, where a witness, examined before the magistrate, was insane at the time of the trial, he was considered as in the same state as if he were dead, and his deposition might be given in evidence (*r*). No question has been raised under sect. 17, *ante*, p. 2213, as to whether this rule still applies. But insanity would seem to fall within the words 'so ill as to be unable to travel.' To justify admitting the deposition of a witness proved to be insane at the date of the trial it should be shewn that he was not insane at the time his deposition was taken.

Where on an indictment for night poaching and assaulting W. Rickards it appeared that he was suffering from delirium and depression of spirits in consequence of a blow on the head, and his intellect was affected by the injury, but it was probable that he would recover: it was held that if he was actually insane at the time of the trial his deposition taken in the presence of the defendant was receivable in evidence, although the insanity might be temporary; but the medical witness, being unable to state that he was at the time of the trial in a state of insanity, the deposition was rejected (*s*).

Absence beyond the Sea.—In R. *v.* Austin (*t*), on a trial for larceny

(*q*) R. *v.* Scaife [1851], 17 Q.B. 238. Although there was nothing in the former statutes providing that the depositions taken under them should in any case be evidence, yet it was considered, that if it were previously proved satisfactorily to the court that the witness was dead, or that he had been kept away by the practices of the prisoner, his deposition might be given in evidence on the trial of an indictment; provided the deposition were duly taken upon oath in the presence of the prisoner, when charged before a magistrate. 1 Hale, 305, 586. Bull. (N. P.) 242 See R. *v.* Shippey, 12 Cox, 161. R. *v.* Smith, 2 Stark. (N. P.) 211. R. *v.* Ward, 2 C. & K. 759. Harrison's case, 12 St. Tr. 833, 852, 5th Res. in Lord Morley's case, Kel. (J.) 55; 6 St. Tr 770, 771. Fost. Disc. 337. Mr. Starkie in a very able note to the case of R. *v.* Smith, 2 Stark. (N. P.) 211, observes that the two statutes of Ph. & M. seem to have been passed without any direct intention on the part of the legislature to use the examinations and depositions as evidence upon the trials of felons But the taking of them having been sanctioned by the legislature, they became, it seems, admissible in evidence upon the rules and principles of evidence already established; and the effect of the statutes in point of evidence seems to consist in removing an objection which would before have occasioned the rejection of such evidence, namely, that the proceeding was *extra-judicial*. 'The object of taking the depositions is that if any of the witnesses, whose evidence is given before the magistrates, should be unable to attend at the trial, or die, there should not by reason of this be a failure of justice.' R. *v.* Ward, 2 C. & K. 759, Cresswell, J.

(*r*) R. *v.* Eriswell, 3 T. R. 707, Kenyon, C.J., Ashhurst, J., and Grose, J., and there seems no reason to doubt that the deposition of a person who has become insane at the time of the trial would be admissible since the statute, either on the same ground as R. *v.* Scaife, *supra*, or R. *v.* Cockburn, *ante*, p. 2233, were decided. In R. *v.* Eriswell, *supra*, the pauper, whose examination was in question, had become insane after the examination was taken.

(*s*) R. *v.* Marshall, C. & M. 147, Ludlow, Serjt., after consulting Coltman, J. It is not stated in the report when the blow on the head was inflicted.

(*t*) [1856], Dears. 612. As to former law see Bull. (N. P.) 242. R. *v.* Hagan, 8 C. & P. 167. R. *v.* Hunt, 2 Cox, 261.

it was proposed to put in evidence the deposition of W. D., which had been duly taken in the presence of the prisoner, who had the opportunity of cross-examination, and it was satisfactorily proved that W. D. was not absent with any intention of defeating justice, but, being a foreigner, serving on board a foreign vessel at the time the property was stolen, he had, since the committal of the prisoner, returned to his own country, and at the time of the trial was residing in a foreign kingdom. It was contended that, although the cause of absence was not within sect. 17, the deposition was receivable independently of that section. But, on a case reserved, it was held that the deposition was inadmissible. Although it was quite possible that cases might occur, in which depositions would be receivable in evidence independently of the statute, yet if the admissibility of depositions was extended beyond the cases provided for by the statute, the rule ought to be carefully and rigidly limited. And in this case it was consistent with what appeared, that the attendance of the witness might have been obtained and it was not shewn that anything was done by writing or otherwise to procure his attendance (*u*).

Depositions taken at the preliminary inquiry may be put in by the prisoner to shew that they are inconsistent with the *viva voce* evidence given by the deponent at the trial (*v*). Thus the deposition of a witness, taken before a justice of the peace, was read at the desire of the prisoner, in order to take off the credit of the witness, by shewing a variance between the deposition and the evidence given in court *viva voce* (*w*). And where a witness for the prosecution, on being examined, gives a different account of the transaction from what he had deposed to before the committing magistrate, counsel for the Crown may, by leave of the judge, contradict the witness by putting in the deposition (*x*). The same rule would apply where a witness called for the prisoner at the trial contradicted his deposition made before the justice.

(g) *Depositions, when Admissible upon Trial for a Different Offence.*

Before 1848, depositions duly taken were receivable in evidence, after the death of the deponent, not only upon the trial of the prisoner for the offence with which he was charged at the time they were taken, but upon an indictment for another offence. Thus a deposition was held admissible in a case of murder, although it was taken when the prisoner had been brought before two magistrates upon a charge of an assault

(*u*) It is said (Bull. [N. P.] 242), that the deposition of a witness beyond the seas is admissible; but in R. *v.* Hagan, 8 C. & P. 167, Bolland, B., and Coltman, J., excluded the deposition of a witness who had gone to sea after the deposition was taken. In the regulations as to costs in criminal cases special provision is made for the expenses of seamen detained on shore for the purpose of giving evidence on a criminal prosecution. St. R. & O. [1904], No. 1219, art. 6.

(*v*) See R. *v.* Lambe, 2 Leach, 558, *cur. per* Grose, J.

(*w*) Lord Stafford's case, 7 St. Tr. 1218. See 2 Phill. Ev. 76.

(*x*) 28 & 29 Vict. c. 18, s. 5, *post*, p. 2314. As to former practice see R. *v.* Beardmore, 8 C. & P. 260. R. *v.* Boyle, cited in Wright *v.* Beckett, 1 M. & Rob. 422. R. *v.* Oldroyd, R. & R. 88. Wright *v.* Beckett, 1 M. & Rob. 414. R. *v.* Hallett, 9 C. & P. 748. R. *v.* Williams, 6 Cox, 343.

upon the deceased, and also upon a charge of robbing a manufactory which the deceased had been employed to guard (*y*).

But the particular wording of sect. 17, *ante*, p. 2213, has led to some doubt upon the subject (*z*).

It would seem that the charge need not be stated with technical preciseness if it is in substance the charge upon which the trial takes place (*a*), or details the acts or omissions upon some of which the indictment is ultimately found.

In R. *v.* Ledbetter (*b*), upon an indictment for 'wounding T. G. with intent to do him grievous bodily harm,' it appeared that T. G. was too ill to attend at the trial, and that his deposition had been taken in accordance with sect. 17, on a charge of assault against the prisoner, and was founded on the same identical evidence as was offered in support of the present indictment: it was held that this deposition was not admissible in evidence upon this indictment. Where a prisoner was taken before a magistrate on any charge, his attention would necessarily be directed to that particular charge, and his cross-examination would probably be directed to meet such charge alone; in addition to which, cases might well be supposed in which the justice might prevent the prisoner from cross-examining as to anything which did not appear to him relevant to the particular charge then pending before him. Upon these grounds it would be very unreasonable to permit a deposition taken on a charge for one offence to be admitted against a prisoner, on a trial for a different offence. Then, if the words of the section itself were carefully examined, it was plain that they only authorised the giving in evidence of a deposition upon an indictment for the very same offence as was 'charged' before the justice. The section commences by directing the manner in which a deposition is to be taken against any person 'charged with any indictable offence,' and afterwards provides that 'if upon the trial of the person *so accused*' certain proof be given, such deposition may be read 'as evidence in *such* prosecution.' Now that must mean a prosecution for the very offence 'charged' before the justice (*c*). Whether, therefore, the reason of the thing or the words of the section were considered, a deposition could only be admissible where the indictment was for the same identical offence as that 'charged' before the justice, and upon

(*y*) R. *v.* Smith, R. & R. 337; 2 Stark. (N. P.) 208. Eleven of the judges met. Abbott, J., thought the evidence ought not to have been received. Dallas, J., Graham, B., Richards, C.B., and Lord Ellenborough stated that they should have doubted the admissibility of the evidence but for R. *v.* Radbourne, 1 Leach, 457. Cf. R. *v.* Shippey, 12 Cox, 161.

(*z*) In Caudle *v.* Seymour, 1 Q.B. 889, where a clerk went upstairs and took the information of a girl as to an assault, on oath, whilst the magistrate remained in the kitchen, and it did not appear that he heard what the girl said, it was held that the information was illegally taken, as it was not taken in the presence of the magistrate. Coleridge, J., said, 'It is far too common a practice for the clerk to examine a witness apart, and take down the answers, and then read them over in the magistrate's presence'; and again, 'A magistrate taking depositions has a discretion to exercise; he is to examine the witness, hear his answers, and judge of the manner in which they are given. If he does not, how is he in a condition, supposing the charge were felony, to decide whether or not bail shall be taken?'

(*a*) See Phipson, Ev. (4th ed.) 442.

(*b*) [1850], 3 C. & K. 108.

(*c*) S. 20 also shews that this is the meaning of this section, for a person bound by recognizance to give evidence against a prisoner for one offence (assault), clearly would not forfeit his recognizance by failing to give evidence against prisoner for another offence (feloniously wounding).

which such deposition was taken, and consequently this deposition must be rejected (*d*).

But in R. *v.* Dilmore (*e*), where the prisoner was indicted for manslaughter, and the deposition of the deceased had been taken on a charge that the prisoner 'did feloniously stab, cut, and wound the deceased, of which stabbing, cutting, and wounding the deceased was likely to die,' and the preceding case was cited; Wightman, J., received the deposition, saying, 'There is no decision precisely in point. The case cited differs in one respect from this. There the original charge was an assault; here there is something more' (*f*).

In R. *v.* Beeston (*g*), on a trial for murder, it appeared that between the blow and the death the deposition of the deceased had been duly taken before a justice, in the presence of the prisoner, on the charge of 'wounding the deceased with intent to do some grievous bodily harm' to him, and the admission of this deposition was objected to on the ground that the deposition was not taken on the same charge for which the prisoner was on his trial, and the two preceding cases were cited; but the deposition was received, and, on a case reserved on the question whether the deposition taken on the charge of maliciously wounding with intent, &c., was properly received in evidence, it was held that it was. Before the passing of 11 & 12 Vict. c. 42, the deposition would have been admissible (*h*), and there was nothing in 11 & 12 Vict. c. 42, to render it inadmissible, or to restrict the rule, which had been established by practice since the statutes of Philip and Mary.

Jervis, C.J., said that the legislature had provided 'that the persons whose evidence is to be taken shall be "those who shall know the facts and circumstances of the case," not of the particular technical charge on which the prisoner is afterwards tried; and then it says that if the witness be dead the deposition may be admissible "on the trial of the person so accused," not on his trial for the particular offence with which he was charged before the magistrate; and though the charge at the trial be not identically the same as that made when the deposition was taken, no harm can result from holding it admissible; because it would always be matter for inquiry by the judge trying the case whether the prisoner had had a full opportunity for cross-examination, if the charge on which the deposition was taken was not identical with that stated in the indictment.' And Alderson, B., said: 'The question is not whether the charge made on the inquiry before the magistrate was exactly the same as that made on the trial, but whether the inquiry was such as afforded to the party accused a full opportunity of cross-examination?' In R. *v.* Ledbetter (*ante*, p. 2238), it might very well have been that a full opportunity of cross-examination was not afforded. On a charge for a common assault, the wounding subsequently charged in an indictment

(*d*) This ruling was given by Greaves, Q.C., after consulting Campbell, C.J., and Williams, J., and referring to R. *v.* Smith, *supra*. Campbell, C.J., thought that the authority of R. *v.* Smith, *ante*, p. 2238, was very much impaired by the dissent of Lord Tenterden, and all agreed that that case was not binding under 11 & 12 Vict. c. 42, s. 17.

(*e*) [1852], 6 Cox, 52.

(*f*) The point would have been reserved, but the prisoner was acquitted.

(*g*) [1854], Dears. 405: 24 L. J. M. C. 5.

(*h*) R. *v.* Radbourne, 1 Leach, 457. R. *v.* Smith, *ante*, p. 2238.

might not have been material (*i*); but here the whole of the circumstances which came before the Court at the trial were before the magistrate, with the single exception of the death of the deceased; and the prisoner's opportunity of cross-examining was so complete, that his counsel's ingenuity could not suggest a question on the one inquiry which would not have been so on the other.' If this construction were not the true one, the deposition of a person, who afterwards died, could never be used on a trial for the murder or manslaughter of that person.

But R. *v.* Beeston by no means decides that a deposition would be admissible if the charges on the two occasions were substantially different (*j*).

In R. *v.* Fretwell (*k*), on an indictment for murder by administering poison with intent to procure abortion, the deposition of the deceased had been taken on a charge against the prisoner of having administered, or caused to be taken, poison in order to procure abortion. Cockburn, C.J., admitted the deposition, being disposed to think that, the transaction being the same, the evidence was admissible, although, in consequence of the death of the woman having supervened, the charge had assumed a different shape and character (*l*).

In R. *v.* Lee (*m*), on a trial for murder it appeared that the prisoners had been originally apprehended on a charge of robbing the deceased with violence, and the death was alleged to have been caused by that violence. Pollock, C.B., admitted the deposition of the deceased, which had been made, on the charge of robbery with violence, in the presence of both prisoners, who had full opportunity of cross-examination.

In R. *v.* Edmunds (*mm*), a deposition taken on a charge of wounding with intent to murder was held admissible on an indictment for murder of the deponent, who had died after the taking of the deposition, and R. *v.* Beeston and R. *v.* Lee were followed.

In R. *v.* Williams (*n*), the prisoner was charged before a magistrate with obtaining money by false pretences, and afterwards indicted for uttering a forged promissory note, the charges arising out of one and the same transaction, and being in fact identical, and the prisoner having had the opportunity of cross-examination before the magistrate. It was held, that the deposition of a witness taken at such hearing, and who was afterwards unfit to travel to give evidence, was admissible and might be read at the trial for uttering the forged promissory note.

In R. *v.* Lydane (*o*), on a trial for murder it appeared that the deceased had sworn an information for rape against the prisoner in his presence, and had subscribed it with her mark, before a magistrate, and the prisoner had executed a recognizance, with sureties, to appear to the charge at the ensuing assizes; before which, however, he married the deceased, but they never lived together after the marriage; and statements of the prisoner were proved tending to shew that he married her to prevent

(*i*) He added: 'I therefore do not say whether Mr. Greaves was or was not wrong in rejecting the deposition in that case.'

(*j*) In R. *v.* Beeston, Jervis, C.J., said: 'I do not mean to say that a deposition would be admissible if the charges on the two occasions were substantially different.'

(*k*) [1862], L. & C. 161; 31 L. J. M. C. 145.

(*l*) The point was reserved together with another, which being decided in favour of the prisoner, this point was not noticed.

(*m*) [1864], 4 F. & F. 63.

(*mm*) [1909], 2 Cr. App. R. 257.

(*n*) [1871], 12 Cox, 101, Montague Smith, J.

(*o*) 8 Cox, 38 (Ir.).

the prosecution, and he had said that he would give her a short life. Christian, J., received the information and recognizance; but he told the jury that they were not to regard them as evidence of anything, save simply of the facts that, before the parties married, such a charge had been made, and the prisoner placed under recognizances to stand his trial for it; that they had nothing whatever to do with the question whether the charge was true or false, but that the facts evinced by the mere existence of these documents might be taken into their consideration, along with the other circumstances, specially as bearing upon the question of the existence of a motive, which might have prompted the prisoner to the commission of the murder. And, on a case reserved, it was held that this evidence was properly admitted. It was not offered as evidence of an information taken under the Irish statute, but was given in evidence as a charge found to be in writing, and which happened to be in writing, because the information was made upon a certain occasion. The recognizance of the prisoner was taken upon the same occasion as that on which the charge was made, and was also in writing, and was no more to be regarded than if the statute had never been made. If the charge rested on parol evidence, and the party by whom it had been made had used expressions equivalent to what appeared in the information, all that might have been given in evidence; but nothing of the sort could here be given in evidence, as all of it was in writing, and the only proper evidence of the writing was the documents containing the matters which had been so committed to writing. The documents were not given in evidence to substantiate the truth of the charge, but merely as to the fact that they had been made, and that the prisoner had entered into the recognizances.

(h) *Proof of Depositions at Trial.*

It is the duty of justices to return to the Court at which the prisoner is to be tried, all depositions that have been taken at the preliminary inquiry respecting the offence which is to be the subject of the trial (*p*); whether the depositions were taken on behalf of the Crown or of the accused (*q*), and whether the deponents were or were not bound over to attend at the trial (*r*). Failure to discharge this duty entails penalties (*s*).

When the prosecution is instituted or taken over by the Director of Public Prosecutions, the depositions, &c. are handed to him instead of being transmitted to the Court of trial (*t*).

By 11 & 12 Vict. c. 42, sect. 17 (*u*), after it has been proved that the witness is 'dead or so ill as not to be able to travel,' it must be proved, 1st, that 'the deposition was taken in the presence of the person so accused'; and 2ndly, 'that he or his counsel or attorney had a full

(*p*) 11 & 12 Vict. c. 42, s. 25. R. *v.* Simons, 6 C. & P. 540.

(*q*) 11 & 12 Vict. c. 42, s. 25. 30 & 31 Vict. c. 35, s. 3. 7 C. & P. 270. 2 C. & K. 845. R. *v.* Clark, 5 Cox, 230. R. *v.* Fuller, 7 C. & P. 269, Vaughan, J. R. *v.* Arnold, 8 C. & P. 621.

(*r*) R. *v.* Smith, 2 C. & K. 207, Denman, C.J.

(*s*) 7 & 8 Geo. IV. c. 64, s. 5.

(*t*) *Ante*, p. 1925.

(*u*) *Ante*, p. 2213. Before this Act depositions might be proved by any one who was present when same were taken. R. *v.* Pikesley, 9 C. & P. 124. R. *v.* Wilshaw, C. & M. 145. As to the practice under the Acts of Philip and Mary, see 2 Hale, 284.

opportunity of cross-examining the witness' ; and then, 'if such deposition purport to be signed by the justice' or justices by or before whom the same purports to have been taken, the deposition may be read (*uu*) as evidence without further proof, unless it shall be proved that the deposition was not in fact signed by the justice purporting to sign the same.

Where, in a case before 1848, it was proposed to prove the deposition of a witness in order to cross-examine her upon it, and neither the magistrate nor his clerk were at the assizes, and the witness denied her mark to the deposition ; but a constable, who was present before the magistrate when the witness was examined, proved the signature of the magistrate, but was not sure that he saw the witness make her mark to it, though he recollected seeing the pen in her hand, and heard her deposition read over to her, and believed the deposition to be the same that was read over to her, and his own deposition immediately followed it ; Coleridge, J., held that the deposition might be read to the witness to examine her upon it (*v*).

Upon an indictment for ravishing S. H., it appeared that she was a person of very weak intellect ; but her deposition before the magistrate was in the usual form, and did not shew anything as to any inquiry into the competency of the witness in point of intellect. When she was called as a witness, she appeared not at all to understand the nature of an oath, and to have no idea of a future state ; upon which Wilde, C.J., observed : 'It would be always desirable, where a person of weak intellect is examined before a magistrate in a case of felony, that the magistrate's clerk should take down in the depositions the questions put by the magistrate, and the answers given by the witness as to the witness's capacity to take an oath' (*w*).

Parol evidence of evidence taken at the preliminary inquiry is inadmissible, till it is shewn that it was not reduced to writing (*x*). Thus where the plaintiff had been arrested on a charge of felony and taken before a magistrate, who discharged him, and there was no positive evidence whether the depositions of the witnesses had been taken in writing, and it was urged that, as no case had been made out against the plaintiff, it was to be presumed that no depositions had been taken in writing; Jervis, C.J., said: 'The statute positively requires every examination before justices to be taken down in writing. I know this is frequently neglected under the circumstances mentioned, but it is a practice quite illegal and highly improper. I cannot in any case presume that the law has been violated, and therefore, without positive evidence that in this case the examinations have not been taken down, I cannot admit parol evidence' (*y*).

On the trial of an action for a malicious prosecution it appeared

(*uu*) See R. *v.* Paget, 64 J.P. 281. R. *v.* Cowle, 71 J.P. 152.

(*v*) R. *v.* Hallett, 9 C. & P. 748. Coleridge, J., said : 'Suppose there was no mark at all, why should not a third person say that this was the paper that was read over to the witness ? '

(*w*) R. *v.* Painter, 2 C. & K. 319. 'With all deference, such questions and answers are preliminary to the swearing of the witness, and cannot therefore form any part of the *deposition*. It might be well, however, to make a note of the questions and answers either on another paper, or separately from and so as to form no part of the deposition. In a confession, such as R. *v.* Dingley, 1 C. & K. 637, of course anything the prisoner says may be inserted.' C.S.G.

(*x*) R. *v.* Fearshire, 1 Leach, 202.

(*y*) Parsons *v.* Brown, 3 C. & K. 295.

that the defendant had made a charge against the plaintiff before a magistrate, the hearing of which was in the first instance adjourned, and that on a subsequent occasion the case was heard, and the depositions were gone through, taken down, and the plaintiff committed for trial. A magistrate's clerk attended on the first occasion, and took down what the defendant said, but neither the defendant nor the magistrate signed it. It was objected that parol evidence of what the defendant said on the first occasion was inadmissible, and that the writing must be produced. Cresswell, J.: 'I know, from the depositions returned to me at the assizes, that in practice, when a case is adjourned, the depositions are not regularly reduced to writing under the statute; and I think that parol evidence is admissible here of what was said on the first occasion. If two persons are present on the examination of a witness, and one takes a note of what the witness says, and the other does not, the latter is as competent as the former to prove what he heard' (*z*).

In an action for maliciously laying an information before a magistrate, that he, the defendant, apprehended danger to his life or bodily harm from the plaintiff, the information of the defendant, taken in writing by the magistrate's clerk, was put in, after being proved by the clerk, and after it was read the counsel for the defendant asked the clerk in cross-examination whether the defendant had not, in addition to what appeared in the information, stated that, on the occasion deposed to, the plaintiff had used a certain threat; and the question was objected to on the ground that it went to explain or add to the written information.

Gaselee, J., as the point was a difficult one and of frequent occurrence, consulted the other judges of the Court of Common Pleas, and stated that they all were of opinion that evidence was admissible to prove anything the party had said as part of his information, beyond what was put in writing, either for the purpose of explanation or addition (*a*). Upon an indictment for obtaining money by false pretences, a witness was examined for the prosecution, who had been examined before the magistrates, *on the application of the prisoner*, touching the present charge, and the prisoner's counsel now asked him whether, when he was before the magistrate, he did not say, *whilst under cross-examination by the prisoner's attorney*, that he knew the prisoner was collecting rates after the 24th of June. This question was objected to on the ground that the depositions being referred to, contained no note of any such cross-examination. But Erle, J., was of opinion that the question must be allowed. There did appear to have been decisions the other way, but he had always been of opinion that in principle those decisions were wrong (*b*).

(*z*) Jeans *v.* Wheedon, 2 M. & Rob. 486. See the reporter's note there. See also R. *v.* Christopher, 1 Den. 536, *ante*, p. 2226.

(*a*) Venafra *v.* Johnson, 1 M. & Rob. 316. See Rowland *v.* Ashby, Ry. & M. 231; R. *v.* Harris, 1 Mood. 338, *ante*, p. 2221, and R. *v.* Reed, M. & M. 403. The information on which application is made for process, sworn in the absence of the accused, is not evidence against the accused, but only against the person swearing it. It is distinct from depositions taken in supporting the charge at the preliminary inquiry *in the presence of* the accused.

(*b*) R. *v.* Curtis, 2 C. & K. 763. But see *contra*, R. *v.* Thornton, Warwick Sum. Ass. 1817. Holroyd, J., R. *v.* Wylde, 6 C. & P. 380. See R. *v.* Edmunds, 6 C. & P. 164, *ante*, p. 2201. 'With reference to cases where the magistrate has not taken the evidence of a witness in writing, Mr. Phillipps observes: 'If the magistrate has

Sect. III.—Depositions and Statements before Coroners.

By the Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 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 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.'

By Sect. 5, ' (3) The coroner shall deliver the inquisition deposition and recognisances, 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 ' (*c*).

not taken in writing the information of a witness, it is clear that no proof can be admitted after his death of what he said before the magistrate; or if the magistrate took the information in writing, but irregularly, as, for instance, if the witness was not sworn, or the magistrate did not subscribe, it is equally clear that after the witness's death parol evidence of his information will not be admissible; for such evidence would not have been admissible except by virtue of the statute, nor is it admissible since the passing of the statute, the statutory regulations not having been complied with; the written information is the primary and best proof of the information, and the irregularity of that primary evidence is not a sufficient ground for receiving evidence of a secondary or inferior nature.' In this passage (which does not appear in the 7th edition), the observations must be taken to apply to ' an examination taken in the presence of the prisoner '; and taking them so to apply, it may admit of considerable doubt whether they are well founded. The deposition of a witness is not admissible because it is in writing under the statute, but because it is taken in the presence of the prisoner, and he has had an opportunity of cross-examining the witness; and it is conceived that at common law the rule is well established, that the testimony of a deceased witness, who has been examined upon oath on a former occasion in a proceeding between the same parties, on the same subject matter, is admissible in a subsequent proceeding between the same parties, and may be proved by any one who heard the evidence given. And this rule extends to criminal as well as civil proceedings. See *ante*, p. 2084. In all criminal prosecutions the King is considered as the prosecutor, both before the magistrate and on the trial. The parties, therefore, before the magistrate and on the trial are the same, and consequently the evidence of a deceased witness examined in the presence of the prisoner before the magistrate might, at common law, be proved by parol on the trial of the prisoner. But the statute having required the magistrate to put the evidence in writing, such writing is the best evidence of what the witness said. It is submitted, however, that in case no part of the evidence were taken down, parol evidence would be admissible of what the witness said. The statute has directed the examination of a prisoner to be taken in writing, and yet if that be not done, parol evidence is admissible, because such parol evidence was admissible at common law. R. *v.* Lambe, 2 Leach, 552. The observations of the judges in this case furnish a strong argument by analogy in support of the view here contended for. It might be further contended that what was said by a witness in the presence of a prisoner before a magistrate was admissible at common law, as a statement made in the prisoner's presence, to which he not only might reply, but which he was called upon expressly to answer. See R. *v.* Edmunds, 6 C. & P. 164, where Tindal, C.J., admitted evidence of what a deceased prosecutor swore in the presence of a prisoner on an examination before a magistrate for committing the assault, from the effects of which the deceased died, ' as producing an answer, and like any other conversation.' And see the observations of Parke, B., in Melen *v.* Andrews, *ante*, p. 2200. C. S. G.

(*c*) Non-compliance with the obligation entails penalties, sect. 9. Sect. 5 (1) gives the coroner power where the inquisition charges a person with murder or manslaughter to issue a warrant for his arrest, and to bind by recognizance all material witnesses examined before him to appear and give evidence at the next Court of oyer and terminer or gaol delivery. Sect. 5 (2)

The provisions of the Indictable Offences Act, 1848, s. 17 (*ante*, p. 2213), as to the admission at the trial of depositions of deceased or sick witnesses do not extend to depositions taken before a coroner (*d*). But according to Jervis on Coroners (6th ed.) 51, the provisions of sect. 5 (3) of the Act of 1887, render the depositions admissible as secondary evidence (*e*). Depositions before coroners are not proved under the Act of 1848, but by calling the coroner who took them, who is bound to attend the trial (*f*), or a person who can prove his signature that the deponent was sworn and that the depositions contain the evidence given by the deponent (*g*).

In R. *v.* Cowle (*h*), the deposition of a witness before a coroner was admitted on proof of the death of the witness, and that the deposition was taken in the presence of the accused, who by his solicitor had full opportunity of cross-examining.

There are conflicting authorities upon the question whether a deposition taken before a coroner is receivable in evidence on the trial of a prisoner who was not present when the witness was examined (*i*).

In R. *v.* Rigge (*j*), Montague Smith, J., refused to admit in evidence the deposition of a witness taken before the coroner where the prisoner was not present at the inquest when the witness was examined (*k*).

A marked distinction exists between the situation in which a prisoner stands when he is before a magistrate on a charge of felony or misdemeanor, and when he is present during the time a coroner is holding an inquest; and this distinction seems to have been acted upon in the following case. Upon an indictment for murder it was proved that a witness who had been examined before the coroner was insane at the time of the trial, and had been so for some time previously, but there was no evidence of the state of mind of the witness when he was examined before the coroner. Part of his deposition had been taken in the absence of the prisoner, and part in his presence, but the whole was read over in his presence; and it was proposed to give this deposition in evidence, and 1 Phill. Ev. 369, 373, was referred to, in order to shew that the deposition was admissible where the witness had become insane; and R. *v.* Smith (*l*), to shew that reading the whole over in the presence of the prisoner rendered it admissible. Park, J., said: 'There is one positive objection, that the witness might be insane when he was examined before the coroner. Secondly, 7 Geo. IV. c. 64 (*m*), makes a strong distinction

empowers the coroner to give bail. It will be seen that no special provision is made for taking the examination of any person suspected of causing the death of the person on whose body the inquest is held.

(*d*) R. *v.* Cowle, 71 J. P. 152, Grantham, J. The contrary ruling in R. *v.* Butcher, 64 J. P. 808, by Darling, J., seems to be erroneous.

(*e*) Sills *v.* Brown, 9 C. & P. 601, is cited for this proposition.

(*f*) *Re* Urwin [1827], cited Jervis on Coroners (6th ed.) 52 *n.*

(*g*) See R. *v.* Wilshaw, C. & M. 145. R. *v.* England, 2 Leach, 770.

(*h*) 71 J. P. 152.

(*i*) Lord Morley's case, Kel. (J.) 55. Thatcher's case, Sir T. Jones, 53. Bromwich's case, 1 Lev. 180. Gilb. Ev. 124. R. *v.* Stockley, 1 East, P. C. 310. Bull. (N. P.) 242. See R. *v.* Austin, Dears. 612, Alderson, B. R. *v.* Eriswell, 3 T. R. 722. Garnett *v.* Ferrand, 6 B. & C. 611. Sills *v.* Brown, 9 C. & P. 601.

(*j*) 4 F. & F. 1085.

(*k*) It is submitted that this decision is correct and in accordance with the common law rule as to admitting depositions. Taylor, Ev. (10th ed.) s. 494. Roscoe, Cr. Ev. (13th ed.) 67.

(*l*) R. & R. 339.

(*m*) Repealed by 50 & 51 Vict. c. 71, so far as it relates to coroners, and replaced by ss. 4, 5, 9, of that Act.

between magistrates and coroners. There is a charge made before a magistrate; but I cannot call it a charge before a coroner. In R. *v.* Smith, the deposition was taken in a common felony, and there the question was, whether a deposition taken on one charge could be evidence on another. I will not receive this deposition. I think it safer not to do so' (*n*).

Statement of Prisoner before Coroner.—The prisoner's own depositions or statements before the coroner are admissible as evidence against him (*o*), subject to the question whether he has been properly cautioned that he is not bound to incriminate himself (*p*), and to the rule that before a coroner there is no right to be represented by solicitor or counsel (*q*).

Where a witness having, in her examination before the coroner, stated that she had slept with the prisoner, that he had given her two black eyes, that they had seen a placard, &c., the statement of the prisoner before the coroner was tendered in evidence, and was as follows:—'Prisoner admits sleeping with the witness, blackening her eyes, seeing the placard,' &c.: and it was objected that the examination was taken in the third person, which was not complying with the statute (*r*), and did not purport to be the language of the prisoner at all, but merely the coroner's expression of what he considered the prisoner to mean. The jury were to judge of the effect of the statement, and they could not do that without having before them the very words in which it had been made. Denman, C.J., thought the mode of taking the examination of the prisoner very improper. He expressed himself unable to exclude the statement but said that he would reserve the point if necessary (*s*).

Sect. IV.—Bedside Depositions.

The Criminal Law Amendment Act, 1867 (*t*) (30 & 31 Vict. c. 35), s. 6, after reciting that by 11 & 12 Vict. c. 42, s. 17 (*u*), it is permitted under certain circumstances to read in evidence on the trial of an accused person the deposition taken in accordance with the provisions of the said Act, of a witness who is dead, or so ill as to be unable to travel. And whereas it may happen that a person dangerously ill, and unable to travel, may be able to give material and important information relating to an indictable offence, or to a person accused thereof, and it may not be practicable or permissible to take, in accordance with the provisions of the said Act, the examination or deposition of the person so being ill,

(*n*) R. *v.* Wall, Worcester Sum. Ass. 1830, MSS. C. S. G. The distinction taken by the learned judge seems to deserve much consideration. The ground on which a deposition before a magistrate is admissible is that the prisoner, being there to answer a charge, has the *right* to cross-examine the witnesses. In many cases before coroners, even if the prisoner be present, there is no charge, and perhaps no suspicion, against him, and it may be doubted whether in strictness under any circumstances he has the *right* to cross-examine the witnesses; and if there were no charge in fact made against him, his interference would be an unwarranted interruption of the proceedings. See the observations of Parke, B., in Melen *v.* Andrews, M. & M. 336, *ante*, p. 2200. C. S. G.

(*o*) R. *v.* Bateman, 4 F. & F. 1068. R. *v.* Coote, L. R. 4 P. C. 599. There is no right to refuse the evidence of persons who might criminate themselves. Wakley *v.* Cooke, 4 Ex. 511.

(*p*) Wakley *v.* Cooke, *ubi sup.*

(*q*) See Barclee's case, 2 Sid. 90, 101.

(*r*) 7 Geo. IV. c. 64. Evidence, &c., before a coroner is now recorded under 50 & 51 Vict. c. 71, s. 4 (2). See Jervis on Coroners (6th ed.) 39.

(*s*) R. *v.* Roche, C. & M. 341. The prisoner was acquitted.

(*t*) Russell Gurney's Act.

(*u*) *Ante*, p. 2213.

so as to make the same available as evidence in the event of his or her death before the trial of the accused person, and it is desirable in the interest of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same; enacts that '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 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.'

By sect. 7, 'Whenever a prisoner in actual custody shall have served or shall have received notice of an intention to take such statement as hereinbefore mentioned, the judge or justice of the peace by whom the prisoner was committed, or the visiting justices of the prison in which he is confined, may, by an order in writing, direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement; and such gaoler shall convey the prisoner accordingly, and the expenses of such conveyance shall be paid out of the funds applicable to the other expenses of the prison from which the prisoner shall have been conveyed.'

The notice of intention to take the statement to be served on the prisoner under sect. 6 must be in writing, and service of the notice

is a condition precedent to the admissibility of the deposition (*v*); and an oral notice is insufficient, although the prisoner is proved to have been present at the time when the statement was taken (*w*). Depositions taken under these sections should, it would seem, have a proper caption added when the deposition is taken, showing when and where and by whom it was taken. In R. *v.* Prestridge (*x*) a bedside deposition was rejected because the caption was added after the taking of the deposition. In this case the justice had asked questions of the deponent after the cross-examination of the prisoner, and had added the answers to the deposition.

In R. *v.* Curtis (*y*) the deposition was rejected because the caption did not state where it was taken.

In R. *v.* Rees (*z*) a deposition was rejected which had no caption.

The enactments do not prevent the justice who is conducting the preliminary inquiry from attending at the bedside of the prisoner, and taking a deposition in accordance with the Act of 1848, without complying with the requirements of the Act of 1867 (*a*).

Sect. V.—Depositions taken on Commission or Abroad.

General Rule.—The general statutes authorising the taking of evidence on commission in the United Kingdom, or in foreign countries, or British possessions, or India, do not extend to evidence required for the purpose of a trial on indictment, and there is no common law power to authorise the taking of evidence on commission for a criminal case (*b*). This rule does not of course exclude the use *against* a party of his deposition taken on commission or abroad (*c*).

According to Roscoe, Cr. Ev. (13th ed.) p. 68, on a prosecution for misdemeanor where a witness is about to leave England, his deposition may be taken by consent, and used if he is away from England at the date of the trial: and there is a case reported in which the Court of King's Bench, upon application of the defendant, postponed the trial of an information for a misdemeanor, upon the defendant's consenting, by writing under his own hand, to the examination upon interrogatories of a witness for the Crown (*d*).

Special Statutory Exceptions.—Where an indictment or information is exhibited in the High Court (K.B.D.) for an offence committed in India, the depositions of the witnesses may be obtained under the provisions of several statutes (*e*). The East India Company Act, 1773

(*v*) Cf. R. *v.* Quigley, 18 L. T. (N. S.), 211, Mellor and Leigh, JJ. R. *v.* Peacock, 12 Cox, 21, Brett, J.

(*w*) R. *v.* Shurmer, 17 Q.B.D. 323.

(*x*) [1881]. 72 L. T. Journ. 93. Hawkins, J.

(*y*) [1904], 21 T. L. R. 87, Bigham, J.

(*z*) [1888]. Charles, J., Archb. Cr. Pl. (23rd ed.) 374.

(*a*) R. *v.* Katz [1900], 64 J. P. 807, Darling, J., where Wills, J., is said to have retracted the contrary opinion expressed by him in R. *v.* Simpson, 62 J.P. 825. A preliminary inquiry is not necessarily held in open Court nor at a petty sessional or occasional Court house, 11 & 12 Vict. c. 42, s. 19.

(*b*) The Evidence on Commission Act, 1831 (1 & 2 Will. IV. c. 22).

(*c*) R. *v.* Upton St. Leonards, 10 Q.B. 827; 17 L. J. M. C. 13: a criminal information for non-repair of a road. See R. *v.* Lady Briscoe, 1 Dowl. Pr. Cas. 520.

(*d*) R. *v.* Morphew, 2 M. & S. 602. Cf. Anon. 2 Chit. (K.B.) 199.

(*e*) 13 Geo. III. c. 63; 24 Geo. III. sess. 2, c. 25; 26 Geo. III. c. 57; 24 & 25 Vict. c. 104, ss. 10, 11.

(13 Geo. III. c. 63), by sects. 40, 44, enacts that the Court may award a writ of mandamus to the judges of the courts in India, as the case may require, for the examination of witnesses, who are to be examined publicly in the Court, upon oath administered according to the form of their several religions; and these depositions duly taken and returned, in the form prescribed by the Act, are to be allowed, and deemed as good and competent evidence, as if the witnesses had been sworn at the trial, and examined *vivâ voce* (*f*).

The Act of 1773 is by sect. 4 of the Slave Trade Act, 1843 (6 & 7 Vict. c. 98, *ante*, Vol. I. p. 276), applied for the purposes of trial in the King's Bench Division of misdemeanors against the Slave Trade Acts committed out of the United Kingdom and in British possessions.

In the case of a prosecution for an offence committed out of Great Britain by any person employed in the public service, the depositions of witnesses resident abroad may be obtained under the Criminal Jurisdiction Act, 1802 (42 Geo. III. c. 85) (*g*). This Act has also been extended to offences within the Official Secrets Act, 1889 (*h*), and by sect. 3 of the Evidence by Commission Act, 1885 (48 & 49 Vict. c. 74), provision is made for the delegation by the Court (to which a mandamus or order to take evidence is directed) of the task of taking the evidence required (*i*).

Depositions under Merchant Shipping Acts.—Provisions were made by the Mercantile Marine Acts, of 1844 (7 & 8 Vict. c. 112) and 1850 (12 & 13 Vict. c. 93) for taking depositions abroad. These were superseded by the corresponding provisions of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 120). That Act was repealed in 1894 by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60) (*j*), which makes the following provisions on the subject.

Sect. 691 (*k*). '(1) Whenever in the course of any legal proceeding instituted in any part of His Majesty's dominions before any judge or magistrate, or before any person authorized by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of that proceeding, then upon due proof, if the proceeding is instituted in the United Kingdom, that the witness cannot be found in that kingdom (*l*), or if in any British possession, that he cannot be found in that possession, any deposition that the witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in His Majesty's dominions, or any British consular officer elsewhere, shall be admissible in evidence; provided that

(*f*) See R. *v.* Douglas, 1 C. & K. 670, Denman, C.J.

(*g*) As to jurisdiction under the Act, *vide ante*, Vol. i. pp. 31, 609.

(*h*) 52 & 53 Vict. c. 52, s. 6 (2), *ante*, Vol. i. p. 319.

(*i*) See Short and Mellor, Cr. Pr. (2nd ed.) 250. This Act does not extend the cases in which such evidence may be taken, but merely regulates the mode of taking it.

(*j*) As to jurisdiction under that Act see ss. 686, 687, *ante*, Vol. i. p. 43.

(*k*) S. 691 replaces 17 & 18 Vict. c. 104, s. 170.

(*l*) Witnesses whose evidence had been taken abroad by the British Vice Consul under 17 & 18 Vict. c. 104, s. 270 (rep.), were officers of a British sailing vessel, which traded between Fayal and Boston, and which was stated by an officer of the Board of Trade, from examination of official records, never to have been in this country, held that it was sufficiently proved that the witnesses were not in the United Kingdom, and the depositions were accordingly admitted in evidence. R. *v.* Conning, 11 Cox, 134. R. *v.* Anderson, 11 Cox, 154. R. *v.* Stewart, 13 Cox, 296.

(a) If the deposition was made in the United Kingdom, it shall not be admissible in any proceeding instituted in the United Kingdom: and

(b) If the deposition was made in any British possession, it shall not be admissible in any proceeding instituted in that British possession: and

(c) If the proceeding is criminal it shall not be admissible unless it was made in the presence of the person accused.

'(2) A deposition so made shall be authenticated by the signature of the judge, magistrate, or consular officer, before whom it is made; and the judge, magistrate, or consular officer shall certify, if the fact is so, that the accused was present at the taking thereof.

'(3) It shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition, and in any criminal proceeding a certificate under this section shall, unless the contrary is proved, be sufficient evidence of the accused having been present in manner thereby certified.

'(4) Nothing herein contained shall affect any case in which depositions taken in any proceeding are rendered admissible in evidence by any Act of Parliament, or by any Act or Ordinance of the Legislature of any colony, so far as regards that colony, or interfere with the power of any colonial legislature to make those depositions admissible in evidence, or to interfere with the practice of any court in which depositions not authenticated as hereinbefore mentioned are admissible.'

In R. *v.* Russell (*m*) the prisoner was indicted for larceny alleged to have been committed in 1852, on board a British merchant ship, lying in the Bosphorus, of which the prisoner was mate and the prosecutor captain. The principal evidence against the prisoner consisted of the depositions of witnesses still abroad; and the captain proved that he made a charge against the prisoner of stealing his property before the British Consul at Constantinople. Each witness was sworn and examined by the Consul. Each witness was asked if he could speak English, and if he could not he was sworn in another language; some were sworn in Greek, which the captain did not understand. They were all sworn on the same book, which was an English Bible. The captain did not know the religion of any of the witnesses sworn in the foreign language. The Consul himself took the examinations, and translated each question and answer as it was given, and wrote the depositions in English; and when the whole of each deposition was taken down it was read to the prisoner, and he was asked what he had to say; and all he said was that he was not guilty. The captain could not be answerable whether the prisoner was asked whether he would ask any witness any question. He could not ask questions of the witnesses, because he did not understand the language, and he did not tell the Consul anything he wished to be asked of the witnesses. The depositions had been transmitted to the Board of Trade by the Consul, and by that Board to the attorney for the prosecution, who produced them, and the captain proved his

(*m*) 6 Cox, 60, and MSS. C. S. G.

signature to his information and examination, which were amongst the depositions. The depositions bore the official seal of the English Consul for Constantinople, and were certified to have been taken in the presence of the prisoner. It was objected, 1, that there was no proof that the witnesses were duly sworn; 2, that there ought to have been an interpreter sworn, and that the Consul could not act as interpreter as he had done, or the depositions ought to have been returned in the language of the witnesses; 3, that the depositions, not being in the language of the witnesses, were not in fact their depositions; 4, that the prisoner was not proved to have had a fair opportunity of cross-examination. For the Crown it was contended that the Merchant Shipping Act, 1844 (7 & 8 Vict. c. 112), s. 59, made depositions taken before a Consul abroad and certified under his official seal to be the depositions, and that they were taken in the presence of the accused, admissible in courts of criminal jurisdiction, 'in like manner as depositions taken before any justice of the peace in England' (*n*), and that by the 13 & 14 Vict. c. 93, s. 115 (*o*), depositions of any witnesses taken before any consular officer, in any criminal proceeding in the presence of the accused, and certified under his official seal to have been so taken, shall be admissible; and 'any deposition purporting to be so certified shall be deemed to have been so taken and certified as aforesaid, unless the contrary is proved': and that the deposition so certified was the deposition as it stood on the face of the documents. 7 & 8 Vict. c. 112, s. 1 (*p*), was also cited. It was replied that 13 & 14 Vict. c. 93, s. 115, had not been complied with, because it was proved that the depositions were not properly taken; and that 7 & 8 Vict. c. 112, s. 59, only made the depositions receivable where they would have been receivable if taken in England, and that these depositions would not have been so receivable. Greaves, Q.C., consulted Wightman, J., and they agreed that the proper course would be to admit the depositions, but to reserve the points. The depositions were then put in; but on examination they were found to contain a great deal of hearsay evidence. It was then objected that they were inadmissible on this ground; as it was impossible to separate the good and bad evidence, and the statute had made the depositions evidence, and there was no power to strike out any part of them. Greaves, Q.C., was of opinion that he might run his pen through all the objectionable parts of the depositions (*q*), and direct the officer to read the remainder (*r*).

Fugitive Criminals.—Provision is made by the Fugitive Offenders

(*n*) Repealed in 1854 by 17 & 18 Vict. c. 120.

(*o*) Repealed in 1854 (17 & 18 Vict. c. 120).

(*p*) Repealed in 1854.

(*q*) See Small *v.* Nairne, 13 Q.B. 840. Hutchinson *v.* Bernard, 2 M. & Rob. 1. Steinkeller *v.* Newton, 9 C. & P. 313.

(*r*) On attempting to strike out the objectionable parts, it appeared so clear that the depositions had been taken by a person very little conversant with law, that Greaves, Q.C., told the counsel for the prosecution that it was very difficult to presume that such a person had properly administered the oath or given the prisoner a proper opportunity of cross-examination; and, thereupon, the prosecution was abandoned. Wightman, J., thought that as the witnesses had taken the oath without objection, it might perhaps be presumed that they were properly sworn (see 1 & 2 Vict. c. 105, *post*, p. 2295), but on the other points he entertained grave doubts. Greaves, Q.C., was strongly inclined to think that all the objections were good.

Act, 1881 (*s*), for the taking of depositions in the absence of the accused for the purpose of founding and supporting applications for his surrender by the judicial authorities of that part of the Empire in which he has taken refuge, for trial in that part in which he is alleged to have committed an offence within the Act: but such depositions may not be used in evidence on the trial, and the same rule seems to apply even to depositions taken in the presence of the accused and under and for the purposes of the Act. Similar provisions are made by the Extradition Act, with reference to depositions taken for the purpose of obtaining surrender of a criminal by a foreign state (*t*).

On the surrender of accused persons under either set of Acts a preliminary inquiry is instituted in the same manner as if they had been arrested in England, and neither the depositions of persons other than the accused (*u*) taken in the United Kingdom, to obtain the surrender of the accused, or in a foreign state or a British possession, are admissible in evidence at the trial except in cases falling within the Acts stated *ante*, pp. 2248 *et seq.* But it would seem that such depositions may be referred to by the Court in order to see on what charges the offender was surrendered, where the Extradition Treaties and Acts limit the power to try the offender to offences disclosed by the evidence by which the surrender was accorded (*v*).

Sect. VI.—Inspection and Copies of Depositions.

Under the Trials for Felony Act, 1836 (6 & 7 Will. IV. c. 114), s. 4, 'All persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the Court before which such trial shall be had.'

This enactment is not limited to trials for felony, but extends to all offences against the law (*w*), and gives a right of inspection, not recognised at common law, in cases of treason and felony (*x*).

Justices.—Under the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 27, 'at any time after all the examinations aforesaid (*i.e.* of persons charged with any indictable offence before justices), shall have been completed, and before the first day of the assizes or sessions or other first sitting of the Court at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require, and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three half-pence for each folio of ninety words' (*y*).

Coroners.—By the Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 18 (4), 'a person charged by an inquisition with murder or manslaughter shall be

(*s*) 44 & 45 Vict. c. 69, s. 29.

(*t*) See Biron and Chalmers on Extradition. Clarke on Extradition (4th ed.).

(*u*) Depositions, &c., of the accused may be admissible against him as admissions.

(*v*) 33 & 34 Vict. c. 52, s. 19.

(*w*) Cf. s. 3 (rep. in 1848), which gave a right to copies of examinations on committal for trial for any offence against the law.

(*x*) 2 Phill. Ev. 178.

(*y*) Replacing 6 & 7 Will. IV. c. 114, s. 3, in R. *v.* Butcher, 64 J. P. 808, Darling, J., *per incuriam* applied this section to depositions taken before a coroner.

entitled to have from the person having for the time being the custody of the inquisition, or of the depositions of the witnesses at the inquest, copies thereof on payment of a reasonable sum for the same, not exceeding the rate of three half-pence for every folio of ninety words' (*z*).

The depositions taken at a preliminary inquiry before justices or by a coroner are transmitted to the proper officer of the Court at which the person accused is to be tried (*a*), unless the prosecution is undertaken by the Director of Public Prosecutions, in which case they are sent to him (*b*).

Poor Prisoners.—Under the Costs in Criminal Cases Act, 1908 (8 Edw. VII. c. 15) (*c*), the cost of a copy of the depositions was included in the costs of defending a poor prisoner who has obtained a certificate under the Act for legal aid (sect. 1). (This section is superseded by sect. 3.)

A prisoner was not entitled under sect. 3 of the Act of 1836 (6 & 7 Will. IV. c. 114) (*d*), to a copy of his own examination, taken before the committing magistrate, which had been returned with the depositions, but only to a copy of the depositions of the witnesses against him (*e*). This decision (*f*) was founded on the express language of the Act, which spoke of depositions of witnesses, and said nothing of the examinations of prisoners. Sect. 27 of the Act of 1848 is in the same terms; but it is submitted that the prisoner's unsworn statement is part of the depositions, and his own sworn evidence and that of witnesses called for the defence under 30 & 31 Vict. c. 35, s. 3, would certainly be so (*ff*). It is as necessary for the full defence of the prisoner that he should be furnished with a copy of his own statement taken in writing before the magistrate, as it is to have a copy of the depositions, especially where a part of the case for the prosecution consists of evidence intended to disprove or contradict the prisoner's statement. In such a case, if it were necessary for the ends of justice, the judge, by virtue of his judicial authority, might allow the prisoner to inspect his written examination (*g*).

It has been held that a prisoner is not entitled, under sect. 27, to such copies, unless he has been 'committed for trial,' and therefore a person committed to the next sessions for want of sureties to keep the peace, and then do what should be enjoined him by the Court, is not entitled to copies of the depositions taken against him (*h*).

It is submitted that this decision tends to impede the prisoner in his defence at the preliminary inquiry at which he is entitled to give and call evidence, and might consequently affect his position in claiming legal aid as a poor prisoner.

(*z*) This enactment takes the place of 22 & 23 Vict. c. 33 (rep.). In R. *v.* White, 5 Cox, 562, Platt, B., ruled that 6 & 7 Will. IV. c. 114, s. 3, applied to depositions taken before a coroner. But that section was repealed in 1848 (11 & 12 Vict. c. 42, s. 34).

(*a*) 11 & 12 Vict. c. 42, s. 20; 7 Geo. IV. c. 64, s. 5; 50 & 51 Vict. c. 71, ss. 5 (3), 9.

(*b*) 42 & 43 Vict. c. 22, s. 5, *ante*, p. 1925.

(*c*) *Ante*, p. 2040. This enactment supersedes s. 1 (2) of the Poor Prisoners Defence Act, 1903 (*ante*, p. 2048).

(*d*) Superseded by s. 27 of the Act of 1848 and repealed.

(*e*) R. *v.* Aylett, 8 C. & P. 669, Littledale, J., and Parke, B.

(*f*) 2 Phill. Ev. (3rd ed.) 181.

(*ff*) *Vide ante*, p. 2216.

(*g*) *Ex parte* Greenacre, 8 C. & P. 32, Coleridge, J.

(*h*) *Ex parte* Humphrys [1850], 19 L. J. M. C. 189. Coleridge, J., seemed clearly of opinion that a prisoner would have no right to a copy of the depositions after he had been tried. Cf. *Ex parte* Fletcher [1844], 13 L. J. M. C. 67; s. c. as R. *v.* Mayor of London, 5 Q. B. 555, where under the Act of 1836 copies of depositions taken before a remand were refused to the prisoner.

Where additional evidence has been obtained after committal for trial, but no depositions containing such evidence taken, the Court has no authority to order a copy of such evidence (*i*).

But it is now the established practice to require the prosecution to give notice of intention to call additional witnesses, or produce further documents, and serve on the defence a copy or summary of the proofs of the additional evidence, and to give a list of the additional documents with notice, to produce or admit this according as they are in the possession of the prosecution or of the defence (*j*).

Where the prisoner was committed for receiving iron, knowing it to have been stolen, and a person, who had been committed as having stolen the iron, was admitted as a witness for the Crown, Patteson, J., allowed the prisoner's counsel to inspect the depositions which had been returned against the person charged as the thief (*k*).

Where a true bill was found against a prisoner for the murder of a person, on the investigation of whose death the coroner's jury returned a verdict of 'Wilful murder against some person or persons unknown,' and the depositions taken before the coroner were in the possession of the officer of the Court before whom the prisoner was to be tried; it was held that, although the coroner could not have been compelled to return the depositions under 7 Geo. IV. c. 64, s. 4 (*l*), yet the judges had power by their general authority as a court of justice, if they thought it essential to the interests of justice, to order a copy of them to be given to the prisoner (*m*).

Where a prisoner was indicted for obtaining money by falsely pretending that a parcel contained a number of letters, and those letters had been seized under a search-warrant, and were in the possession of the prosecutrix, who had written and sent them to the prisoner, an order was made by the Central Criminal Court for an inspection of the letters, but not for copies (*n*).

(*i*) R. *v.* Connor, 1 Cox, 233, Patteson, J.

(*j*) See Archb. Cr. Pl. (23rd ed.), 415, and cases there collected.

(*k*) R. *v.* Walford, 8 C. & P. 767. The report does not state whether these depositions were taken in the presence or absence of the prisoner.

(*l*) He is now required to do so by 50 & 51 Vict. c. 71, s. 9.

(*m*) *Ex parte* Greenacre, 8 C. & P. 32. Littledale, J., and Coleridge, J. Coleridge, J., said: 'Supposing these depositions had been against some other person tried a year ago for an offence with which this particular prisoner had nothing to do, yet if we had them, have we not authority as a court of justice, if we think it essential to the interests of justice, to order a copy of them to be given to him? I think that we have.'

(*n*) R. *v.* Colucci, 3 F. & F. 103. *Quære* whether these letters were not the property of the prisoner; and *quære* the right to issue a search-warrant for them. C. S. G.

CANADIAN NOTES.

OF CONFESSIONS, ETC.

Sec. 1.—*Of Confessions and Admissions.*

Confession, When Admissible.—Code sec. 685.

Confessions and Admissions as Evidence.—An admission of guilt made by a party charged with a crime to a person in authority under the inducement of a promise of favour, or by reason of menaces or under terror, is inadmissible in evidence. R. v. Charcoal (1897), 4 Can. Cr. Cas. 93 (N.W.T.).

The Indian Agent, appointed under the Indian Act (Can.), for the Indian Reserve upon which an accused Indian lives, is a person in authority; and to allow in evidence a confession made to him it must appear that no inducement was offered to the accused to make it. *Ibid.*

The onus of proving that the alleged confession was not made under an inducement or threat is on the Crown. *Ibid.*

Smith was a clerk in a post office. A post office inspector discovered irregularities and questioned Smith about them. Smith admitted that he delayed letters. The inspector said: "If you have tampered with the contents it will go hard with you." Smith then made a confession. The trial Judge (McLeod, J.) refused to admit evidence of confessions subsequent to the threat. R. v. Smith (1897), 33 C.L.J. 331.

Admissions made by a prisoner to a police officer in respect of the charge upon which he is in custody, are admissible in evidence although made in response to questions put by the officer, if the trial judge finds that the answers were not unduly or improperly obtained having regard to the circumstances of the particular case. R. v. Elliott (1899), 3 Can. Cr. Cas. 95, 31 Ont. R. 14.

In the course of conversation between the prisoner and a detective relative to the purchase of counterfeit money, the prisoner asked the detective whether he had received a letter written by the prisoner stating his desire to purchase counterfeit money, and upon the detective shewing the prisoner the letter he admitted it was his; it was held that the letter was properly received in evidence, as part of the history of the case, and as, in a sense, forming part of the subject-matter of conversation. R. v. Attwood (1891), 20 Ont. R. 574.

Where a prisoner made an admission of guilt, being induced to do so by a police officer who said: "The truth will go better than a lie. If any one prompted you to do it you had better tell about it," it was held (following R. v. Fennell (1881), 7 Q.B.D. 147), that the inducement invalidated the admission. R. v. Romp (1889), 17 O.R. 567.

The reason why the statement of a prisoner under oath is to be rejected rests upon two grounds: first, that the confession must be voluntary, and it is contended that a statement under oath is not so; secondly, that a prisoner shall not be compelled to criminate himself; and to this it may be added that it is harsh and inquisitorial, and for that reason an examination of the prisoner so had should be rejected. But after the examination of the charge against the prisoner has been concluded, and he has been committed for trial on it, if he is allowed to make a charge against another person, and his testimony is properly receivable against such other person, and no inducements have been held out to him to make any statement whatever in relation to the matter, no principle of law is violated in receiving the statements so made as evidence against himself. R. v. Field (1865), 16 U.C.C.P. 98.

In the last mentioned case 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 appear 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 the rule of law excluding the sworn statements of a 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. R. v. Field (1865), 16 U.C.C.P. 98.

Prisoner was convicted of arson. On the trial the Judge allowed a confession or admission of the prisoner to be read. The evidence of the confession was that of a constable who stated that after prisoner had been in a second time before the coroner he stated there was some-

thing more he could tell; the constable asked what it was, but not to say what was not true; he said he went over to the house, got in at the window and set the place on fire; the constable did not recollect any inducement being held out; the constable asked him if he wanted to go in and state that before the jury; he said he did. It further appeared that on the third day after he had been taken into custody he told the jury he wished to confess; the coroner said to him that anything he said might be used against him, not to say anything unless he wished, just the ordinary caution. He then made a second statement. He had only been absent a few minutes when he returned and made the last written confession, after the constable had informed the coroner of the prisoner's desire. Held, that the statement made to the constable was *primâ facie* receivable, and that the Judge was warranted in receiving as voluntary the confession made to the coroner after due warning by him. R. v. Finkle (1865), 15 U.C.C.P. 453.

The reason that it is a rule of law that confessions made as the result of inducements held out by persons in authority are inadmissible is that the authority that the accused knows such persons to possess may well be supposed in the majority of instances both to animate his hopes of favour on the one hand and on the other to inspire him with awe, and in some degree to overcome the powers of his mind: Greenleaf on Evidence, sec. 222. If, therefore, the prisoner when he made the admission was without notice or knowledge of any facts that could constitute either of two men to whom it was made persons in authority, it could not be contended that as to the prisoner they were persons in authority. R. v. Todd (1901), 4 Can. Cr. Cas. 514, 527, per Bain, J.

The well-known rule as to the admission or rejection of a confession made by a prisoner is to the effect that no confession by the prisoner is admissible which is made in consequence of any threat or inducement of a temporal nature, having reference to the charge against the prisoner, made or held out by a person in authority; and, as stated by Roscoe, in his work on Criminal Evidence, the tendency of the present decisions seems to be to admit any confessions which do not come within this proposition. But the strict application of that rule is more or less influenced by the peculiar circumstances of each case; and in each instance a good deal is left to the discretion of the Judge trying the cause. Taylor on Evidence, sec. 796; Russell on Crimes, 4th ed., vol. 3, p. 368; R. v. Todd (1901), 4 Can. Cr. Cas. 514, 519, per Dubuc, J.

A confession is not involuntary only because it was brought about by an inducement that is not connected with the charge; but, as pointed out by Bain, J., in R. v. Todd (1901), 4 Can. Cr. Cas. 514, 525, this still leaves the question an open one, whether the Judge, if he considers that the inducement, though it did not refer to the charge, was

of such a nature as to be likely to produce an untrue confession, should reject the evidence of the confession as an involuntary one, or must he admit the evidence and leave the jury to decide as to its credibility?

A false statement made by an officer to one of the persons accused to the effect that a co-defendant, also in custody, had made a statement to the police about the facts, will not prevent the reception in evidence of a confession or admission afterwards volunteered by the prisoner to whom such false statement was made if no inducement was held out, or threat made to obtain such confession. R. v. White, 15 Can. Cr. Cas. 30.

A confession which is preceded by a statement from a person in authority, which may have operated as an inducement to the prisoner to make the confession, will, notwithstanding, be admissible in evidence if he were duly cautioned after the inducing statement, and before the confession itself, by the magistrate who received the same. R. v. Lai Ping, 8 Can. Cr. Cas. 467, 11 B.C.R. 102.

The rector of a cathedral is a person in authority over the choir boys with respect to the investigation of an alleged assault committed by them while on the way to a meeting of the choir, and answers of a choir boy elicited by the rector and the choirmaster upon such investigation, and stated to be only for the purpose of that enquiry, are not admissible in evidence against the choir boy afterwards prosecuted for the assault without proof that the statement was voluntarily made. R. v. Royds, 8 Can. Cr. Cas. 209, 10 B.C.R. 407.

A prisoner's admission to a Crown officer while in custody is not admissible in evidence, if it appears that such an admission was suggested to the prisoner by a peace officer with inducements which would make an admission to him inadmissible, and was shortly afterwards made to the Crown officer as a result of such inducement. R. v. Hope Young, 10 Can. Cr. Cas. 46.

In R. v. Day (1890), 20 O.R. 209, the prisoner, who was charged with murder, had been first cautioned by the detectives against saying anything, and had then been questioned by them, and evidence of the statements made by him in answer to such questions was admitted by the trial Judge, who reserved a case for the consideration of the Queen's Bench Division. In delivering the judgment of the Court, 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 shew 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. We hold the evidence admissible and affirm the conviction."

That decision was referred to with approval in the Quebec case of R. v. Viau, 7 Que. Q.B. 362.

A confession alone is sufficient to justify a conviction. R. v. Graf, 19 O.L.R. 242.

Onus of Proof.—The onus of proof that the confession or admissions made by the accused were made voluntarily and without improper inducements or threats is upon the prosecution. R. v. Royds (1904), 8 Can. Cr. Cas. 209, 10 B.C.R. 407; R. v. Charcoal, 4 Can. Cr. Cas. 93; R. v. Jackson, 2 Can. Cr. Cas. 149; R. v. Ryan, 9 Can. Cr. Cas. 347.

Beyond the right the accused person undoubtedly has to have the whole of the conversation in which the alleged admission was made given in the evidence (Roscoe, 11th ed., p. 51) to make a confession by a prisoner admissible it must be affirmatively proved that such confession was free and voluntary, that it was not preceded by any inducements to the prisoner to make a statement held out by a person in authority or that it was not made until after such inducement had clearly been removed. R. v. Ockerman (1898), 2 Can. Cr. Cas. 262.

In a case where the person in authority to whom the admission was made would not swear that he did not hold out any threat or inducement to the prisoner to make the statement, it was held that such onus is not satisfied by the evidence of the interpreter who said that he remembered that "any statement the prisoner made was voluntary," since it was not shewn that the interpreter knew what was in law a voluntary statement. R. v. Charcoal (1897), 34 C.L.J. 210, 4 Can. Cr. Cas. 93.

A confession induced by false statements of the officer as to the knowledge already obtained in regard to the alleged offence is not a free and voluntary confession. So where an accused was charged with stealing a post letter, and had made admissions in presence of a detective and a post office inspector, after the latter had said to him: "There is no use your denying it. You were seen taking the letters out of the box. You may as well tell us what you did with them, as have it brought out in a Court of law," and it was admitted by the Crown that there was no evidence that accused was seen taking letters, it was held that the evidence was inadmissible not only because of the threat implied in the statement of the inspector, but because the admission had been improperly obtained by means of a false statement by a person in authority. R. v. MacDonald (1896), 2 Can. Cr. Cas. 221, 32 C.L.J. 783, per Scott, J.

On a Crown witness being interrogated as to an alleged confession made by the accused, and the defendant objecting to its being received

counsel for the defendant may be allowed to intervene on the examination to cross-examine on the question of the confession being a voluntary one, with the view of excluding evidence thereof. R. v. Ryan (1905), 9 Can. Cr. Cas. 347, 9 O.L.R. 137.

The proper mode of proving that the prisoner's statement was voluntarily made, is by negativing the possible inducements by way of hope or fear that would have made the statement inadmissible, and not by merely taking the affirmative answer of the officer under oath that the statement was made voluntarily. R. v. Tutty (1905), 9 Can. Cr. Cas. 544.

Where a witness called to prove a confession alleged to have been made by the accused, purports to give a complete account of the interview, and no suspicious circumstances are brought out pointing to any threat or inducement relating thereto, the evidence should not be rejected, although the witness was not asked whether any threats or inducement had been held out. Re Lewis (1904), 9 Can. Cr. Cas. 233.

1. Whereas a person falsely assumed the character of an interpreter sent by the prisoner's solicitor to obtain from the prisoner his statement of the case and the prisoner was by that means induced to make a statement, such statement is privileged and is not admissible in evidence against him.

2. Where a police officer had asked the interpreter to get the prisoner to talk about the case and had arranged to conceal witnesses near the prisoner's cell to overhear the conversation, the concealed listeners will also be treated as having fraudulently adopted the character of solicitor's representatives, and their evidence will be rejected on the ground of privilege. H. v. Choney, 13 Can. Cr. Cas. 289.

The prisoner W. was tried for attempting to murder J. P., whose wife, M. P., was tried at the same time for aiding and abetting in the attempt. Before the trial, and while W. was in custody a police officer made an untrue statement to him, that M. P. had "done some talking" about the matter, upon which W. voluntarily made statements to the officer as to the key of J. P.'s house, and as to a club which he said he had used.

Held, that evidence was properly admitted as to the statements made by W. with regard to the key and the club.

Subsequently to the making of the untrue statement by the police officer, conversations were overheard between W. and his father and between W. and M. P., in which the former admitted his guilt.

Held, that evidence was properly admitted as to these conversations.

Per Osler, J.A.—Though the practice is not to be approved of it is, generally speaking, no objection to the admissibility of a prisoner's confession that it was obtained by means of a trick or artifice practised upon him by the officer or other person to whom it was made. R. v. White, 18 O.L.R. 700.

Interrogation by Police.—There is much conflict of authority in England as to the admission of statements made by a prisoner to a police officer in answer to the latter's enquiries. It was held by Mr. Justice Smith in R. v. Gavin (1885), 15 Cox Cr. Cas. 656, that when a prisoner is in custody the police have no right to ask him questions. The same view was expressed by Cave, J., in R. v. Male (1893), 17 Cox Cr. Cas. 689, in which he said that the law does not allow the Judge or jury to put questions in open Court to a prisoner, and it would be monstrous if it permitted a police officer, without anyone present to check him, to put a prisoner through an examination and then produce the effects of it against him. The police officer should keep his mouth shut and his ears open, should listen and report, neither encouraging nor discouraging a statement, but putting no questions. The same learned Judge is also reported as having stated at a *nisi prius* trial that he would exclude all evidence obtained by a system of private interrogation of accused persons by the police, and that he believed most of the Judges agreed with his opinion. 20 Mon. Legal News 272.

There is a distinction between confessions obtained before and after arrest, the arrest itself constituting an inducement or pressure upon the accused to speak; and in order to satisfy the onus upon the Crown of proving that a confession in answer to questions put by a constable to a prisoner was voluntary, it must be shewn that the accused was warned that what he said might be used against him. R. v. Kay (1904), 9 Can. Cr. Cas. 403, 11 B.C.R. 157.

A confession obtained from a person under arrest for theft in answer to questions put by a police officer without any warning being given to the prisoner is not admissible against him upon a charge of murder subsequently preferred. *Ibid.*

A police officer or other person having the duty of investigating into an alleged crime may obtain information by questioning persons able to give such information, whether he suspected those persons or not; but after he has determined to accuse a particular person of the crime he ought not, whether he had in fact arrested the accused person or not, to question him further; and apart from any positive rule of evidence, answers to improper questions obtained by the protracted and continuous system of questioning and worrying the accused known as the "sweat-box system," may be excluded by the Judge in the exercise of his discretion directing that such evidence should not be given. R. v. Knight (1905), 21 Times L.R. 310, referred to in 9 Can. Cr. Cas. 356.

Persons Jointly Accused.—Where two prisoners are being jointly tried for an offence, a voluntary admission made by one of them is evidence against himself only, and if it implicates a fellow prisoner the trial Judge should warn the jury that the statement is evidence

only against the person making it and should not be considered in weighing the evidence against the fellow prisoner. R. v. Martin (1905), 9 Can. Cr. Cas. 371.

Semble, the prisoner jointly charged and likely to be implicated by the statement of the other accused person, would have good ground for applying to be separately tried, in order to prevent the statement being put in even with such warning, as evidence before the jury by which he is to be tried. *Ibid.*

Such a statement of one prisoner, if proved, must be proved *in toto*, and the Court would not be justified in directing that the name of others thereby implicated be suppressed by the witness proving the statement of the accused. *Ibid.*

Admissions in Court.—See Code secs. 978 and 1001.

Evidence Given on Oath by Prisoner—When Admissible.—Section 978 does not enable a valid consent to be given to something which is manifestly irregular, as that the witnesses should be examined without being sworn, or that admissions made by the prisoner's solicitor to the opposing solicitor out of Court should be received as evidence. Whelan v. R., 28 U.C.Q.B. 2, 52.

The accused person may legally consent to withdraw or release his challenge of a juror or to accept a juror on his challenge being overruled. So if the prisoner whose challenge of a juror for favour has been disallowed chooses then to challenge the juror peremptorily, he waives the benefit of any exception to the disallowance of his challenge for favour. He may consent to secondary evidence being given, or to withdraw a plea of not guilty and plead guilty. Whelan v. R., 28 U.C.Q.B. 2.

Code sec. 978 permits an admission of any "fact" to be made at the trial by the prisoner or his counsel so as to dispense with proof, but the section does not apply to an alleged consent of the prisoner's counsel to put in evidence not properly receivable against the prisoner. R. v. Brooks, 11 Can. Cr. Cas. 188, 11 O.L.R. 525.

But on a summary trial before a magistrate on a charge of being an inmate of a bawdy house it is competent for the accused or her counsel to consent that the evidence which had been given before the magistrate upon a concluded trial of another person for keeping the bawdy house should be read as evidence in the case. R. v. St. Clair (1900), 3 Can. Cr. Cas. 551, 27 Ont. App. 308.

Statement by Accused upon Preliminary Inquiry.—See Code sec. 1001.

Although the magistrate's record of proceedings does not shew on its face that a statement made by the accused to him in answer to the charge was made after due caution in accordance with sec. 684, the fact that it was so made may be proved at the trial and the statement may

thus be put in evidence by the prosecution. R. v. Kalabeen (1867), 1 B.C.R., p. 1, per Begbie, C.J.

Admissions Made at Trial.—See Code sec. 684.

Sec. 684 is directory only and a statement made by a prisoner may be used in evidence against him, although the justice has not complied with the provisions of the section, if it appeared that the prisoner was not induced to make the statement by any promise or threat. R. v. Soucie, 1 P. & B. (N.B.) 611.

Upon a preliminary trial it is proper for the magistrate to ask the accused to sign the statement of the accused made under Code sec. 684 even where the prisoner's answer to the statutory question is, "I have nothing to say." The signature of the accused to such statement may be afterwards used against him upon the charge of forgery upon which he was committed, for purposes of comparison of the handwriting with the alleged forgery. R. v. Golden, 10 Can. Cr. Cas. 278.

Admission in Criminal Proceedings of Deposition Previously Taken before Commissioner.—See Code sec. 998.

Deposition on Preliminary Inquiry may be Read in Evidence in Certain Events.—Code sec. 999.

At common law the deposition on the preliminary inquiry was admissible at the trial if the witness had died, or was permanently insane, or was kept away by the prisoner, or if the witness were so ill that there is no probability that he will ever be able to attend. R. v. Hamilton, 16 U.C.C.P. 340.

Using Depositions as Evidence.—The original statute, 23-33 Vict. ch. 30, sec. 30, was passed to prevent the obstruction of justice by the absence of witnesses. The question as to whether or not the witness is unable to travel must in the main be left to the judgment and discretion of the trial Judge. R. v. Wellings (1878), L.R. 3 Q.B.D. 42; R. v. Stephenson (1862), L. & C. 167. And the same rule will be applied where the absence from Canada is not positively proved but is a matter of inference from circumstances. R. v. Nelson (1882), 1 Ont. R. 500.

Evidence of a custom's clerk that the captain of a schooner had cleared from a Canadian port a week before the trial is not sufficient evidence of his being out of Canada to satisfy this section. R. v. Morgan (1893), 2 B.C.R. 329. Semble, there should have been evidence that the schooner actually left the harbour.

The following proof of absence of a witness from Canada was held sufficient to allow of the reading of his deposition taken on the preliminary enquiry; a witness was called who said that he saw the absent witness ten days previously, that he was then employed on a certain boat and on leaving him had said that he was going on board the boat and that the boat's route had now been changed to foreign waters. R. v. Pascaro (1884), 1 B.C.R., pt. 2, p. 144, per Begbie, C.J., Gray and Walkem, JJ.

Depositions may also be proved by the magistrate, or his clerk, and in important cases it is better to have the magistrate present at the trial. R. v. Hamilton (1866), 16 U.C.C.P., p. 353.

A deposition read over to and signed by the deponent may be admissible in evidence as a dying declaration, although irregular as a deposition under this section because taken in the absence of the accused. R. v. Woods (1897), 2 Can. Cr. Cas. 159 (B.C.).

In order that this section should apply to make admissible as evidence at the trial the deposition of a witness, since deceased, taken on a preliminary inquiry or other investigation of a charge against the accused before a justice of the peace, the document containing the deposition is alone to be looked at to ascertain if the deposition "purports to be signed by the justice," as is required by that section. R. v. Hamilton (1898), 2 Can. Cr. Cas. 390 (Man.).

Where the deposition sought to be used had been signed by both the witness and the magistrate, and was attached at the end of depositions taken by the magistrate on a previous date named, but did not itself contain a new "caption," or the date when taken, or any record by the magistrate certifying that such added deposition had been taken by him, and the first depositions formed in themselves a complete document concluding with the magistrate's note of the remand of the case, it is not to be presumed that the informal deposition following the formal document is a continuation of the first deposition (in which appeared no reference to the added deposition), or that it relates to the same charge, and it was held that such added deposition did not "purport to be signed by the justice by or before whom the same purports to have been taken." *Ibid.*

A deposition, the caption of which sets out the name of the justice and describes him as one of the justices of the peace for a named county, "purports to be signed by the justice by or before whom the same purports to have been taken," if the same is signed by the justice with his name only, without adding to it, as in form 19 of the Code, the initials "J. P." and the name of the county for which he is a justice; and such a deposition is *primâ facie* admissible in evidence. *Ibid.*

The deposition must be a verbatim record of the witness's evidence. R. v. Graham (1898), 2 Can. Cr. Cas. 388 (Que.).

Notes of evidence taken by the coroner at an inquest which do not contain the precise expressions of the witness, but a summary only of the evidence, are not admissible in contradiction of the witness's testimony in a subsequent proceeding unless signed by the witness, or unless read over to and acquiesced in by him. R. v. Ciarlo (1897), 1 Can. Cr. Cas. 157 (Que.).

But the witness may in such case be cross-examined as to any material statements made by him at the inquest, and witnesses may be

called to shew that he then made a different and contradictory statement. *Ibid.*

The deposition of an ill or absent witness taken before a magistrate having jurisdiction to hold the preliminary enquiry, other than the one before whom the charge was laid and the committal made, may be used at the trial if the deposition was taken in the presence of the prisoner and with full opportunity of cross-examining, and if the formalities of the Code are complied with as to the manner of taking and signing depositions. R. v. De Vidal (1861), 9 Cox C.C. 4 (Blackburn, J.), and approved in Re Guerin (1888), 16 Cox 596 (Wills and Grantham, JJ.); although a commitment can only be made by the magistrate who has himself heard all the evidence upon which it is based. Re Nunn (1899), 2 Can. Cr. Cas. 429 (B.C.).

Depositions of a witness speaking in French taken down by the translator in English at a preliminary inquiry but not read over and explained to the witness or signed by him are not admissible to contradict his testimony on a subsequent proceeding, but the witness may be cross-examined as to material statements then made, and witnesses called to shew a contradiction with his former testimony. R. v. Ciarlo (1897), 1 Can. Cr. Cas. 157 (Que.).

The absence from Canada required by Code sec. 999 to be shewn in respect of a witness before his depositions on the preliminary enquiry can be used as evidence for the prosecution at the trial, must be of a permanent nature, and a mere temporary absence is insufficient. The onus of shewing that the witness's absence from Canada is not merely temporary is upon the prosecution. R. v. McCullough (1901), 8 Can. Cr. Cas. 278 (Que.).

Quære, whether a deposition at a coroner's inquest is admissible as evidence on the homicide trial on the deponent's death, illness or absence from Canada as a deposition on a preliminary enquiry would be, and whether sec. 999 of the Code applies at all to depositions taken before coroners. R. v. Laurin (No. 3), 5 Can. Cr. Cas. 548 (Que.).

Evidence that a witness at the preliminary enquiry was a corporal in the N. W. Mounted Police, that he had been sworn in as a member of "Strathcona's Horse," for active service in the South African War, that he had left the post at which he had been stationed to join the later force, and that, in the opinion of the deponent, if he had left the latter force he would have returned to such post, as in fact it would have been his duty to do, which fact would thereupon have become known to the deponent, was held to be sufficient evidence of the absence of such witness from Canada to justify the admission as evidence at the trial of the deposition of such witness taken at the preliminary enquiry. R. v. Forsyth (1900), 5 Can. Cr. Cas. 475.

In reviewing the evidence of absence from Canada given for the

purpose of admitting a deposition in evidence, the appellate Court should only consider whether such evidence was such as should reasonably satisfy a trial Judge in finding the fact of absence. *Ibid.*

In order that the depositions of a witness taken on the preliminary enquiry should be admissible as evidence on the trial in the event of the witness being out of Canada, it is sufficient if the ordinary employment of the witness necessitates his continued absence for such a period as would involves an obstruction of justice if the trial were delayed until his expected return. A finding that the witness is "absent from Canada" within the meaning of the Code is justified if it be proved that he shipped as a sailor on a sealing voyage, which would ordinarily last six months, and that he was seen on the vessel just before its departure three weeks before the trial. R. v. Deloe, 11 Can. Cr. Cas. 224.

Full Opportunity to Cross-examine.—"Full opportunity to cross-examine" implies the actual seeing of the witness as he testifies, and the hearing of his words, as they fall from his lips. R. v. Lepine (1900), 4 Can. Cr. Cas. 145 (Que.).

Where the cross-examination of a witness for the prosecution upon a preliminary enquiry is interrupted by the illness of the witness, and the magistrate, in the absence of the accused and of his counsel, afterwards obtains the witness's signature to the depositions, but neither the witness nor the prisoner's counsel re-attends the enquiry to complete the cross-examination, there has been no full opportunity to cross-examine so as to admit such depositions in evidence at the trial upon proof of the continued illness of the witness. R. v. Trevane (1902), 6 Can. Cr. Cas. 124, 4 O.L.R. 475. There was no waiver of the right to continue the cross-examination by the failure of prisoner's counsel to attend on the adjourned inquiry when the witness was not present or by the prisoner himself stating thereat that he had nothing to say. *Ibid.*

A magistrate should not obtain a witness's signature to a deposition in the absence of the accused. *Ibid.*

Depositions Taken on Preliminary Inquiry May be Used in Trial for Other Offences.—See Code sec. 1000.

Statement by Accused, How Proven in Evidence.—See Code sec. 1001.

Although the magistrate's record of proceedings does not shew on its face that a statement made by the accused to him in answer to the charge was made after due caution in accordance with sec. 684, the fact that it was so made may be proved at the trial and the statement may then be put in evidence by the prosecution. R. v. Kalabeen (1867), 1 B.C.R., pt. 1, p. 1, per Begbie, C.J.

Sec. 2.—Depositions and Statements at the Preliminary Inquiry.

Inquiry by Justice—Jurisdiction.—Code secs. 668, 669, 670.

Procuring Attendance of Witnesses.—Code secs. 671, 672, 673, 674, 675, 676, 677.

Procedure—Witness Refusing to be Examined.—See Code sec. 678.

Excuse for Refusal.—To justify a magistrate in committing a witness under sec. 678 for refusing to answer a question put to him upon a preliminary enquiry, it must appear not only that the witness refused without just excuse to answer but that the question asked was in some way relevant to the charge. Re Ayotte (1905), 9 Can. Cr. Cas. 133, 15 Man. R. 156.

The section only applies when the refusal is made "without offering any just excuse," and the form of the warrant of commitment referred to in the section contains the words, "now refuses to answer certain questions concerning the premises now put to him." Code form 16.

Defendant and Wife or Husband of Defendant as Witnesses.—See Canada Evidence Act, secs. 4 and 5.

Powers of Magistrate.—See Code sec. 679.

Presence of Accused When Remand Made.—A remand by a magistrate in a preliminary enquiry must be by warrant if made for more than three clear days, and it is essential that the accused should be personally present before the magistrate. Re Sarrault (1905), 9 Can. Cr. Cas. 448.

A remand for eight days for the purpose of a medical examination of the accused as to sanity cannot be made on the mere suggestion of the police officer without bringing the accused personally before the magistrate. *Ibid.*

Verbal Remand—Where on a preliminary enquiry a remand is desired for a time exceeding three clear days, the justice may remand only by warrant (Code form 17), declaring that it appears to be necessary to remand the accused; and an informal remand endorsed upon the warrant is insufficient. R. v. Holley (1893), 4 Can. Cr. Cas. 510, per Townshend, J. (N.S.).

Remand Before Another Justice.—Where the evidence on a preliminary enquiry was commenced before one justice of the peace and finished before him and another justice who joined in the hearing of the case after the evidence of a material witness had been taken and the case adjourned to a subsequent day, a committal made by the two justices jointly was held to be irregular, as both had not heard all of the evidence. Re Nunn (1899), 2 Can. Cr. Cas. 429 (B.C.), per Walkem, J.

The Code form 17 gives, in the form of warrant remanding a prisoner, a direction that he be brought before the remanding justice

"or before such other justice or justices of the peace for the said county as shall then be there, to answer further to the said charge," etc. And by sec. 680 the justice may, before the expiry of the time of remand, order the accused person to be brought before him or before any other justice for the same territorial division. So also under the special provision contained in Code sec. 679(2) regarding verbal remands for a time "not exceeding three clear days," the accused may be brought "before the same or such other justice as shall be there acting at the time appointed for continuing the examination." These provisions, must, therefore, on the principle enunciated in Re Guerin, *supra*, be construed as allowing another magistrate to continue the proceedings without rehearing the depositions already taken, only in case of the death or resignation of the first magistrate.

This will, however, not prevent the use at the trial, under Cr. Code sec. 999, of the deposition of an ill or absent witness taken before a magistrate having jurisdiction to hold the preliminary enquiry, other than the one before whom the charge was laid and the committal made, if the deposition was taken in the presence of the prisoner and with full opportunity of cross-examining, and if the formalties of the Code are complied with as to the manner of taking and signing depositions. R. v. De Vidal (1861), 9 Cox C.C. 4 (Blackburn, J.), approved in Re Guerin (1888), 16 Cox 596 (Wills and Grantham, JJ.).

Substituting Another Charge.—Magistrates conducting a preliminary inquiry in respect of an indictable offence, may not on its conclusion convict of a lesser offence, over which they have summary jurisdiction, although proved by the evidence adduced, if no complaint was laid before them, nor the accused called upon to defend in respect of such lesser offence. R. v. Mines (1894), 1 Can. Cr. Cas. 217 (Ont.).

Re-opening Inquiry.—In a criminal case the preliminary hearing before the magistrate of an offence punishable on indictment, is not, properly speaking, the *enquete* of the informant, but that of the magistrate. On the preliminary hearing, after the *enquete* on the information has been declared closed and no evidence has been offered on the part of the accused, and even after argument on questions of law arising from the evidence given, the magistrate may, in his discretion, allow the informant to re-open the *enquete* and give further evidence. Belanger v. Mulvena, Q.R. 22 S.C. 37.

Private Prosecutor.—A private prosecutor is no party to a criminal prosecution, and cannot insist that he or his counsel shall aid in the conduct thereof. R. v. Gilmore, 7 Can. Cr. Cas. 219, 6 O.L.R. 286.

Hearing may be Resumed During Time of Remand.—Code sec. 680.

Bail may be Given on Remand.—Code sec. 681.

Evidence for Prosecution.—Code sec. 682.

The provision as to the witnesses signing their evidence when not taken in shorthand (sec. 683) is not imperative but directory merely. R. v. Scott, 26 O.R. 646; R. v. Bidgood (1904), 40 C.L.J. 394; Ex parte Doherty, 3 Can. Cr. Cas. 310, 32 N.B.R. 479.

Depositions to which the magistrate had affixed his signature, although such signature was not placed at the end thereof (sub-sec. 5) are sufficiently signed for the purposes of a "charge" brought thereunder under the speedy trials clauses. R. v. Jodrey (1905), 9 Can. Cr. Cas. 477 (N.S.).

In R. v. Traynor (1901), 4 Can. Cr. Cas. 410, the witnesses for the prosecution were sworn by the magistrate and were then taken into another room and their evidence in chief taken by the stenographer in the absence of the magistrate. The witnesses were afterwards brought before the magistrate for cross-examination, but the prisoner's counsel objected to the evidence as illegally taken. The magistrate reserved his ruling on the objection and did not examine the witnesses afresh, and the prisoner's counsel proceeded with the cross-examination subject to the objection. It was held that an indictment subsequently founded on the depositions must be quashed, because the depositions were irregularly taken. R. v. Traynor (1901), 4 Can. Cr. Cas. 410 (Que.), following R. v. Watts, 33 L.J.M.C. 63.

The magistrate is not required to take down the evidence himself, but the law requires in effect that the witnesses must be before him, and that he must see them and hear them when testifying, and then their testimony may be taken down either at length by a clerk or in shorthand by a stenographer. R. v. Traynor (1901), 4 Can. Cr. Cas. 410 (Que.).

It was held in the Manitoba case of R. v. Hamilton (1898), 2 Can. Cr. Cas. 390, per Killam, J., that the deposition of a deceased witness may be used in evidence apart from sec. 999, Cr. Code, although it does not "purport to be signed by the justices by or before whom the same purports to have been taken," but, where it is not admissible by virtue of sec. 999, it must be affirmatively shewn that all the formalities required to be observed in taking depositions have been complied with.

When depositions in a preliminary enquiry, to which the accused was not a party, and, consequently, taken in his absence, are read to the same witness in a case against the accused, and the witness, after being sworn in the presence of the accused, either affirms that his former deposition contains the truth, or makes corrections, as the case may be, and then affirms its truth as corrected, the prosecutor, being then given permission to ask further questions, and the accused to cross-examine, such proceeding does not afford the accused the full and complete opportunity to cross-examine contemplated by law. R. v. Lepine (1900), 4 Can. Cr. Cas. 145 (Que.).

It seems that an accused person may, upon a preliminary inquiry, waive the preliminary examination into the charge and consent to be committed for trial without any depositions being taken; but as the "charge" in the County Judge's Criminal Court must be prepared from the depositions (Cr. Code 827) the accused, committed without depositions having been taken, has no right to elect to be tried at the County Judge's Criminal Court. R. v. Gibson (1896), 3 Can. Cr. Cas. 451; R. v. Wener (1903), 6 Can. Cr. Cas. 406; R. v. McDougall, 8 Can. Cr. Cas. 234 (Ont.).

Depositions may be Taken Down in Writing or by a Stenographer. —Code sec. 683.

Depositions to be Read to Accused—Accused may Make Statement. —Code sec. 684.

Sec. 684 is directory only and a statement made by a prisoner may be used in evidence against him, although the justice has not complied with the provisions of the section if it appears that the prisoner was not induced to make the statement by any promise or threat. R. v. Soucie, 1 P & B. (N.B.) 611.

The statement made by the accused before the justice may, if necessary, upon the trial of such person be used in evidence against him without further proof thereof, unless it is proved that the justice purporting to have signed the same did not in fact sign the same. Code sec. 1001.

Confessions or Admissions by Accused.—See Code sec. 685.

See also notes to Confessions, etc.

Evidence of Witnesses for Defence.—See Code sec. 686.

Sec. 978 permits admissions to be made by the accused or his counsel at the trial, but it does not in terms apply to admissions made on the preliminary enquiry. It is submitted that an admission of counsel for the accused made on the preliminary enquiry is effective only as to that proceeding and cannot afterward be used at the trial of the indictment.

Where a person is accused in Great Britain or in any of the British possessions of an indictable offence and is found in Canada, the proceedings for effecting his return to the country wherein the offence was committed for his trial are governed by the Fugitive Offenders Act (Can.), under which the magistrate shall hear the case in the same manner and have the same jurisdiction and power as if the fugitive was charged with an offence committed within his jurisdiction. R. v. De Lisle (1896), 5 Can. Cr. Cas. 225.

Further Evidence on Behalf of Prosecution.—See Code sec. 679.

Sec. 3.—Depositions and Statements Before Coroners.

Coroner's Inquisition, Warrant, etc., Depositions and Procedure.—See Code sec. 667.

Coroners' Inquests.—A coroner's duty is judicial, and he can only take an inquest *super visum corporis.* Ex parte Wilson (1871), Stevens N.B. Dig. 334. An inquest where the coroner and the jurors were not present at the same time is void. *Ibid.*

A coroner is not liable in trespass for anything done in his judicial capacity. Gamer v. Coleman, 19 U.C.C.P. 106; Agnew v. Stewart, 21 U.C.Q.B. 396.

A coroner's inquest held on Sunday is invalid. Re Cooper, 5 P.R. (Ont.) 256.

A coroner's inquisition or the finding of a coroner's jury is no longer sufficient to alone place the accused on trial before a petit jury for the offence charged in such finding. Section 940. There must first be a true bill found by a grand jury before that can be done.

A coroner's Court is a criminal Court, as well as a Court of record, and proceedings before the coroner are within the jurisdiction of the Federal Parliament, although no one is there charged with the offence of causing the death of the deceased. R. v. Hammond (1898), 1 Can. Cr. Cas. 373 (Ont.).

A coroner has power to himself summon the coroner's jury by a mere verbal direction to the jurors. Davidson v. Garrett (1899), 5 Can. Cr. Cas. 200 (Ont.).

A post-mortem examination may be directed by the coroner, and proceeded with under such direction, before the impanelling of the jury; the matter is one of procedure to be determined on the facts of each case by the coroner in the exercise of his discretion. *Ibid.*

Although the surgeon making the post-mortem examination may not be bound to do so without the coroner's written direction, yet if he proceeds on a verbal direction the latter constitutes a legal justification. *Ibid.*

The same person cannot be both a witness and a judge in a cause which is on trial before him; and where the coroner was a necessary witness by reason of having attended the deceased professionally as a physician during the illness from which death resulted, he is disqualified from holding the inquest. Re Haney v. Mead (1898), 34 C.L.J. 330.

Depositions at Coroner's Inquest.—A coroner's Court is a Court of record. Thomas v. Churton (1862), 2 B. & S. 475; Jervis on Coroners, 5th ed., p. 62; Boys on Coroners, 2nd ed., pp. 2, 208; Davidson v. Garrett (1899), 5 Can. Cr. Cas. 200 (Ont.), 35 C.L.J. 502; but a coroner is not a "justice" within the meaning of section 999, which provides for using upon a trial a certificate of the depositions of a witness absent from Canada taken by a justice in the preliminary or other investigation of any charge: R. v. Graham (1898), 2 Can. Cr. Cas. 388 (Que.);

and sec. 999 does not apply to depositions at coroner's inquests. R. v. Laurin (No. 3), 5 Can. Cr. Cas. 548.

Where it is clear that the proceedings before the coroner were an investigation of the charge against the person subsequently indicted, and he was present in person and had a full opportunity of cross-examining the witness, it would seem that the deposition is admissible on proper proof of same apart from sec. 999, if the witness who had been examined before the coroner was (1) dead, (2) unable to travel, or (3) kept out of the way by means and contrivance of the prisoner. R. v. Hamilton, 16 U.C.C.P. 340. The question is still an unsettled one.

Depositions signed by a witness at a coroner's inquest may be used on the cross-examination of that witness at the trial for the purpose of contradicting his testimony, or of testing his memory, although they were irregularly returned by the coroner to the clerk of the Crown instead of to the magistrate. R. v. Laurin (No. 2) (1902), 5 Can. Cr. Cas. 545; and although not certified to have been read over to the deponent, and although it does not appear thereby that the deponent had no further testimony to add. R. v. Laurin (No. 3), 5 Can. Cr. Cas. 548 (Que.).

Witnesses.—See Re Anderson v. Kinrade, *infra*.

See also sec. 940 of the Code.

(*b*) *Evidence Taken Apart From Trial.*

Evidence of Person Dangerously Ill May be Taken Under Commission, Procedure, etc.—See Code sec. 995.

Power to Hold Court by Consent Where Witness is Ill.—At the trial of an indictable offence, the presiding Judge may with the consent of the counsel for the Crown and for the prisoner respectively, adjourn the hearing to a private house within the same county for the purpose of taking there the evidence of a witness who is too ill to be moved therefrom and may order that the Court and jury proceed there for that purpose. The prisoner is bound by the consent of his counsel in such a matter which does not go to the jurisdiction of the Court. R. v. Rogers (1902), 6 Can. Cr. Cas. 419.

Presence of Prisoner When Such Evidence is Taken.—See Code sec. 996.

Evidence May be Taken Out of Canada Under Commission—Rules and Practice Under.—See Code sec. 997.

Origin of Enactment.—Section 997 is derived from 53 Viet. (Can.) ch. 37, sec. 23, and amendments thereto.

Evidence Under Commission.—An order may be made under Code sec. 997 for taking in Canada, under commission, the evidence of a material witness who ordinarily resides out of Canada, but who is

temporarily within the jurisdiction and about to return to his own country. R. v. Baskett (1902), 6 Can. Cr. Cas. 61.

A commission to take evidence in a foreign country for use upon a prosecution for an indictable offence may be ordered under Code sec. 997 while the preliminary enquiry is pending. R. v. Verral (1895), 6 Can. Cr. Cas. 325, 17 P.R. (Ont.) 61.

The evidence taken under commission is admissible as well at the preliminary enquiry as before the grand jury and at the trial of the indictment when found. The order should provide for the return of the commission into the Court from which it issues and should not direct a transmission of the evidence by the commissioner to the magistrate holding the preliminary enquiry. *Ibid.*

The application of the procedure in civil cases by the second subsection does not confer a like right of appeal as in civil cases from the order appointing the commissioners. R. v. Johnson (1892), 2 B.C.R. 87.

Any evidence taken under commission may be objected to at the trial on the ground of the irregularity of the commissioners' appointment. *Ibid.*

A commission to take the evidence of witnesses abroad in a libel prosecution is properly ordered at the trial where the evidence relates wholly to a plea of justification just entered of record. R. v. Nicol (1898), 5 Can. Cr. Cas. 31 (B.C.).

An order for a commission to take such evidence should not be made in such case before plea. *Ibid.*

In British Columbia, following the practice there in civil cases, the cost of taking evidence under commission abroad on behalf of the defendant in a prosecution for criminal libel cannot be taxed against the prosecutor unless such evidence was used at the trial. R. v. Nichol (1901), 6 Can. Cr. Cas. 8.

CHAPTER THE FIFTH.

OF WITNESSES.

SECT. I.—PRELIMINARY.

IN criminal cases witnesses are called before the Court to give *vivâ voce* evidence of the facts and circumstances relied on in support or disproof of the accusation made; and to produce and verify or authenticate writings and things material for the proof or disproof of the issues involved. They fall into two classes—witnesses of facts within their own knowledge, and witnesses as to matter of opinion.

SECT. II.—ATTENDANCE.

The attendance of witnesses at the trial of an indictable offence, whether to give evidence or to produce documents, is secured (1) by recognizance (*a*), or (2) by writ of *subpœna*, if the witness is not in custody (*b*); and if the witness is in custody, by one or other of the means stated *post*, p. 2258.

In a criminal case a person who is in Court may be compelled to be examined as a witness, whether he has or has not been put under recognizance or served with a *subpœna* (*c*).

1. **Recognizance.**—A justice of the peace who commits any person for trial for an indictable offence after a preliminary inquiry, or the coroner before whom an inquisition of murder or manslaughter is found, may bind over the witnesses whose depositions have been taken to attend the Court at which the trial of the accused is to take place (*d*). The powers of justices extend to witnesses called for the defence at the preliminary inquiry (*e*).

The binding over by justice or coroner is by recognizance conditioned in a penal sum for his attendance at the trial (*f*).

It is considered that a woman married on or since 1st January, 1883,

(*a*) The powers of justices under 11 & 12 Vict. c. 42, s. 7, and 42 & 43 Vict. c. 49, s. 36, to require by summons or warrant the attendance of witnesses at the preliminary inquiry do not extend to enforcing their attendance at the trial.

(*b*) *i.e.* on civil or criminal process for some other matter. Justices in England have no power to hold a person to bail to attend as a witness at a trial (Evans *v.* Rees, 12 A. & E. 55; 9 L. J. M. C. 83), unless he refuses to enter into a recognizance to attend the trial. Bennett *v.* Watson, 3 M. & S. 1. And the court of trial will not grant a bench warrant to compel the attendance of a witness who is keeping out of the way in collusion with the defendant. R. *v.* Crawford, 6 Cox, 481 (Ir.). As to bench warrants, see Archb. Cr. Pl. (23rd ed.), 108.

(*c*) R. *v.* Sadler, 4 C. & P. 218, Littledale, J.

(*d*) 2 Hale, 282.

(*e*) 30 & 31 Vict. c. 35, s. 3, *ante*, p. 2216.

(*f*) 11 & 12 Vict. c. 42, s. 20 (*justices*); 50 & 51 Vict. c. 71, s. 5 (*coroners*).

is competent to enter into a recognizance to appear as a witness (*g*). Where the witness is from infancy or coverture incompetent to enter into a recognizance her attendance should be secured by writ of *subpœna*.

If a witness does not appear, according to the terms of the recognizance in which he is bound, at the Court at which the trial is intended to be, to give evidence against the party accused, the recognizance may be estreated, and the penalty levied.

If a witness who has been examined before a justice of the peace refuses to be bound over, the justice may commit him until the trial of the accused, unless in the meantime he duly enters into a recognizance to prosecute or give evidence (*h*), and a coroner seems to have the same power.

2. **Subpœna.**—The attendance of witnesses, who have not entered into recognizance, may be compelled by process of *subpœna* (*j*) issued from the Crown Office (*k*), or made out by the clerk of assize or clerk of the peace (*l*). By the Subpœna Act, 1805 (45 Geo. III. c. 92), s. 3, service of a writ of *subpœna* on a witness in any one of the parts of the United Kingdom, for his appearance on a criminal prosecution in any other of the parts of the same, shall be as effectual as if it had been in that part where he is required to appear (*m*). A *subpœna* vexatiously sued out of a Court of assize or the Crown Office may be set aside by the High Court (*n*).

The prosecutor may not include more than three persons in one Crown Office *subpœna* (*o*). As soon as the writ is obtained, a copy should be made out for each witness, and served on him personally, and at the same time the writ should be shewn him (*p*). The service must be personal (*q*), and be effected a reasonable time before the trial, for witnesses ought to have a convenient time to put their own affairs in such order that their attendance on the Court may be of as little prejudice to themselves as possible (*r*).

A *subpœna* requiring the witness to attend on the commission days

(*g*) In a case before 1848, Bennett *v.* Watson, 3 M. & S. 1, where the witness was a married woman, and therefore under a legal disability to enter into a recognizance, the justice was held justified in committing her, upon her refusal to appear to give evidence or to find sureties for her appearance.

(*h*) R. *v.* Smith, 17 Cox, 601.

(*j*) The writ of *subpœna* is obtainable either by the prosecutor or the defendant, whether the offence is treason, felony, or misdemeanor. At common law in capital cases attendance of witnesses for the defence could be obtained only by order of the court of trial. 2 Hawk. c 46, s. 170. This was altered as to treason by 7 & 8 Will. III. c. 3, s. 7, and since 1702 (when 1 Anne, st. 2, c. 9, s. 3, provided that witnesses for the defence in felony should be sworn) process for *subpœna* for witnesses for the defence in felony has been granted (2 Hawk. c. 46, s. 172).

(*k*) R. *v.* Ring, 8 T. R. 585. The forms of writ in use are scheduled to the Crown Office Rules, 1906, Nos. 151–156 (and see r. 211).

(*l*) 1 Chit. Cr. L. 608. It is more prudent to sue it out of the Crown Office if an application for an attachment for non-attendance is likely to become necessary. Crown Office Rules, 1906, rr. 240, 241. Short & Mellor, Cr. Pr. (2nd ed.) 405.

(*m*) 'Parts' in this Act mean England (including Wales), Scotland, and Ireland; and not counties, &c. R. *v.* Brownell, 1 A. & E. 598 *r.*

(*n*) R. *v.* Baines [1909], 1 K.B. 258.

(*o*) Short & Mellor, Cr. Pr. (2nd ed.) 405. In other cases it would seem that four names may be included. Doe *v.* Andrews, 2 Cowp. 845.

(*p*) Service of a *subpœna* ticket, containing the substance of the writ, will be as effectual as service of the writ itself. See 1 W. Bl. 36; 2 Cowp. 845. 2 Phill. Ev. 373.

(*q*) Smalt *v.* Whitmill, 2 Str. 1054. R. *v.* Wakefield, Cas. K.B. temp., Hardwicke, 313. Taylor, Ev. (10th ed.), s. 1244.

(*r*) Hammond *v.* Stewart, 1 Str. 510. Taylor, Ev. (10th ed.), s. 1242.

of the assizes extends to the whole assizes, which are but one day in contemplation of law (*s*).

Subpœna duces tecum.—If a witness has in his possession any documents, which it is deemed necessary to produce at the trial, there should be a special clause inserted in the *subpœna*, called a *duces tecum*, commanding the witness to bring them with him (*t*). The writ of *subpœna duces tecum* is the regular and established process of the Court, and is of compulsory obligation on the witness to produce the documents required of him, which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the Court, and not the witness, is to judge (*u*). A person in possession of any document, who is served with a Crown Office *subpœna duces tecum*, is bound to produce it, whether the document belongs to him or not, or though there is a regular way prescribed by law for obtaining it (*v*); and if he refuses to do so, the High Court (K.B.D.) may grant an attachment against him (*w*). The Court, however, in all such cases, will exercise their discretion in deciding what documents shall be produced, and under what qualifications as respects the interest of the witness (*x*). But when the documents to which the *subpœna* relates are held by the person to whom it is addressed for others, or for himself and others, who refuse to consent to their production or take them out of his possession, he is not liable to attachment (*y*). But the Court will not allow counsel for the witness to argue against his liability to produce the documents (*z*). It is uncertain whether the High Court can enforce by attachment writs of *subpœna* issued by a Court of quarter sessions (*a*). There is no express decision as to the obligation of a witness to bring before the Court things relevant to the matter in issue (*pièces de conviction*) which do not fall within the definition of documents (*b*).

(*s*) Scholes *v.* Hilton, 10 M. & W. 15.

(*t*) Short & Mellor, Cr. Pr. (2nd ed.) 405.

(*u*) Amey *v.* Long, 9 East, 473. As to production of banker's books, see 42 & 43 Vict. c. 11, s. 6, *ante*, p. 2152.

(*v*) Corsen *v.* Dubois, Holt (N. P.) 239.

(*w*) R. *v.* Greenaway, 7 Q.B. 126, 134. Short & Mellor, Cr. Pr. (2nd ed.) 348. Where the writ is to attend an inferior Court there must be evidence of its jurisdiction to examine the witness. R. *v.* Vickery, 17 L. J. M. C. 129. In R. *v.* Daye [1908], 2 Q.B. 333, the High Court ordered the issue of a writ of attachment to compel the production by a bank (in extradition proceedings) of a sealed packet deposited by the prisoner and another with the bank, with instructions not to deliver it up without the written order of both depositors. One of the depositors was defendant in the extradition proceedings.

(*x*) Taylor, Ev. (10th ed.), ss. 458, 459. There is a distinction between the obligation of a witness to answer, though it may subject him to a civil responsibility, and the obligation to produce writings under a *subpœna*. See *post*, pp. 2348, 2350, note (*t*). If a *subpœna duces tecum* is served, the party must bring his deeds in obedience to the *subpœna;* but if he states them to be his title deeds, no judge will ever compel him to produce them. Pickering *v.* Noyes, 1 B. & C. 263. R. *v.* Hunter, 3 C. & P. 591, and MSS. C. S. G. See Taylor, Ev. (10th ed.), ss. 458, 1464. As to whether a solicitor can be compelled to produce deeds upon which he has a lien, see Hope *v.* Liddell, 24 L. J. Ch. 691; Taylor, Ev. (10th ed.) s. 458, and *post*, p. 2350.

(*y*) Crowther *v.* Appleby, L. R. 9 C. P. 23, 28. Cf. Lee *v.* Angas, L. R. 2 Eq. 59. *Re* Emma Silver Mining Co., L. R. 10 Ch. App. 194.

(*z*) Doe *v.* Egremont, 2 M. & Rob. 386, Rolfe, B. Taylor, Ev. (10th ed.), s. 1465.

(*a*) In R. *v.* Brownell, 1 A. & E. 598, it was held that the Court of K.B. had no such power. But this decision is to some extent affected by R. *v.* Davies [1906], 1 K.B. 32; 75 L. J. K. B. 104, in which the High Court asserted a larger jurisdiction to punish contempts of inferior Courts. See Taylor, Ev. (10th ed.), s. 1268.

(*b*) In R. *v.* Daye, *ubi sup.* Darling, J., suggested that document meant any written thing capable of being produced in

If a witness who is sworn to give evidence has a document in his possession in Court, he may be compelled to produce it; for he is just as much under the control of the Court as if he had brought the document under a *subpœna duces tecum* (*c*).

It seems to be established that except in cases within the Act of 1805, witnesses making default on criminal prosecutions are not exempted from attachment, on the ground that their expenses were not tendered at the time of the service of the *subpœna;* for in criminal cases the attendance of the witness is a matter of paramount public importance (*d*), although the Court would have good reason to excuse them for not obeying the summons, if in fact they had not the means of defraying the necessary expenses of the journey (*e*).

If a witness, having been personally and at a reasonable time before the trial served with a Crown Office *subpœna* to appear and (or) to produce documents, neglects in obedience to it, he is liable to attachment by the High Court (K.B.D.) (*f*). Where the process is served in one part of the United Kingdom for the appearance of the witness in another of the parts, the Court issuing the same may, upon proof to their satisfaction of the due service of the *subpœna*, transmit a *certiorari* of the default of the witness, under the seal of the Court, or under the hand of one of the justices thereof, to the High Court of Justice, King's Bench Division, if the service were in England or Ireland, and to the Court of Justiciary if in Scotland, which Courts are empowered to punish the witness in the same way as if he had disobeyed a *subpœna* issued out of those Courts, providing the expenses have been tendered (*g*).

Bringing up Prisoners as Witnesses: Secretary of State's Order.—By the Prison Act, 1898 (61 & 62 Vict. c. 41), s. 11 (*h*)—

evidence, irrespective of the material on which it was written.

(*c*) Snelgrove *v.* Stevens, C. & M. 508, Cresswell, J. Doe *d.* Loscombe *v.* Clifford, 2 C. & K. 448. R. *v.* North, 1 Cox, 258, Alderson, B. Dwyer *v.* Collins, 7 Ex. 639.

(*d*) See Pell *v.* Daubeny, 5 Ex. 955, 957, Parke, B.

(*e*) Ibid. Alderson, B. At York Summer Assizes, 1820, Bayley, J., ruled that an unwilling witness, who required to be *paid* before he gave evidence, could not demand it. He said, 'I fear I have not the power to order you your expenses.' And on asking the bar if any one recollected an instance, Scarlett answered, 'It is not done in criminal cases.' MS. 1 Chetw. Burn. 1001. In R. *v.* Cousens, Gloucester Spr. Ass. 1843, Wightman, J., directed an officer of the Ecclesiastical Court, who had brought a will from London under a *subpœna duces tecum*, to go before the grand jury, although he objected on the ground that his expenses had not been paid. In R. *v.* Cooke, 1 C. & P. 321, an indictment for a conspiracy removed into the King's Bench by *certiorari*, a witness called by the defendant stated before he was examined, that at the time he was served with a *subpœna*, no money was paid him; he therefore asked that the judge would order the defendant to pay him his expenses before he was examined. Park, J., having consulted with Garrow, B., said they were of opinion that the judge had no power in a criminal case to order a defendant to pay a witness his expenses, although subpœnaed, and though the indictment came to be tried as a civil record. See Taylor, Ev. (10th ed.), s. 1252.

(*f*) R. *v.* Daye [1908], 2. Q.B. 333. R. *v.* Ring, 8 T. R. 585. And a witness who refuses, after being subpœnaed, to attend to give evidence for a defendant, is liable to an attachment, as in the case of being subpœnaed by a prosecutor. Short & Mellor, Cr. Pr. (2nd ed.) 406. Taylor, Ev. (10th ed.), s. 1268.

(*g*) 45 Geo. III. c. 92, ss. 3, 4. 1 Chit. Cr. L. 614. It is said to be doubtful whether a Court of Quarter Sessions has authority to issue an attachment, and that the only mode of proceeding against a witness in such a case is by indictment. Archb. Cr. Pl. (23rd ed.) 413.

(*h*) This section takes the place of the powers given to a Secretary of State, by the repealed portion of 16 & 17 Vict. c. 30, s. 9. See Taylor, Ev. (10th ed.), s. 1276.

'(1) A Secretary of State, on proof to his satisfaction that the presence of any 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 that the prisoner be taken to that place.

'(2) A prisoner taken from a prison in pursuance of an order made under this section, or of a warrant issued under sect. 9 of the Criminal Procedure Act, 1853 (*infra*), shall, whilst outside the prison, be kept in such custody as the Secretary of State may by general rules prescribe, and whilst in that custody shall be deemed to be in legal custody.

'(3) For the purposes of this section the expression "prisoner" shall include any person lawfully confined under any sentence or under commitment for trial or otherwise, and the expression "prison" shall include any place in which such person is lawfully confined.' This enactment applies only to England, but extends to all persons detained in prison whether on civil or criminal process, and whether awaiting trial or the result of an appeal or undergoing a sentence.

Judges' Orders.—By the Criminal Procedure Act, 1853 (16 & 17 Vict. c. 30), s. 9, 'it shall be lawful for . . . any judge of the Court of King's Bench . . . (*i*) in any case where he may see fit to do so, upon application by affidavit, to issue a warrant or order under his hand for bringing up 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, suit, or proceeding) (*j*), before any court, judge, justice, or other judicature, to be examined as a witness in any case or matter, civil or criminal, depending or to be inquired of, or determined in or before such court, judge, justice, or judicature; and the person required by any such warrant or order to be so brought before such court, judge, justice, or other judicature, shall be so brought under the same care and custody, and be dealt with in like manner in all respects, as a prisoner required by any writ of *habeas corpus* awarded by any of His Majesty's superior Courts of law at Westminster to be brought before such Court to be examined as a witness in any cause or matter depending before such Court is now by law required to be dealt with.' The procedure for obtaining the order is regulated by the Crown Office Rules, 1906, r. 229 (*k*). The application is made to a judge of the King's Bench Division. This Act does not extend to Scotland or Ireland (sect. 10).

Habeas Corpus ad testificandum.—When a witness is in civil custody or in custody under process in a civil action (*l*), or on board a ship under the command of an officer who refuses to permit his attendance (*m*), a writ of *subpœna* is ineffectual, but a *habeas corpus ad testificandum* may be obtained to bring him up under the Habeas Corpus Acts, 1803 (43 Geo. III. c. 140) and 1804 (44 Geo. III. c. 102). An application may be made to any judge of the High Court of Justice (King's Bench Division) in England or Ireland, to bring a witness before any court of

(*i*) The portions omitted were repealed and superseded by the Prison Act, 1898, ss. 11 (*supra*), 15. See Taylor, Ev. (10th ed.), s. 1276.

(*j*) *Vide infra.*

(*k*) Short & Mellor, Cr. Pr. (2nd ed.) 336.

(*l*) Whether an execution or a mesne process. R. *v.* Burbage, 3 Burr. 1440. See Taylor, Ev. (10th ed.), ss. 1272–1275.

(*m*) *e.g.*, a sailor on board a King's ship. R. *v.* Roddam, 2 Cowp. 672.

record, England or Ireland, to be examined before such court, or any grand, petit, or other jury, in any cause or matter, civil or criminal. The application for the writ in England is made on affidavit to a judge of the High Court (*n*). The writ when sued out must be left with the sheriff or other officer, in whose custody the witness is detained, who will bring him up, upon being paid his reasonable charges (*o*). If a witness be a prisoner of war, a *habeas corpus* will not lie to bring him up, but an order from the Secretary of State must be obtained (*p*).

Upon an affidavit that a person confined as a lunatic is not dangerous, but in a fit state to be brought up, a *habeas corpus* may be granted in order that he may be examined as a witness (*q*).

Witnesses abroad.—As to the cases in which the evidence of witnesses, who are not in the United Kingdom, may be made available at the trial without their attendance, see *ante*, p. 2248.

Privileged from Arrest.—A person subpœnaed as a witness, or bound over by recognizance, either to prosecute or give evidence, or attending voluntarily for the *bonâ fide* purpose of giving evidence, is privileged from arrest upon civil process during the necessary time occupied in going to the place where his attendance is required, in staying there for the purpose of such attendance, and in returning from that place (*r*). And in allowing witnesses time sufficient for these purposes, the courts are always disposed to be liberal (*s*). If a witness under these circumstances is arrested, the Court out of which the *subpœna* issued, or the judge of the Court in which the cause has been, or is to be tried, will, upon application, order him to be discharged (*t*).

The privilege does not protect from arrest on criminal process (*u*): nor from arrest by his bail for the purpose of being surrendered in discharge of their liability (*v*).

Expenses of Attendance.—As to the payment of witnesses for the expense and loss of time due to attendance at a criminal trial, see *tit.* 'Costs,' *ante*, p. 2039.

Sect. III.—What Witnesses are Competent.

By the competency of a witness is meant that the law allows him to be sworn and to give evidence. If he is incompetent he is totally excluded from giving his testimony. If he is competent, 'then the jury are to decide on the weight and credibility of his evidence' (*w*).

Witnesses to Matter of Opinion or Scientific or Professional Knowledge.—The general rule is, that the testimony of a witness must be confined to matter of fact; but in questions of skill and judgment, men of science or experience are allowed to give evidence of their opinion. Thus in a

(*n*) C. O. R. 1906, r. 228. Short and Mellor, Cr. Pr. (2nd ed.) 333. As to former practice see Tidd, 858; 1 Chit. Cr. L. 610.

(*o*) See 2 Phill. Ev. 375.

(*p*) Furley *v.* Newnham, 2 Doug. 419.

(*q*) Fennell *v.* Tait, 5 Tyrw. 218.

(*r*) Taylor, Ev. (10th ed.), ss. 1330–1341. Meekins *v.* Smith, 1 H. Bl. 636. Lightfoot *v.* Cameron, 2 W. Bl. 1113. Childerston *v.* Barrett, 11 East, 439. Arding *v.* Flower, 8 T. R. 536.

(*s*) Taylor, Ev. (10th ed.), ss. 1331, 1332.

(*t*) Archb. Cr. Pl. (23rd ed.) 413.

(*u*) *Re* Freston, 11 Q. B. D. 545; see Taylor, Ev. (10th ed.) s. 1333.

(*v*) *Ex parte* Lyne, 3 Stark. (N. P.) 132. He is in contemplation of the law in the custody of his bail.

(*w*) R. *v.* Hill, 2 Den. 254, Campbell, C.J.

civil case, in an inquiry as to an embankment choking up a harbour, an engineer has been admitted to prove, from his own experiments, what were the effects of natural causes upon that particular harbour, and on other harbours similarly situated on the same coast, and that the removal of the bank would not, in his opinion, restore the harbour (*x*). So shipbuilders have been admitted to state their opinion on the sea-worthiness of a ship, from examining a survey, which had been taken by others, and at which they were not present (*y*). Where the question is whether a seal has been forged, seal-engravers may be called to shew the difference between a genuine impression and that supposed to be false (*z*). So on an indictment for forging a will, which, together with writings in support of it, it was suggested had been written over pencil marks, which had been rubbed out; an engraver who had examined the paper with a mirror and traced the pencil marks, was held competent to give evidence of what he had discovered upon such examination (*a*). So in several cases where the genuineness of certain handwriting has been in question, persons skilled in the examination of handwriting, and in the detection of forgeries, as inspectors of franks, and clerks of the post office, have been allowed to state their opinion whether a particular writing was in a genuine or imitated character (*b*).

As to comparison of genuine and disputed writings, *vide ante*, p. 2149.

In criminal cases, the opinions of medical men of science are very frequently employed as evidence. A physician who has not seen the patient, may, after hearing the evidence of others, be called to prove, on his oath, the general effect of the disease described by them, and its probable consequences in the particular case (*c*). The testimony of medical men is constantly admitted with respect to the cause of disease, or of death, in order to connect them with particular acts, and as to the general sane or insane state of the mind of the patient, as collected from a number of circumstances. Such opinions are admissible in evidence, although the professional witnesses found them entirely on the facts, circumstances, and symptoms established by others, and without being personally acquainted with the facts (*d*). Thus where on a trial for murder the medical witnesses called on the part of the prosecution ascribed the death to strangulation, other medical men

(*x*) Folkes *v.* Chadd, 3 Dougl. 157 & MS. 1 Phill. Ev. 291 (7th ed.), cited by Buller, J., in Goodtitle *v.* Braham, 2 T.R. 498. Taylor, Ev. (10th ed.), ss. 1416, 1417. Roscoe's Nisi Prius (18th ed.) 175. So the opinion of a person conversant with the business of insurance may be asked as to whether the communication of particular facts would have varied the terms of insurance, though not what his conduct would have been in the particular case. Berthon *v.* Loughman, 2 Stark. (N. P.) 258, Holroyd, J., but see *contra* Durrell *v.* Bederley, Holt (N. P.) 286, by Gibbs, C.J.

(*y*) Thornton *v.* Royal Exchange Assurance Company, Peake, 25. Chaurand *v.* Angerstein, ibid. 43. Beckwith *v.* Sydebotham, 1 Camp. 117. See Alcock *v.* Royal Exchange Assurance Co., 13 Q.B. 292, where evidence that a captain was addicted to drunkenness was held admissible in order to shew that he was incapable of exercising a sound judgment in respect of the abandonment of a ship.

(*z*) By Lord Mansfield in Folkes *v.* Chadd, *ubi supra*.

(*a*) R. *v.* Williams, 8 C. & P. 434, Parke, B., after consulting Tindal, C.J.

(*b*) Goodtitle *v.* Braham, 4 T. R. 497. R. *v.* Cator, 4 Esp. 117, 145. Stranger *v.* Searle, 1 Esp. 14. But see Gurney *v.* Langlands, 5 B. & Ald. 330. Cary *v.* Pitt, Peake, Ev. App. 84.

(*c*) Peake, Ev. 190.

(*d*) 1 Stark. Ev. 175.

called on behalf of the prisoner were allowed to give their opinion that, from the evidence they had heard upon the trial, the death did not arise from strangulation, although they had not seen the body of the deceased, and had no means of forming a judgment of the cause of his death except from the evidence given in court (*e*). So in prosecutions for murder, medical men have been allowed to state their opinion, whether the wounds, described by witnesses, were likely to be the cause of death (*f*). So in a case of murder (*g*), where the defence was insanity, the twelve judges were unanimous in thinking that a witness of medical skill might be asked, whether in his judgment, such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a paroxysm of that disorder in a person subject to it. But several of the judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide, viz. whether, from the other testimony given in the case, the act as to which the prisoner was charged was, in his opinion, an act of insanity (*h*). And it has been since held that a physician who had heard the whole evidence on a trial for murder might be asked whether the facts and appearances proved shewed symptoms of insanity (*i*).

The law of foreign countries is proved as a matter of fact (*j*).

Determination of Competency.—The question whether a witness is competent is a preliminary question to be determined by the judge and not by the jury (*k*). The proper time for objecting that a witness is not competent, is when he comes to the book to be sworn. He is then examined on the *voire dire* (*l*), or evidence *aliunde* is taken, *e.g.* in cases of suggested lunacy. If the judge decides that the witness is competent he is then sworn and examined. At one time it was held too late to object to a witness after he was sworn in chief (*m*); the rule is now so far relaxed for the convenience of the Court and in furtherance of justice, that if, during any part of the witness's examination, or even after his cross-examination, it is discovered that he is incompetent, the objection may be taken, and his evidence will be struck out (*n*).

(*e*) R. *v.* Shaw, 6 C. & P. 372, and MSS. C. S. G., Patteson, J.

(*f*) 1 Phill. Ev. 290 (7th ed.).

(*g*) R. *v.* Wright, R. & R. 456.

(*h*) It seems that in R. *v.* Macnaughton, 10 Cl. & F. 200, such questions were allowed to be asked. 29 Law Mag. 396. *Vide ante*, Vol. i. p. 80.

(*i*) R. *v.* Searle, 1 M. & Rob. 75.

(*j*) As to the mode of proof, *vide ante*, p. 2136; and see R. *v.* Vaughan, 13 St. Tr. 485. Peter Cooke's case, ibid. 311.

(*k*) 2 Hale, 277. R. *v.* Hill, 2 Den. 254. R. *v.* Whitehead, L. R. 1 C. C. R. 33; 35 L. J. M. C. 186. Cf. R. *v.* Brasier, 1 Leach, 199, as to children.

(*l*) Examination on the *voire dire* (O.F. for *vere dicere*:—to speak truly, Littré s. v. *voire*) is an inquiry held by the judge as to the qualification or competency of a juror or witness before taking the jurors' or witnesses' oath. Since disqualification by interest or crime were removed the occasions for use of this examination of witnesses are not numerous. If an oath is administered it is 'to make true answer to such questions as the Court shall demand' of the person sworn. The answers made are for the consideration of the judge, and are not evidence in the case. Jacobs *v.* Laybourn, 11 M. & W. 685, 693. A similar procedure is adopted after conviction on taking evidence as to the antecedents of the accused for the purpose of fixing the sentence. Examination of jurors on the *voire dire* is rare in England, more frequent in Ireland, and usual in the United States. See Taylor, Ev. (10th ed.), s. 1393.

(*m*) Turner *v.* Pearte, 1 T. R. 719.

(*n*) R. *v.* Whitehead, *ubi sup.* Jacobs *v.* Laybourn, 11 M. & W. 685. Turner *v.* Pearte, 1 T. R. 720. Howe'l *v.* Locke, 2 Camp. 15. Stone *v.* Blackburn, 1 Esp. 37. Perigal *v.* Nicholson, Wightw. 64. But

But after the witness has left the box it is too late to object to his competency (*o*); and after a witness has been dismissed without objection to his competency, it is not allowable to call a witness to prove his incompetency (*p*). With respect, however, to the power of questioning a witness to establish his incompetency, there is a material difference (*vide infra*) between examination on the *voire dire* and one after the witness has been sworn in chief.

The party against whom a witness is called may examine him respecting his competency on the *voire dire*, or may call another witness and produce other evidence in support of the objection (*q*): and the fact of incompetency may be satisfactorily proved *aliunde*, although the witness has denied it on the *voire dire* (*r*).

Where a question arises as to the competency of a witness before he is sworn, the proper course is to receive all the evidence upon the question, both to impeach the competency of the witness and in support of it, before he is allowed to give any evidence. Thus, where a witness was objected to by a prisoner as incompetent on the ground that he was insane, and the question arose as to the mode to be adopted under such circumstances; Parke, B., consulted the judges upon it before he went the circuit, and they were of opinion that it ought to be tried on the *voire dire*, and evidence admitted both on the part of the prisoner and on the part of the prosecution to impeach the competency of the witness, and in support of it (*s*). And where an objection is raised to the

where upon a trial for high treason it appeared, after a witness had been examined for the Crown, without objection on the part of the prisoner, that he had been misdescribed in the list of witnesses, which is required by 7 Ann. c. 21, s. 14, to be given to the prisoner previous to his trial, the Court would not permit the evidence of the witness to be struck out; but said, the objection ought to have been taken in the first instance; otherwise a party might take the chance of getting evidence which he liked, or, if he disliked the testimony, he might then get rid of it on the ground of misdescription. R. *v.* Watson, 2 Stark. (N. P.) 151. And upon this ground, Mr. Starkie expressed his opinion that a party who was cognisant of the interest of a witness at the time he was called, was bound to make his objection in the first instance. 1 Stark. Ev. 137; and see 1 Phill. Ev. 154, note (3), and Hartshorne *v.* Watson, 5 Bing. (N. C.) 477.

(*o*) Beeching *v.* Gower, Holt (N. P.) 314.

(*p*) Dewdney *v.* Palmer, 4 M. & W. 664.

(*q*) R. *v.* Wakefield, Murray's report, p. 157: 2 Lew. 279, Hullock, B.

(*r*) Taylor, Ev. (10th ed.), s. 1393. In several cases it seems to have been considered that it is in the discretion of the judge whether other evidence should be called to support the objection before the witness is examined. And if the judge refuses to allow it to be then given, it seems that it may be given as part of the case of the party raising the objection, and if it support the objection, then the evidence of the witness objected to may be struck out of the notes. R. *v.* Wakefield, M. & M. 197, note (*a*). Jones *v.* Fort, M. & M. 196. In this case the question was whether the defendant's examination taken under a commission of bankruptcy was admissible, and Lord Tenterden, C.J., refused to allow evidence to be given tending to shew that from the mode of taking it, and the state of the defendant's health, it was inadmissible before the examination was read, but held that it might be received in the defendant's case, and if the objection was supported, the evidence might be struck out. It certainly, however, is much more convenient, as well for the purpose of saving time as to prevent the jury from being influenced by inadmissible evidence, to receive the evidence before the examination of the witness. C. S. G. The old rule is said to have been that if the witness were examined by the opposite party as to the fact of the objection and denied it on oath, evidence to contradict his oath could not be called without the acquiescence of the party seeking to call the witness. Lord Lovat's case, 18 St. Tr. 929, Lord Hardwicke. See also the observations of Parker, C.J., in R. *v.* Muscot, 10 Mod. 193, in which case it was held that in criminal cases there could be an examination on the *voire dire*.

(*s*) Anon. at York, stated by Parke, B., in Att.-Gen. *v.* Hitchcock, 1 Ex. 91, and also in Bartlett *v.* Smith, 11 M. & W. 483.

competency of a witness on the ground that he is insane, it is for the Court to decide whether such person has the sense of religion on his mind, and whether he understands the nature and sanction of an oath; and in order to determine these questions, he may be examined and cross-examined, and witnesses on both sides may be examined, in order to found and to meet the objection to his competency before he himself is sworn (*t*).

Where question is raised about the competency of a witness *after* he has been sworn and partly examined, the witness should be sworn 'to make true answer to all such questions as the Court shall demand of him'; *i.e.* an examination on the *voire dire* may be instituted at any period of the examination (*u*).

On a prosecution for rape the prosecutrix was deaf and dumb; and her father, who was sworn to interpret her evidence, said that he believed her to be ignorant of the nature of an oath. An expert, however, came, and from his report to the Court the prosecutrix was sworn, and her evidence taken down as interpreted by the expert. In the course of her examination it became apparent that she did not understand the questions, and that her answers could not be relied upon. The judge directed her to stand down, and struck out her evidence from the case. On a case reserved it was held, that although the prosecutrix had been sworn, the judge acted

(*t*) R. *v.* Hill, 2 Den. 254.

(*u*) Jacobs *v.* Laybourn, 11 M. & W. 685, Abinger, C.B., and Rolfe, B. In Cleave *v.* Jones, Hereford Sum. Ass. 1849, MSS. C. S. G., the plaintiff's counsel, in order to take the case out of the Statute of Limitations, tendered an account in the defendant's handwriting; and Rolfe, B., held that the defendant's counsel might at once put in two letters written by the plaintiff to the defendant, in order to shew that the account was a confidential communication by the defendant to the plaintiff as her attorney. So on a subsequent trial of the same cause, when the same account was tendered in evidence, the counsel for the defendant claimed the right to interpose, and put in a letter of the plaintiff, and to call a witness to shew that the account was written out and sent by the defendant to the plaintiff in consequence of such letter; and Erle, J., held that this might be done; and upon the defendant's counsel insisting that the witness ought to be sworn on the *voire dire*, Erle, J., held that that was the proper course, as the question whether the account was a privileged communication was to be determined by himself; and the letter and evidence of the witness were received, and the account rejected as a privileged communication: Cleave *v.* Jones, Hereford Sum. Ass. 1851; and the Court of Exchequer held that this ruling was correct. 7 Ex. 421. In an action by the payee against the maker of a promissory note, payable 'two' months after date, with a plea that the defendant did not make the note, the defendant's signature to the note was proved; but the word 'two' was evidently written on an erasure. Erle, J., said that it was incumbent on the plaintiff to explain this, and a witness was called for the plaintiff to prove that the note was in the same state when it was signed by the defendant. Before the note was read, it was proposed, on the part of the defendant, to call witnesses to prove that, when the note was signed by the defendant, it was payable 'three' months after date; it was objected that this evidence should be given as part of the defendant's case; but Erle, J., at once received the evidence of two witnesses for the defendant, and upon their evidence decided that the alteration was not accounted for to his satisfaction. Painter *v.* Hill, 2 C. & K. 724, n. And where a witness for a plaintiff being about to state the contents of a letter, a letter was put in his hands by the defendant's counsel, and he did not admit it to be the same; and the judge held that the defendant could not at that stage of the cause give evidence that it was the original; the Court held that this was erroneous, and that the judge was bound at once to hear the evidence on both sides, and decide whether the document was the original; and Parke, B., said: 'It is now well settled that all these preliminary questions, on which the reception of evidence depends, ought not to be submitted to the jury, but must be decided by the judge himself.' Boyle *v.* Wiseman, 11 Ex. 360; and see R. *v.* Campbell, 11 M. & W. 486, cit. *ante*, p. 2086.

rightly in striking out and withdrawing her evidence from the jury (*v*). An examination on the *voire dire* may be conducted without strict regard to the general rule, which requires the best possible proof of a fact, and admits no other (*ante*, p. 2056). Thus a witness may be examined as to the contents of a written document without a notice to produce (*w*); for the party objecting could not know previously that the witness would be called, and consequently might not be prepared with the best evidence to establish his objection (*x*). The same latitude is allowed in removing an objection of incompetency as in raising it. Thus where in an action brought by a chartered company, a witness for the plaintiffs admitted on the *voire dire* that he had been a freeman of the company, but added that he was then disfranchised; Lord Kenyon ruled that it was not necessary to prove the disfranchisement by the regular entry in the company's books, and that the witness was competent (*y*). So where a witness was objected to as next of kin in an action by an administrator, but on re-examination answered that he had released all his interest, this was held by Lord Ellenborough to remove the objection (*z*).

But it is only on the *voire dire* that the general rules of evidence are thus relaxed; for objections to the competency of a witness made at any later stages of the trial, are not attended with the privileges of an examination upon the *voire dire* (*a*). So where a party, who calls a witness, attempts to remove the objection by other independent proof, and not on the *voire dire*, he will then be subject to all the general rules of evidence (*b*). So where the objection is not raised on the *voire dire*, but appears in evidence in any other manner, the other party in answering it is bound by the usual rules of evidence (*c*).

Grounds of Incompetency.—It is no objection in law against a witness for or against a prisoner, that he is one of the judges or jurors who is to try him (*d*). And in the case of Hacker, two of the persons in the commission for the trial came off from the bench, and were sworn, and gave evidence, and did not go up to the bench again during his trial (*e*).

The rules of common law or early statutes, which rendered a witness

(*v*) R. *v.* Whitehead, L. R. 1 C. C. R. 33; 10 Cox, 234.

(*w*) Howell *v.* Locke, 2 Camp. 15.

(*x*) See Butler *v.* Carver, 2 Stark. (N. P.) 434. On the passage in the text being cited in Macdonnell *v.* Evans, 11 C. B. 937, Maule, J., said, 'In many cases witnesses are called whom the opposite party has *no* reason to expect to see; the reason, therefore, given in that book is *not* a good one. An examination on the *voire dire* is for the purpose of establishing something of which the Court is to be the judge and not the jury. It may well be, therefore, that the rule there is not so exclusive as in the case of an examination going to a jury.' Either the 'no' or 'not' in italics seems inserted by mistake in the report.

(*y*) Butchers' Company *v.* Jones, 1 Esp. 162. In Botham *v.* Swingler, 1 Esp. 164; Peake, 219, the witness was allowed to remove an objection of interest raised on the *voire dire* by his own statement that he had become a bankrupt, and his estate had been assigned. See also R. *v.* Gisburn, 15 East, 57. In Carlisle *v.* Eady, 1 C. & P. 234, where a bankrupt, called as a witness, stated on the *voire dire* that he had obtained his certificate and released his assignees; Park, J., held him competent, without production of the release. See also Bunter *v.* Warre, 1 B. & C. 689.

(*z*) Ingram *v.* Dade, MS. 1 Phill. Ev. 155. Lunniss *v.* Row, 10 A. & E. 606, overruling Goodhay *v.* Hendry, M. & M. 319, and a case in a note, ibid. 321. See 1 Phill. Ev. 156.

(*a*) Howell *v.* Locke, 2 Camp. 14.

(*b*) Corking *v.* Jarrard, 1 Camp. 37.

(*c*) Botham *v.* Swingler, 1 Esp. 165, Kenyon, C.J.; but see Cleave *v.* Jones, *ante*, p. 2264, note (*u*).

(*d*) 2 Hawk. c. 46, s. 83.

(*e*) Ibid.

incompetent by crime (*f*) or interest (*g*), were abolished by the Evidence Act, 1843 (6 & 7 Vict. c. 85) (*h*) both as to criminal and civil cases (sect. 1), and persons excommunicated by sentence of an ecclesiastical court now incur no civil disabilities (*i*).

The only causes of incompetency, therefore, now to be considered are: 1. Defect of understanding. 2. Defect of religious belief. 3. Marriage. 4. Being defendant in a criminal case.

Persons Incompetent from Want of Understanding: Persons of Unsound Mind.—Idiots (*j*) are not admissible to give evidence. By the word 'idiot' is meant a fool or madman from his nativity, who never has any lucid intervals (*l*). A person deaf and dumb from birth if he is capable of conversing by signs, and has a proper sense of the obligation of an oath, may be admitted as a witness and examined with the assistance of an interpreter (*m*). But however intelligent and capable of communicating and receiving information by signs he may be, he cannot be admitted as a witness if it does not appear that he clearly understands the nature of an oath (*n*). Lunatics are incompetent; that is, persons usually mad, but if they have intervals of reason (*o*) they are competent during those times (*p*).

Children.—At common law the competency of children as witnesses (*q*) does not depend on their age but on whether they are fit to be sworn. A child of any age may be sworn and examined as a witness, if able to understand the nature of an oath (*r*). The competency of the child is a question for the Court to decide after due inquiry (*s*). Before a child

(*f*) As to the former law see 2 Hawk. c. 46, s. 101. Taylor, Ev. (10th ed.) ss. 1342–1346. Proof of conviction and judgment was necessary to disqualify. Gilb. Ev. 128; Com. Dig., Testmoign, A. S. And outlawry as a personal action did not disqualify, Co. Litt. 6 *b*; Com. Dig., Testmoign, A. S. As to whether a person under sentence of death may now be called as a witness, see R. *v.* Webb [1867], 11 Cox, 133; 33 & 34 Vict. c. 23, s. 1. Taylor, Ev. (10th ed.) p. 959, note.

(*g*) See Smith *v.* Prager, 7 T. R. 60. The rule as to interest never applied to the prosecutor or the husband or wife of the prosecutor. Taylor, Ev. (10th ed.) s. 1365; nor to accomplices. As to the accused, *vide post*, p. 2271.

(*h*) Commonly called Lord Denman's Act. The fact that a person tendered as a witness had been convicted and attainted of felony did not, after the passing of this Act, render him incompetent to testify for the Crown after pleading guilty to another felony against persons indicted jointly with them to the latter felony. R. *v.* Drury, 3 C. & K. 190, Rolfe, B.

(*i*) 53 Geo. III. c. 127, s. 3. Before this Act it was doubted whether such sentence disqualified from testifying. Gilb. Ev. 130.

(*j*) Com. Dig., Testmoign, A. I.

(*l*) *Ante*, Vol. i. p. 62.

(*m*) R. *v.* Ruston, 1 Leach, 408. There is not now any presumption of law that a deaf and dumb person is *non compos mentis*. Harrod *v.* Harrod, 1 K. & J. 4, Wood, V.-C. *Vide ante*, Vol. i. pp. 62 *et seq.* Taylor, Ev. (10th ed.) s. 1376.

(*n*) R. *v.* O'Brien, 1 Cox, 185 (Ir.), Jackson, J.

(*o*) *Ante*, Vol. i. p. 63. R. *v.* Hill, 2 Den. 254.

(*p*) Com. Dig., Testmoign, A. I. See Taylor, Ev. (10th ed.) s. 1375.

(*q*) As to the mode of ascertaining their competency, see R. *v.* Hill, 2 Den. 254.

(*r*) *Re* its nature and moral obligation, but it would seem not the legal consequences of false swearing. See R. *v.* Dent 71 J. P. 511. R. *v.* White, 1 Leach, 430. 'It certainly is not law that a child under seven cannot be examined as a witness. If he shows sufficient capacity on examination, a judge would allow him to be sworn.' R. *v.* Perkins, 2 Mood. 135, Alderson, B. See Phipson, Ev. (4th ed.) 423. Taylor, Ev. (10th ed.) s. 1377. As to the rule in former times, see R. *v.* Travers, 2 Str. 700. R. *v.* Dunnell, 1 East, P. C. 443, 444; 1 Hale, 302; 2 Hale, 278.

(*s*) R. *v.* Brasier, 1779, 1 Leach, 199; 1 East, P. C. 443. R. *v.* Powell, 1 Leach, 110, where a conviction for rape was quashed because founded on the unsworn testimony of a child of seven. See Taylor, Ev. (10th ed.) s. 1377.

is examined the judge must be satisfied that the child feels the binding obligation of an oath from the general course of its religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to it for the purposes of a trial. Where, therefore, on an indictment for murder it appeared that, previous to the happening of the circumstances, to which a child came to speak, she had had no religious education whatever, and had never heard of a future state, and she had been twice visited by a clergyman who had given her some instruction as to the nature and obligation of an oath, but she had no intelligence as to religion or a future state at the time of trial; her testimony was rejected (*t*). There is no difference in respect of the competency of children between capital cases and misdemeanors (*u*).

Where the child appears not sufficiently to understand the nature and obligation of an oath, judges may, in their discretion, if they think it necessary, for the purposes of justice, put off the trial, directing that the child in the meantime should be properly instructed (*v*). Where a criminal prosecution was coming on for trial, and the learned judge found that the principal witness was a female infant, wholly incompetent to take an oath, he postponed the trial till the following assizes; and ordered the child to be instructed in the meantime, by a clergyman, in the principles of her duty, and the nature and obligation of an oath (*w*). At the next assizes the prisoner was put upon his trial, and the infant, being found by the court on examination to have a proper sense of the nature of an oath, was sworn; and the prisoner was convicted upon her testimony (*x*). And where a bill was preferred against a prisoner for carnally knowing a girl under ten years of age, and the girl, being examined by Erle, J., before going before the grand jury, appeared to have no notion of religious or moral duties, and therefore was not sworn, and the bill was ignored in consequence; Erle, J., on the authority of the preceding case, directed the prisoner to be detained till the next assizes, and that the girl in the meantime should be duly instructed (*y*).

(*t*) R. *v.* Williams, 7 C. & P. 321, Patteson, J., *infra*, note (*y*). In R. *v.* Holmes, 2 F. & F. 788, Wightman, J., seems to have thought it sufficient to allow a child of six years old to be sworn, that to the question, 'Is it a good or bad thing to tell a lie?' the child answered 'A bad thing.' But the following questions and answers were also put and given: 'Do you say your prayers?' 'Yes.' 'What becomes of a person who tells lies?' 'If he tells lies he will go to the wicked fire'; and the child was then sworn. And Wightman, J., admitted a child of about the same age, who answered the question, 'Is it a good or bad thing to tell a lie?' by saying it was a bad thing. Anon. in the note, ibid.

(*u*) R. *v.* Travers, 2 Str. 700.

(*v*) See Taylor, Ev. (10th ed.) 986 *n.* But this must not be done in order that an *adult* may become capable, ibid. R. *v.* Wade, 1 Mood. 86; R. *v.* Whitehead, L. R. 1 C. C. R. 33: 10 Cox, 234.

(*w*) Anon. *cor.* Rooke, J., at Gloucester. Rooke, J., mentioned the case on a trial at the Old Bailey, in 1795; and added, that upon a conference with the other judges, on his return from the circuit, they unanimously approved of what he had done. See note (*a*) to R. *v.* White, 1 Leach, 430; and 2 Bac. Abr. 577, in the notes.

(*x*) Id. ibid.

(*y*) R. *v.* Baylis, 4 Cox. 23. In R. *v.* Williams, 7 C. & P. 321, where on a trial for murder, a child of eight years of age had been visited twice by a clergyman, who had given her some instruction as to the nature of an oath; Patteson, J., said, 'I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not

It is entirely in the discretion of the Court whether the trial should be postponed for this purpose or not: and where the want of understanding the nature and obligation of an oath arose from no neglect, but from the child being only six years old, and therefore being too young to have been taught; Pollock, C.B., refused to postpone the trial, as he doubted whether the loss in point of memory would not more than countervail the gain in point of religious education (*z*). An application to postpone the trial on this ground ought properly to be made before the child is examined by the grand jury, or at all events before the trial has commenced; for if the jury are sworn, and the prisoner is put upon his trial before the incompetency of the witness is discovered, the judge cannot discharge the jury, but should, if there is no other evidence of the offence having been committed, direct an acquittal (*a*). When the child is incompetent to be sworn, the account which it has given of the transaction to others is inadmissible (*b*).

Unsworn Evidence of Children.—The necessity of examining children on oath (*c*) has been removed by legislation in the case of certain offences. By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4, it was provided that, ['Where upon the hearing of a charge "of unlawfully and carnally knowing or attempting to know a girl under 13 years of age" (*d*), the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the court or justices understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given upon oath, if in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. Provided that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section, and given on behalf of the prosecution, shall be corroborated by some other material evidence in support thereof implicating the accused: Provided also that any witness whose evidence has been admitted under this section shall be liable to indictment and punishment for perjury in all respects as if he or she had been sworn'] (*d*). This provision is superseded, and similar and more general provisions are made by sect. 30 of the Children

merely from instructions, confined to the nature of an oath, and communicated to her for the purposes of this trial.' In cases where the unsworn evidence of the child is admissible, but needs corroboration, it may be fairer to the prisoner to take unsworn evidence than to postpone the trial for the instruction of the child. See R. *v.* Armstrong [1907], 12 Canada Cr. Cas. 545.

(*z*) R. *v.* Nicholas, 2 C. & K. 246, 2 Cox. 136. Pollock, C.B., observed that he could easily conceive that there might be cases where the intellect of the child was much more ripened, as in the cases of children of nine, ten, or twelve years old, where their education had been so utterly neglected that they were wholly ignorant on religious subjects; and in these cases a postponement of the trial might be very proper. In R. *v.* Cox [1898], 62 J. P. 89, in a case in which a boy did not understand the nature of an oath, and in which he could not by law give unsworn evidence, an order was made adjourning the trial for the boy to receive religious instruction and be taught the nature of an oath.

(*a*) R. *v.* Wade, 1 Mood. 86. Taylor, Ev. (10th ed.) s. 1377. Roscoe, Cr. Ev. (13th ed.) 98.

(*b*) R. *v.* Nicholas, 2 C. & K. 246.

(*c*) See R. *v.* Brasier, 1 Leach, 199.

(*d*) *Vide ante*, Vol. i. p. 919.

Act, 1908 (8 Edw. VII. c. 67), as to offences against Part II. of the Act and the offences specified in Schedule I. (*e*).

Want of Religious Belief.—At common law a man wholly without religious belief (*f*) could not be sworn as a witness (*g*). By 32 & 33 Vict. c. 68, s. 4 (*h*), provision was made for taking a solemn declaration in lieu of an oath, if the latter would have no binding effect on the conscience of the proposed witness. And the disability created by unbelief is removed by the Oaths Act, 1888 (*post*, p. 2298).

Competency of Accused Prisoners.—At common law persons jointly indicted and *tried* are not competent or compellable witnesses on their own behalf (*i*), or *for* or *against* each other, until they have been convicted by verdict, or plea of guilty (*j*), or acquitted (*k*), or the indictment, as against the person called as a witness, has been put an end to by a *nolle prosequi* (*l*). A person jointly indicted, but not given in charge to the jury, may give evidence on the trial of the persons included in the indictment with him, though neither acquitted nor convicted and though a *nolle prosequi* has not been entered (*m*). And where an order is made for the separate trial of persons jointly indicted, the defendants not under trial are competent witnesses for the defendants who are under trial (*n*). It is not essential that the convicted person should have been sentenced before he is admitted as a witness (*o*).

Where J. and C. were jointly indicted for forgery, and J., who was also charged with having been previously convicted of felony, pleaded guilty to the charge of forgery, but denied his previous conviction, and the jury found that he had been previously convicted; Erle, J., was of opinion that the proper course was to pass sentence upon him, and so

(*e*) *Ante*, Vol. i. p. 924. As to examining a child to see whether she is fit to give unsworn evidence, see R. *v.* Dent [1907], 71 J. P. 511.

(*f*) A belief in a God, in a future state, of rewards and punishments, and in the moral obligation of the witness's oath. Omichund *v.* Barker, Willes, 538. Consequently the witness was not required to be a Christian. Taylor, Ev. (10th ed.), s. 1382.

(*g*) Maden *v.* Catanach, 7 H. & N. 360; 31 L. J. Ex. 118. Cf. R. *v.* Wade, 1 Mood. 86.

(*h*) Rep. 51 & 52 Vict. c. 46, s. 6.

(*i*) If the accused is examined on oath except under statutory authority the proceedings are thereby rendered void. See Parker *v.* Green, 2 B. & S. 299. In R. *v* Sullivan [1874], Ir. Rep. 8 C. L. 404 (C. C. R.), an indictment for perjury founded on the sworn evidence of a person under accusation of a petty misdemeanor was quashed, and see Taylor, Ev. (10th ed.) s. 895.

(*j*) R. *v.* George, C. & M. 111, Coltman, J. R. *v.* King, 1 Cox, 232, Platt, B., after consulting Erle, J. R. *v.* Arundel, 4 Cox, 260, Patteson, J. R. *v.* Tomey, C. C. A. July 30, 1899. Cf. R. *v.* Williams, 1 Cox, 289. In R. *v.* Drury, 3 C. & K. 190, the reception for the Crown of the evidence of co-defendants who had pleaded guilty was objected to on the ground that they had been convicted and attainted of another felony. The objection was overruled on the ground that the disqualification was removed by 6 & 7 Vict. c. 85.

(*k*) R. *v.* Rowland, Ry. & M. 101. R. *v.* O'Donnell, 7 Cox, 337 (C. C. R. Ir.). This case decided that the person acquitted was a competent witness for the others. It is equally clear that he would have been a competent witness *against* them. R. *v.* Hinks, 1 Den. 84; 2 C. & K. 289. In that case W. was jointly indicted with H. for larceny and pleaded guilty. It was held that at common law W. was a competent witness for the prosecution. Alderson, B., on a reference to 6 & 7 Vict. c. 85, said that W. was not a party to the issue involved in the trial of H.; cf. Hawksworth *v.* Showler, 12 M. & W. 45. Where a defendant has been joined to an indictment simply to shut his mouth, it would seem that the Court may order his immediate acquittal. Archb. Cr. Pl. (23rd ed.) 393, 394.

(*l*) See R. *v.* Sherman, Cas. K. B. *temp.* Hardw. 303.

(*m*) Winsor *v.* R., L. R. 1 Q.B. 289. R. *v.* Gallagher, 13 Cox, 61.

(*n*) R. *v.* Bradlaugh, 15 Cox, 217, Coleridge, L.C.J.

(*o*) See R. *v.* Tomey, *ubi sup.*

put an end to the whole matter as regarded him, before he allowed him to give evidence for the other prisoner; and this course was adopted (*p*).

When it is intended to call a prisoner as a witness against those jointly indicted with him, the usual practice is to obtain the leave of the Court to offer no evidence against the particular prisoner, and to take an acquittal of him before examining him as a witness (*q*).

The common law rule above stated was not altered by the Evidence Act, 1851 (*r*). Four prisoners were jointly indicted for night poaching, and during their trial, and at the close of the case for the prosecution, it was proposed to call one of the prisoners to prove an *alibi* for another of them. The proposed witness had been examined before the justices on the committal of the other three prisoners, and had given evidence of an *alibi*, and had been bound over, by recognizance by the justices to give evidence on the trial (*s*), but had been afterwards taken into custody, and committed, and was indicted jointly with the others. No *nolle prosequi* was entered for him, nor did he plead guilty, and no application had been made for a separate trial. The evidence was rejected. It was held, that the evidence was properly rejected, and that the conviction was right (*t*).

Nor has the common law rule been directly altered by the Criminal Evidence Act, 1898 (*u*). But where persons tried together elect under that Act to give evidence on their own behalf, if the evidence tends to criminate a co-defendant it is admissible subject to a right of cross-examination on the part of the co-defendant whom it affects (*v*); and if the evidence tends to exculpate a co-defendant it would seem to be equally admissible. The words of the Act of 1898 entitle a defendant to be sworn as a witness 'for the defence' not merely 'on his own behalf' (*vv*).

The competency of an accused person as a witness is now in the main regulated by statutes of 1877, 1898, and 1908.

By the Evidence Act, 1877 (40 & 41 Vict. c. 14), '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 obeying 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.'

This Act is not affected by the Act of 1898 (*w*). Highway and bridge indictments are now treated as civil proceedings for the purposes of appeal (*x*) and costs (*y*).

(*p*) R. *v.* Jackson, 6 Cox, 525.

(*q*) R. *v.* Rowland, Ry. & M. 401. R. *v.* Owen, 9 C. & P. 83.

(*r*) 14 & 15 Vict. c. 99. By sect. 3, '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. . . . The rest is repealed.

(*s*) Under 30 & 31 Vict. c. 35, s. 3, *ante*, p. 2216.

(*t*) R. *v.* Payne, L. R. 1 C. C. R. 349; 41 L. J. M. C. 65. Before this case there was some doubt. See 1 Hale, 305. 2 Stark. Ev. 11. See Sir Percy Cresby's case, Noy, 154, cited 2 Hale, 234. R. *v.* Lyons, 9 C. & P. 555. R. *v.* Deeley, 11 Cox, 607.

(*u*) *Post*, p. 2271.

(*v*) R. *v.* Hadwen [1902], 1 K. B. 882; 71 L. J. K. B. 581.

(*vv*) In R. *v.* McDonnell (C. C. A.) July 30, 1909, the Court held that where two persons were jointly indicted and tried, one could be called as a witness for the other.

(*w*) 61 & 62 Vict. c. 36, s. 6 (1), *post*, p. 2272.

(*x*) 7 Edw. VII. c. 23, s. 20 (3), *ante*, p. 2011.

(*y*) 8 Edw. VII. c. 15, s. 9 (3), *ante*, p. 2044.

By the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36) (*z*),—

Sect. 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 (*a*), 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: (*aa*)

'(c) The wife or husband of the person charged shall not, save as in this Act mentioned (*b*) 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 shew 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—

(1) the proof that he has committed or been convicted of such other offence is admissible evidence to shew that he is guilty of the offence wherewith he is then charged (*bb*); or

(2) 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 (*c*), 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 (*cc*); or

(*z*) The Act was passed Aug. 12, 1898, and came into operation on Oct. 12, 1898 (sect. 7 (2)). It does not extend to Ireland (sect. 7 (1)).

(*a*) Including the preliminary inquiry before justices, but not proceedings before the grand jury, which does not hear evidence for the defence. R. *v.* Rhodes [1899], 1 Q.B. 77; 68 L. J. Q. B. 83. Nor after a plea of guilty. R. *v.* Hodgkinson, 64 J. P. 808, Darling, J.

(*aa*) Comment by the judge is not unlawful. R. *v.* Rhodes, *ubi supra*; and the jury may draw inferences against the defendant if he does not give evidence to explain facts proved by the prosecution. R. *v.* Corrie, 68 J. P. 294 (C. C. R.).

(*b*) Sect. 4, *post*, p. 2277. Sect. 6 (1), *post*, p. 2272.

(*bb*) See R. *v.* Chitson (C. C. A.), July 30, 1909.

(*c*) See R. *v.* Solomon, 2 Cr. App. R. 80, where cross-examination as to character was allowed when the accused on arrest had alleged that he was a respectable tradesman.

(*cc*) To deny in strong terms a statement made by the prosecutor is not necessarily an imputation on the character of the prosecutor or his witnesses. R. *v.* Rouse [1904], 1 K.B. 184; and see R. *v.* Bridgwater [1905], 1 K.B. 131, *ante*, p. 2120; R. *v.* Preston [1909], 1 K.B. 568. To impute the offence charged against the defendant to a witness for the Crown, is such an imputation. R. *v.* Marshall, 63 J. P. 36.

(3) 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 sect. 18 of the Indictable Offences Act, 1848 (*d*), or any right of the person charged to make a statement without being sworn' (*e*).

Sect. 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.'

Sect. 3. 'In cases where the right of reply depends upon the question whether evidence has been called for the defence (*ee*), the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply' (*f*).

Sect. 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' (40 & 41 Vict. c. 14, *ante*, p. 2270).

'(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 (29 & 30 Vict. c. 109), by general orders made in pursuance of sect. 65 of that Act (*g*); and

(b) as to courts martial under the Army Act (44 & 45 Vict. c. 58), by rules made in pursuance of sect. 70 of that Act' (*h*).

Before the passing of the Criminal Evidence Act, 1898, the following enactments permitted the calling of the defendant or the husband or wife of the defendant in the following cases:

Short title.	Regnal Year and Chapter.	Offence.	Extent.
Offences against the Person Act, 1861.	24 & 25 Vict. c. 100.	Offences against sects. 52–55 (*i*). (See Criminal Law Amendment Act, 1885, *post*, p. 2274.)	England and Ireland.
Licensing Act, 1872.	35 & 36 Vict. c. 94.	Sect. 51 (4). 'In all cases of summary proceedings under this Act the defendant and his wife shall be *competent* to give evidence.	England and Ireland (s. 77).

(*d*) 11 & 12 Vict. c. 42.

(*e*) If the prisoner elects to give evidence at the preliminary inquiry his evidence is taken down as a deposition and may be used against him by the prosecution at the trial. R. *v.* Bird, 19 Cox, 180 (C. C. R.). R. *v.* Boyle, 20 T. L. R. 192, Jelf, J.

(*ee*) *Vide ante*, p. 1999.

(*f*) For Sect. 4, *vide post*, p. 2277. Sect. 5 relates to Scotland.

(*g*) See the King's Regulations, Chap. xvii (ed. 1906).

(*h*) See the Army Rules of Procedure, 1899.

(*i*) As to sect. 52, *vide* R. *v.* Owen, 20 Q.B.D. 829.

TABLE OF ENACTMENTS—*continued.*

Short Title.	Regnal Year and Chapter.	Offences.	Extent.
Metalliferous Mines Act, 1872.	35 & 36 Vict. c. 77.	Sect. 34, 'The owner or agent (of a mine) may, if he think fit, be sworn and examined as an ordinary witness in the case where he is charged in respect of any contravention or non-compliance by another person.'	United Kingdom.
Sale of Food and Drugs Act, 1875.	38 & 39 Vict. c. 63.	Sect. 21, 'At the hearing of the information in such proceeding (under the Act and the incorporated Acts) . . . the defendant may, if he think fit, tender himself and his wife to be examined on his behalf, and he or she shall if *he* so desire be examined accordingly.'	United Kingdom.
Conspiracy and Protection of Property Act, 1875.	38 & 39 Vict. c. 86.	Sect. 11, 'Upon the hearing and determining of any indictment under sects. 4, 5, 6, of this Act (*j*) the respective parties to the contract of service, their husbands or wives, shall be deemed and considered as competent witnesses.'	United Kingdom.
Customs Consolidation Act, 1876.	39 & 40 Vict. c. 36.	Sect. 259, In proceedings in the High Court (Revenue Side) in respect of claims to seize or forfeit goods or for penalties under the Customs Acts the defendant is competent and compellable to give evidence on certain matters in dispute (*k*).	United Kingdom.
Threshing Machines Act, 1878.	41 & 42 Vict. c. 12.	Sect. 3,' On the prosecution of any person for an offence against this Act he may on his own application be sworn and examined as a witness.'	England (s. 2).
Children's Dangerous Performances Act, 1879.	42 & 43 Vict. c. 34.	See Children Act, 1908, sect. 27 and Sch. I., *ante*, Vol. i. p. 924.	United Kingdom.
Army Act, 1881.	44 & 45 Vict. c. 58.	Sect. 156 (3), 'A person charged with an offence against this section' (purchasing from soldiers regimental necessaries, &c.,) 'the wife or husband of such person may, *if he or she think fit*, be sworn and examined as an ordinary witness in the case.'	British Islands, &c.
Married Women's Property Act, 1882.	45 & 46 Vict. c. 75.	Sect. 12, 'In any proceeding under this section' (criminal, &c., remedies for security of wife's separate property) 'a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding.'	England and Ireland.
Married Women's Property Act, 1884.	47 & 48 Vict. c. 14.	Sect. 1, 'In any such criminal proceeding' (under sect. 16 of the Act of 1875) 'the husband and wife respectively shall be *competent* and admissible witnesses, and *except when defendant compellable* to give evidence.'	England and Ireland.

(*j*) For sects. 4, 5, *vide ante*, p. 1910, 1911. (*k*) See Taylor, Ev. (10th ed.) s. 1359.
For sect. 6, *vide ante*, Vol. i. p. 910.

TABLE OF ENACTMENTS—*continued.*

Short Title.	Regnal Year and Chapter.	Offences.	Extent.
Explosive Substances Act, 1883.	46 & 47 Vict. c. 3.	Sect. 4, 'In any proceeding against any person for a crime under this section (which relates to the possession of explosive substances under suspicious circumstances) '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.'	United Kingdom.
Corrupt and Illegal Practices Prevention Act, 1883.	46 & 47 Vict. c. 51.	Sect. 53 (2), 'On any prosecution under this Act whether on indictment or summarily, and whether before an election court or otherwise, and in any action for a pecuniary forfeiture under this Act, the person prosecuted or sued, and the husband or wife of such person may, if he or she think fit, be examined as an ordinary witness in the case' (*l*).	United Kingdom.
Corrupt and Illegal Practices Prevention Act, 1895.	58 & 59 Vict. c. 40.	Sect. 2, 'Any person charged with an offence under this Act, and the husband or wife of such person, as the case may be, shall be competent to give evidence in answer to such charge.'	United Kingdom.
Criminal Law Amendment Act, 1885.	48 & 49 Vict. c. 69.	Sect. 20, 'Every person charged with an offence under this Act, or under sect. 48 (which deals with rape) or sects. 52 to 55, both inclusive, of the Offences Against the Person Act, 1861 (*m*) (which deal with abduction), or any of such sections, and the husband or wife of the person so charged shall be competent, but not compellable witnesses on every hearing at every stage of such charge except an enquiry before a grand jury.'	United Kingdom.
Merchandise Marks Act, 1877.	50 & 51 Vict. c. 28.	Sect. 10, 'In any prosecution for an offence against this Act a defendant and his wife, or her husband, as the case may be, may, if the defendant thinks fit, be called as a witness, and if called shall be sworn and examined, and may be cross-examined, and re-examined in like manner as any other witness.'	United Kingdom.
Coal Mines Regulation Act, 1887.	50 & 51 Vict. c. 58.	Sect. 62 (2).	United Kingdom.
Libel Act, 1888.	51 & 52 Vict. c. 64.	Sect. 9, 'Every person charged with the offence of libel before any court of criminal jurisdiction, and the husband or wife of the person so charged shall be competent but not compellable witnesses on every hearing at every stage of such charge.'	England and Ireland.

(*l*) This enactment is extended to municipal elections, *ante*, Vol. i. p. 652.

(*m*) See the sects. *ante*, Vol. i. pp. 931, 955, 959, 968, 969.

TABLE OF ENACTMENTS—*continued.*

Short Title.	Regnal Year and Chapter.	Offences.	Extent.
Public Health (London) Act, 1891.	54 & 55 Vict. c. 76.	Sect. 118.	
Betting and Loans (Infants) Act, 1892.	55 & 56 Vict. c. 4.	Sect. 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.'	United Kingdom.
Building Societies Act, 1894.	57 & 58 Vict. c. 47.	Sect. 24, 'Upon the hearing of any charge involving the infliction of fine or imprisonment on summary conviction under this Act, the defendant and his wife shall be admissible as competent witnesses.	United Kingdom.
Diseases of Animals Act, 1894.	57 & 58 Vict. c. 57.	Sect. 57 (3), 'A person charged with an offence against this Act may, if he think fit, tender himself to be examined on his own behalf, and thereupon, he may give evidence in the same manner and with the like effect and consequences as any other witness.	United Kingdom.
Merchant Shipping Act, 1894.	57 & 58 Vict. c. 60.	Sect. 457, 'A master of ship a competent witness as to certain matters of defence on charge of knowingly taking to sea a ship so unseaworthy as to endanger life.'	British Empire, subject to local laws of British possessions.
Law of Distress Amendment Act, 1895.	58 & 59 Vict. c. 24.	Sect. 5, 'In any proceeding against any person for an offence against this Act, such person shall be competent but not compellable to give evidence, and the wife 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.'	United Kingdom.
False Alarms of Fire Act, 1895.	58 & 59 Vict. c. 28.	Sect. 27, *in iisdem verbis* with the section last above set out.	United Kingdom.
Chaff Cutting Machines (Accidents) Act, 1897	60 & 61 Vict. c. 60.	Sect. 5, 'Every person charged with an offence under this Act before any court of criminal jurisdiction and the husband or wife of the person so charged shall be competent but not compellable witnesses on every hearing at every stage of such charge.'	United Kingdom.
Prevention of Cruelty to Children Act, 1894 (*n*).	57 & 58 Vict. c. 41.	Offences against children under sixteen.	United Kingdom.
Dangerous Performances Act, 1897.	60 & 61 Vict. c. 52.	See 8 Edw. VII. c. 67, s. 27, and sched. 1.	United Kingdom.

(*n*) Repealed and replaced by 4 Edw. VII. c. 15, and now represented (except as to offences within sects. 2, 3 of the latter Act) by Part ii. of the Children Act, 1908 (8 Edw. VII. c. 67), *ante*, Vol. i. pp. 913 *et seq.*

By the Children Act, 1908 (8 Edw. VII. c. 67) s. 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' (*p*).

This section supersedes sect. 12 of the Act of 1904, which repealed or superseded the Act of 1894 (scheduled to the Criminal Evidence Act, 1898, and referred to in sect. 4), so as to entitle the husband or wife of the accused to give evidence for the prosecution or defence without the consent of the accused.

In R. *v.* Martin (*q*), a case under the Cruelty to Children Act, 1889 (52 & 53 Vict. c. 44) (*r*), which by sect. 7 allowed a husband and wife to give evidence for or against each other, a husband and wife were jointly indicted for cruelty to their child. At the conclusion of the prosecution counsel for the husband submitted that no case had been made against him, and the judge so held; but the wife electing to give evidence on her own behalf, the judge declined to allow the husband to be discharged, on the ground that the case was not over, and the husband must take his chance of the wife's evidence making against him.

The statutes in the above table are in full force so far as they apply to Ireland. So far as they relate to the right (*s*) of the defendant to give evidence in a criminal case in England and Scotland and the procedure when he elects to give evidence, the scheduled Acts in the table appear to be impliedly repealed by the Act of 1898 (*t*). As to the effect of the Act of 1898 with reference to the calling of the husband or wife of the accused, *vide post*, p. 2777.

Competency of the Husband or Wife of an Accused Person: Common Law.—At common law the husband or wife of a person under trial for crime is not a competent witness for or against the accused (*u*), except in the cases presently to be stated (*uu*). The common law rule was left untouched by the Evidence Acts of 1851 (*v*) and 1853 (*w*), the latter whereof made the husband and wife of a party to a civil proceeding a

(*p*) This provision is unnecessary as to England and Scotland, 61 & 62 Vict. c. 36, s. 1, *ante*, p. 2271, but necessary as to Ireland.

(*q*) 17 Cox, 36, Wills, J.

(*r*) Repealed in 1894, and now represented by 8 Edw. VII. c. 67, Part ii.

(*s*) It has not been decided whether the Act of 1898 affects prior Acts (other than that of 1877) making the defendant a compellable witness.

(*t*) See sect. 6, and Charnock *v.* Merchant [1900], 1 Q. B. 474; 69 L. J. Q. B. 221, which turned on the extent of the right to cross-examine a defendant prosecuted under the Prevention of Cruelty to Children Act, 1894.

(*u*) Gilb. Ev. 119. 2 Hawk. c. 46, s. 70. Barker *v.* Dixie, Cas. K. B. *temp.* Hardw. 264. As to admitting statements made out of Court by a wife in presence of her husband as evidence against him, see R. *v.* Mallory, 13 Q. B. D. 33.

(*uu*) *Post*, p. 2281.

(*v*) 14 & 15 Vict. c. 99. By sect. 3, 'Nothing herein contained . . . 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.'

(*w*) 16 & 17 Vict. c. 83. By sect. 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.' The portion of the section relating to proceedings in respect of adultery was repealed in 1869 (32 & 33 Vict. c. 68, s. 1).

competent and compellable witness in the proceeding (*x*). The rule was altered as to particular cases by a series of statutes passed between 1872 and 1897 to the extent shown in the table *ante*, p. 2272.

By sect. 1 of the Criminal Evidence Act, 1898 (*ante*, p. 2271), the wife or husband of every person charged with an offence is a competent witness *for the defence* at every stage of the proceedings, whether the person charged is charged solely or jointly with any other person.

The husband or wife of the person cannot be called as a witness in pursuance of the Act of 1898 without the consent of such person charged, except in the cases provided for by sect. 4 which provides that—

(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.'

THE ENACTMENTS REFERRED TO IN THE SCHEDULE ARE:

Statute.	Enactments referred to in Section 4.
The Vagrancy Act, 1824 (5 Geo. IV. c. 83).	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family. (See Reeve *v.* Wood, 10 Cox, 58.)
The Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83).	Section eighty.
The Offences against the Person Act, 1861 (24 & 25 Vict. c. 100).	Sections forty-eight to fifty-five.
The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).	Section twelve and section sixteen.
The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69).	The whole Act.
Punishment of Incest Act, 1908 (*y*) (8 Edw. VII. c. 45).	The whole Act.
The Children Act, 1908 (8 Edw. VII. c. 67) (*z*).	Part II. and Schedule I. (*y*).

It is not clear whether sect. 4 makes the husband or wife a compellable witness in cases falling within its terms (*a*).

Under 48 & 49 Vict. c. 69, s. 20, referred to in the schedule and not expressly repealed, the husband and wife could be called without the consent of the person charged, but was not compellable.

The common law only applies as between persons who are actually and validly married (*c*). Thus on an indictment for bigamy the first and

(*x*) Sect. 1.

(*y*) Added 8 Edw. VII. c. 45, s. 4 (4) (*ante*, Vol. i. p. 975).

(*z*) Substituted by sect. 27 of the Act of 1908 (*ante*, p. 2276), for the Act of 1894.

(*a*) There have been some *nisi prius* rulings that the spouse is compellable. See Archb. Cr. Pl. (23rd ed.) 398, 399. Charnock *v.* Merchant [1900], 1 Q.B. 474, does not touch this point, and it would seem that the object of including the Act of 1885 and the sections of the Act of 1861 therein mentioned in the schedule was to preserve and not to alter the rules which they contained as to calling the husband or wife without the consent of the accused.

(*c*) See Taylor, Ev. (10th ed.) s. 1365.

true wife or husband is not admissible to give evidence against the other spouse (*d*).

But the rule does not extend to persons not married, who have lived together and cohabited as man and wife (*e*). Thus where a woman had been married to a man whom she had not seen for thirty years, and then married again, but afterwards found that the man she had first married was alive; as the second marriage was a mere nullity, she was held competent to give evidence of statements made by her second husband during the time they cohabited (*f*). So where the prisoner had married his deceased wife's sister, Erle, J., held that the wife was a competent witness against him, as the marriage was void, and that the wife might prove her relationship to the former wife on the *voire dire* (*g*). So a kept mistress, who has passed by the name and appeared in the world as the wife of her protector, has been held to be a competent witness for him (*h*).

In R. *v.* Perry (*i*), Gibbs, C.J., when Recorder of Bristol, stated that he could see no distinction between admitting a wife for or against her husband. 'R. *v.* Perry,' said Abbott, C.J., in R. *v.* Sergeant (*j*) 'was much talked about at the time, and Gibbs, C.J., expressed his surprise that any doubt should have been entertained that a wife was in all cases a competent witness for her husband when admissible against him.'

Where one spouse is under trial jointly with another person, the other spouse is not, at common law, a competent witness for the Crown or the defence of either defendant (*k*), unless she would be competent to testify for or against her spouse if he were being tried alone.

Where an offence can only be committed by several joining in it, as conspiracy or riot, the husband or wife of one of those who are jointly indicted is at common law incompetent as a witness for or against any of the others; for the acquittal or conviction of such other would directly tend to the acquittal or conviction of the wife or husband, as the case might be. Thus on a prosecution against several persons for conspiracy the wife of one of the defendants was held not to be a competent witness for the others, a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for her husband (*l*). And wherever the acquittal of the principal would entitle an accessory to be discharged, it may well be doubted whether the wife or husband of the accessory would be a competent witness for the principal. On

(*d*) 1 Hawk, c. 42, s. 8. The Act of 1898 has not altered this rule though it has made the first husband or wife a competent witness for the defence. R. *v.* Green, Nov. 18, 1899, Wills, J., noted 34 Law. Journ. Newsp. 622, and Archb. Cr. Pl. (22nd ed.), 1169.

(*e*) 1 Phill. Ev. 69. Taylor, Ev. (10th ed.) s. 1366.

(*f*) Wells *v.* Fletcher, 5 C. & P. 12: s.c. as Wells *v.* Fisher, 1 M. & Rob. 99. R. *v.* Peat, 2 Lew. 288. R. *v.* Ayley, 15 Cox, 328. As to former doubts on the subject see 1 Price 81, 83, Richards, B.

(*g*) R. *v.* Young, 5 Cox, 296. See R. *v.* Chadwick, 11 Q.B. 173. R. *v.* Blackburn, 6 Cox, 333.

(*h*) Batthews *v.* Galindo, 4 Bing. 610. R. *v.* Young, 2 Cox, 291, Erle, J.

(*i*) At Bristol, 1794.

(*j*) Ry. & M. 354.

(*k*) R. *v.* Thompson, L. R. 1 C. C. R. 377; 41 L. J. M. C. 112. The indictment contained counts against the husband and H. jointly, and a count against H. separately. The Court said the rule applied in R. *v.* Payne (*ante*, p. 2270) to accused persons, applied equally to their spouses. R. *v.* Thompson settled a point previously in some doubt. See R. *v.* Sills, 1 C. & K. 494. R. *v.* Moore, 1 Cox, 59. R. *v.* Bartlett, 1 Cox, 105. R. *v.* Denslow, 2 Cox, 230.

(*l*) *Ante*, Vol. i. p. 201. R. *v.* Frederick, 2 Str. 1095. R. *v.* Smith, 1 Mood. 289. See R. *v.* Rudd, 1 Leach, 127.

an indictment for conspiracy against H. and others Mrs. B. was examined for the prosecution, and it appeared that her husband had been bound by recognizances to appear and take his trial for cheating at play at a previous assize, but that he did not appear, and had not returned home since, and the wife being asked whether she had not seen her husband in Birmingham a few days before, said: 'I decline to answer the question, because my husband did not appear to his recognizance'; Campbell, C.J., said: 'I think on that the question ought not to be proposed' (*m*).

On an indictment against Webb and three others for sheep-stealing counsel for the prosecution proposed to call Webb's wife to prove facts against the other prisoners, and argued that it was only in cases where the acquittal or conviction of one prisoner had a direct tendency to cause the acquittal or conviction of the other prisoners that the wife of one prisoner was incompetent to give evidence for or against the other prisoners; but Bolland, B., held that the witness was incompetent (*n*).

The rule does not apply when the husband or wife of the person tendered as a witness has already been acquitted or convicted, or is not included in the indictment, or is not being tried on it. Thus, on an indictment for sheep-stealing, the wife of a person who had been previously convicted of stealing the same sheep, was held a competent witness for the prosecution (*o*). So where one prisoner pleaded guilty, it was held that his wife was a competent witness against the other prisoner jointly indicted with him, as on the issue to be tried her husband was no longer interested (*p*). In Thurtell's case, Mrs. Probert was examined as a witness against Thurtell after her husband was acquitted (*q*). If Probert had not been apprehended, and Thurtell only had been on trial at the time, the wife of Probert would have been competent; because the question would have been whether Thurtell was guilty, and not whether Thurtell and Probert were guilty (*r*).

On an indictment at common law against a wife and her paramour for stealing the goods of the husband, it was held that the husband was a competent witness against the paramour; for the wife was entitled to acquittal, as she could not be guilty of stealing her husband's goods (*s*). Under the Married Women's Property Acts, 1882 and 1884 (*t*), one spouse is in certain cases liable for stealing the property of the other, and in such cases the aggrieved spouse is a competent witness for the prosecution.

The first count of an indictment charged H. with obtaining money by falsely pretending that a document produced to a bank by Eliza, the wife of D. T., had been filled up by his authority; the second count was similar as to another document; and the third count charged H.

(*m*) R. *v.* Hamp, 6 Cox, 167.

(*n*) R. *v.* Webb, Bushell and Croome, Gloucester Spring Ass. [1830], MSS. C. S. G.; and see Dalt. c. 164, p. 540, cited 1 Hale, 301.

(*o*) R. *v.* Williams, 8 C. & P. 284.

(*p*) R. *v.* Thompson, 3 F. & F. 824, Keating, J.

(*q*) R. *v.* Williams, 8 C. & P. 284, Alderson, B.

(*r*) Hawksworth *v.* Showler, 2 M. & W. 45, Alderson, B.

(*s*) R. *v.* Glassie, 7 Cox, 1 (Ir.), Lefroy *v.* Monahan, CC. JJ.

(*t*) *Vide, ante*, p. 2277. The latter Act overrides R. *v.* Brittleton, 12 Q.B.D. 266; 53 L. J. M. C. 83.

and Eliza T. with a conspiracy to cheat the bank; but she was not tried with H. The evidence of D. T. was essential to prove that he had given no authority to fill up the documents; but it was objected, on the authority of the preceding case, that he was incompetent to prove his wife guilty of a conspiracy, or even to prove the counts for false pretences; but Byles, J., thought his evidence admissible on all the counts. The jury found the prisoner guilty on the first count only; and, on a case reserved, it was held that the evidence of the husband was admissible in support of the first count. His evidence no doubt tended to shew that his wife had acted criminally, but that count contained no charge against her (*u*).

The rule excluding the evidence of husband and wife does not apply to evidence given in distinct proceedings which could not be used against the incriminated spouse. In R. *v.* All Saints, Worcester (*v*), it was held that where the evidence of the wife did not directly criminate the husband (as in a proceeding relating to other matters, and not to any criminal charge against him), and never could be used against him, nor could he ever be affected by the judgment of the Court founded upon such evidence, she was a competent witness. Upon the trial of an appeal a pauper proved his marriage with E., and M. B. was then called by the other side to prove that she had previously been married to the pauper. It was held that she was competent for this purpose; as nothing that was said by her in this case, nor any decision founded upon her testimony, could afterwards be received in evidence to support an indictment against her husband for bigamy (*w*).

But where on an indictment for stealing wheat, Eliza Ellis was called on the part of the Crown to prove that her husband, who had absconded, had been present when the wheat was stolen, and that she saw him deliver it to the prisoner; Taunton, J., doubted whether she could be so examined, as her evidence might be used as a ground of convicting her husband by causing a charge to be made against him. He added: 'I am against breaking down the rules of law. My opinion is to adhere to the rule laid down by Lord Hale (*x*). In R. *v.* All Saints, Worcester, when the witness was examined, there was nothing in her evidence to criminate her husband. Here it is sought to make the woman charge her husband, not obliquely, but directly and immediately.' After consulting Littledale, J., he added: 'We both agree in opinion that the witness is incompetent. We think R. *v.* All Saints, Worcester, very distinguishable. There at the time when the wife was examined there was nothing in her evidence to criminate her husband. Here the evidence

(*u*) R. *v.* Halliday, Bell, 257. The Court seems to have considered the husband competent on all the counts, as Pollock, C.B., added: "Indeed, in this indictment she was not charged at all, although she was involved in the conspiracy charged in the third count; but that did not prevent the husband's evidence from being admissible.' This case was not argued, and no cases were cited.

(*v*) 6 M. & S. 194. In this case the Court held that the rule had been stated too widely in R. *v.* Cliviger, 2 T. R. 263. See Taylor, Ev. (10th ed.) s. 1367.

(*w*) R. *v.* Bathwick, 2 B. & Ad. 639. The Court doubted whether the competency of a witness could depend upon the marshalling the evidence, or the stage of the cause at which the witness was called.

(*x*) 'I am not aware of the passage referred to by the learned judge, but see 2 Hale, 279, 1 Hale, 301.' C. S. G.

would directly charge the husband with being a principal; and although there is no prosecution pending, her evidence cannot but facilitate an accusation against her husband. Now, the law does not allow the wife to give evidence against her husband, and it is quite consistent with that principle that this evidence should not be 'received' (*y*). The reasoning upon R. *v.* All Saints, Worcester, was founded, is equally strong to shew that one spouse may be called as a witness to disprove what has been stated by the other, and that either the party who has called the one or the opposing party may call the other spouse for the purpose of contradicting.

Common Law Exceptions.—One spouse is a competent witness against the other *ex necessitate*, in a prosecution of the other for offences against the person or liberty of the witness (*z*). In R. *v.* Wakefield (*a*), Hullock, B., said: 'I take it, it is quite clear now that a wife is a competent witness against her husband in respect of any charge which affects her liberty and person.' And the dying declarations of one spouse are admissible against the other on an indictment of the other spouse for homicide (*b*). In R. *v.* Whitehouse (*c*), an indictment of a husband for shooting at his wife, she was admitted as a witness for the prosecution by Garrow, B., after consulting Holroyd, J., upon the ground of the necessity of the case; and Holroyd, J., sent Garrow, B., the case of R. *v.* Jagger, Yorkshire Assizes, 1797 (*cc*), where the husband had attempted to poison his wife with a cake in which arsenic was introduced, and the wife was admitted to prove the fact of the cake having been given her by her husband; and Rooke, J., afterwards delivered the opinion of the twelve judges that the evidence had been rightly admitted. Holroyd, J., however, said he thought the wife could only be admitted to prove facts which could not be proved by any other witness (*d*). So on an indictment against a man for beating his wife, she was held competent (*e*), and one spouse may swear the peace against the other (*f*).

Upon an indictment for forcible abduction and marriage of a woman, she may be a witness for the Crown (*g*), or the prisoner (*h*); but this is rather a case which does not fall within the general rule than an exception to it; and rests on the view that she is not legally his wife, a contract obtained by force having no obligation in law (*i*). If the actual marriage is valid (as where the woman after abduction consents to the marriage voluntarily, and not induced by any precedent menace), or if the marriage has been ratified by subsequent voluntary cohabitation,

(*y*) R. *v.* Gleed, Gloucester Lent Ass. 1832. MSS. C. S. G.

(*z*) Lord Audley's case, 3 St. Tr. 401, where the husband was indicted for aiding and abetting a rape on his wife. 1 Hale, 301. 2 Hawk. c. 46, s. 77. Bull. (N. P.), 287. R. *v.* Sergeant, Ry. & M. 354. R. *v.* Jellyman, 8 C. & P. 604. 1 East, P. C. 455. Taylor, Ev. (10th ed.) s. 1371.

(*a*) Murray's Report, p. 257.

(*b*) R. *v.* Woodcock, 1 Leach, 500: 1 East, P. C. 354. R. *v.* Johns, 1 Leach, 504 *n.*

(*c*) Stafford Assizes, MSS. Russell, Serjt.

(*cc*) See 1 East P.C. 455.

(*d*) Cf. R. *v.* Pearce, 9 C. & P. 667.

(*e*) R. *v.* Azire, 1 Str. 633, per Lord Raymond. Bull. (N. P.), 287.

(*f*) Bull. (N. P.), 287. 1 Hawk. c. 28, s. 2. Short and Mellor, Cr. Pr. (2nd ed.) 377.

(*g*) Gilb. Ev. 120. 1 Hale, 301, 302. 2 Hawk. c. 46, s. 78. Fulwood's case, Cro. Car. 488. Brown's case, 1 Ventr. 243. Swendsen's case, 14 St. Tr. 595.

(*h*) R. *v.* Perry (Bristol, 1794), cited by Abbott, C.J., in R. *v.* Sergeant, Ry. & M. 354. 1 Hawk. c. 41, s. 13.

(*i*) Gilb. Ev. 120. 1 Hale, 302, 660, 661. Bull. (N. P.), 286. Taylor, Ev. (10th ed.) s. 1370.

it has been said she is not competent for or against the prisoner (*j*). But there are very considerable authorities to the contrary (*k*). And in one case, where the defendants were indicted for a misdemeanor, in conspiring to carry away a young lady under the age of sixteen, from the custody appointed by her father, and to cause her to marry one of the defendants; and, in another count, for conspiring to take her away by force, being an heiress, and to marry her to one of the defendants; Hullock, B., was of opinion that, even assuming the young lady to be at the time of the trial the lawful wife of one of the defendants, she was a competent witness for the prosecution, although there was no evidence to support that part of the indictment which charged force (*l*).

The affidavit of a wife was allowed to be read on an application to the Court of King's Bench for an information against the husband for an attempt to take her away by force after articles of separation; and it would be strange to permit her to be a witness to ground a prosecution, and not afterwards to be a witness at the trial (*m*). But on an indictment for a conspiracy in procuring a lady, then a ward in Chancery, to marry, the wife was held not to be a good witness for one of the co-defendants, if her evidence might enure to the acquittal of her husband (*n*). That on an indictment against the wife of W. S. and others, for a conspiracy in procuring W. S. to marry, Abbot, C.J., refused to admit W. S. as a witness in support of the prosecution (*o*). There are dicta to the effect that one spouse is a competent witness for the Crown in high treason (*p*).

Accomplices.—At common law an accomplice is a competent witness both against and for his confederates at every stage of the prosecution, unless he is actually under trial jointly with them (*q*): but until 1843 he was incompetent if he had been convicted and attainted (*r*). The term accomplice does not include persons who have acted with the accused

(*j*) 1 Hale, 302, 661. 1 Phill. Ev. 84 (7th ed.). 2 Stark. Ev. 553.

(*k*) 4 Bl. Com. 209. 1 East, P. C. 454.

(*l*) R. *v.* Wakefield, Murray's Report, p. 257; 2 Lew. 1, 279. In Perry's case, (*ante*, p. 2278), no force was used. See per Hullock, B., in R. *v.* Wakefield. In this case it was contended that the wife's incompetency might be shewn either by examining her on the *voire dire*, or by other witnesses, and for the defendant it was proposed to shew her incompetency by other witnesses. Hullock, B., ruled that as this was a point of practice, and he saw some inconvenience in not calling her, which would not exist if she were called, she should be called.

(*m*) Lady Lawley's case. 2 Str. 904. Bull. (N. P.) 287.

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

(*o*) R. *v.* Sergeant, Ry. & M. 352. But it is not necessary, it should seem, that there should be *force* employed in order to make the husband or wife competent. In R. *v.* Wakefield, *supra*, Hullock, B., was of that opinion, and he mentioned that he had seen a report of the case of R. *v.* Perry, tried before Gibbs, C.J., as Recorder of Bristol, where the wife was held competent, and that no force was used in the abduction in that case.

(*p*) 2 Hawk. c. 46, s. 82. Taylor, Ev, (10th ed.) s. 1372.

(*q*) 2 Hawk c. 46, ss. 94-100. R. *v.* Dodd, 1 Leach, 155; 2 East, P. C., 1003. R. *v.* Castell Careinion, 8 East, 77. Tonge's case, Kel. (J.) 17, 18: 6 St. Tr. 225. 1 Hale, 303, 304. R. *v.* Westbeer, 1 Leach, 12: 2 East, P. C. 596. R. *v.* Russell, Ry. & M. 356. And this was so, though he was indicted, if not put on his trial at the same time with the prisoner against whom he gave evidence. Bilmore's case, 1 Hale, 305. R. *v.* Clark, ibid. note. R. *v.* Tinkler, 1 East, P. C., 354, 356. And see R. *v.* Lyons, 9 C. & P. 555; and Sir Percy Cresby's case, 1 Hale, 303. As regards the admissibility of the accomplice in favour of a confederate, see 2 Hale, 280, citing the case of Bilmore, Gray, and Harbin, 2 Rolle, Abr. 685, pl. 3. Bath and Montague's case, cited in Lock *v.* Hayton, Fortesc. 246.

(*r*) 6 & 7 Vict. c. 85, s. 1.

with a view to aid justice by detecting crime (*s*). But it does include a person who consents to the commission of an unnatural offence with him or her (*ss*). The rule above stated is at first sight an exception to that which renders co-defendants incompetent as witnesses for the Crown or the defence: but as will be presently stated, it is merely a particular application of the rule stated, *ante*, p. 2269.

The practice of admitting the testimony of accomplices and the promise of pardon, express or implied, under which they usually give their evidence, were introduced instead of the ancient system of approvement (*t*), which Hale (2 P. C. 226) speaks of as having been already long disused.

All the good that could be expected from approvement is now secured by one of the following methods: (1) By special proclamation pardon is sometimes promised upon certain conditions. Accomplices within this class have a *right* to pardon (*u*). (2) By admitting accomplices to give evidence for the Crown, under an implied promise of pardon, on condition of their making a full and fair confession of the truth (*v*). On a strict and ample performance of this condition, to the satisfaction of the judge presiding at the trial (although they are not of right entitled to pardon), they have an equitable title to a recommendation for the King's mercy (*w*). They cannot plead this in bar to an indictment against them, nor can they avail themselves of it as a defence on their trial, though it may be made the ground of a motion for postponing the trial, in order

(*s*) R. *v.* Mullins, 3 Cox, 326, followed in R. *v.* Bickley, 73 J. P., 239; 2 Cr. App. R. 53.

(*ss*) R. *v.* Jellyman, 8 C. & P. 604, and R. *v.* Tate [1908], 2 K.B. 680.

(*t*) Approvement was when a prisoner, arraigned for treason or felony, confessed the fact before plea pleaded, and appealed or accused others his accomplices of the same crime, in order to obtain his pardon (4 Bl. Com. 227). He was also bound to discover on oath, not only the particular crime charged upon him, but all treasons and felonies of which he could give any information (2 Hale, 227). It was purely in the discretion of the Court to permit the approvement or not; if they allowed it, the party accused was put on his trial: whereon, if he was convicted, the approver had his pardon *ex debito justitiæ* (4 Bl. Com. 330): if he was acquitted, the approver received judgment of death upon his own confession of the indictment (ibid.).

(*u*) R. *v.* Rudd, 1 Cowp. 334, 1 Leach, 115, Lord Mansfield. The promise of a pardon by proclamation in the Gazette does not give the party a legal right to exemption from punishment. R. *v.* Garside, 2 A. & E. 266. He should apply to the judge to postpone the execution, in order that an application may be made to the Secretary of State for a pardon.

(*v*) R. *v.* Rudd, *supra*. The promise of freedom did not at common law render the accomplice incompetent as a witness. 1 Hale, 304; 2 Hale, 280. Tonge's case, Kel. (J.), 17: 6 St. Tr. 225. R. *v.* Layer, 16 St. Tr. 93. 2 Hawk. c. 46, s. 135.

(*w*) Ibid. The equitable claim to pardon does not protect an accomplice from prosecutions for other offences, in which he was not concerned with the prisoner, but it is entirely in the discretion of the judge whether he will recommend the prisoner to mercy. R. *v.* Lee, R. & R. 361. R. *v.* Brunton, ibid, 454, and MS. Burn's Just. (ed. Chetwynd), tit. 'Approver.' With respect to such offences, therefore, he is not bound to answer on his cross-examination. West's case, MS. 1 Phill. Ev. 28. Where an accomplice made a disclosure of property, which was the subject-matter of a different robbery by the same parties, under the impression that by the information he had previously given as to the robbery of other property he had delivered himself from the consequences of having the property he so disclosed in his possession; Coleridge, J., recommended the counsel for the prosecution not to proceed against the accomplice for feloniously receiving such property. R. *v.* Garside, 2 Lew. 38. In England principals have frequently been allowed to become witnesses against accessories. See R. *v.* Wild, 1 Leach, 17, note (*a*). And cases frequently occur where the accessory is far the more guilty party; as where young persons have been induced to commit crimes by the procurement of old offenders: and in such cases the young persons are not unfrequently admitted as witnesses for the Crown.

to give the prisoner time for an application in another quarter (*x*). And if an accomplice, after being received as a witness against his companions, breaks the condition on which he is admitted, and refuses to give full and fair information, he will be sent to trial to anwer for his share of guilt in the transaction (*y*).

The evidence of the accomplice may not be received while he is under trial jointly with the other parties to the crime. In such case the rule as to the evidence of persons accused jointly (*z*) applies. It is not a matter of course to admit an offender as witness on the trial of his associates, not even after he has been so allowed by the committing magistrate.

In order to use the evidence of the accomplice the practice is (where the accomplice is in custody) for counsel for the prosecution to move that the accomplice be allowed to go before the grand jury, pledging his own opinion, after a perusal of the facts of the case, that his testimony is essential (*a*). This application is usually made before the bill is taken before the grand jury, and if the application is granted, the accomplice is not included in the indictment (*b*). And it is in the discretion of the court, under all the circumstances of the case, whether the application be granted or refused (*c*).

(*x*) 1 Phill. Ev. 28.

(*y*) Ibid. R. *v.* Moore, 2 Lew. 37. In one instance a prisoner, who had made a confession after a representation made to him by a constable in gaol, that his accomplices had been taken into custody, which was not the fact, and who, after having been admitted as a witness against his associates, on a charge of maliciously killing sheep, upon the trial denied all knowledge of the subject, was afterwards tried and convicted upon his confession. R. *v.* Burley, Garrow, B., Leicester Lent Assizes, 1818. And the conviction was afterwards approved of by all the judges. MS. 2 Stark. Ev. 13. So where an accomplice when sworn pretended that he knew nothing of the stealing of a sheep, Coleridge, J., committed him for trial at the next assizes, when he was convicted and transported, upon proof of his statement made to a policeman before he was called as a witness. R. *v.* Smith, Gloucester Spr. and Sum. Ass. 1841. So where an accomplice, who was called as a witness against several prisoners, gave evidence which shewed that all, except one, who was apparently the leader of the gang, were present at a robbery, but refused to give any evidence as to that one being present, and the jury found all the prisoners guilty; Parke, B., thinking that the accomplice had refused to state that the particular prisoner was present in order to screen him, ordered the accomplice to be kept in custody till the next assizes, and then tried for the robbery. R. *v.* Stokes, Stafford Spr. Ass. 1837. And where an accomplice, who had made a full disclosure of the facts attending the commission of a burglary when before the committing magistrate, refused before the grand jury to give any evidence at all; Wightman, J., ordered his name to be inserted in the bill of indictment, and he was convicted on his own confession. R. *v.* Holtham and five others, Stafford Spr. Ass. 1843.

(*z*) *Ante*, p. 2269.

(*a*) 2 Stark. Ev. 2. But even if the accomplice is taken before the grand jury, by means of a surreptitious and illegal order, the indictment so found is good. R. *v.* Dodd, 1 Leach, 155. It is not usual to admit more than one accomplice. Barnsley Rioters' case, 1 Lew. 5, Parke, J. But under peculiar circumstances three have been admitted. R. *v.* Scott, 2 Lew. 36, Denman, C.J. In this case the accomplices spoke to different facts, and no one could prove the whole. See R. *v.* Noakes, 5 C. & P. 326.

(*b*) 1 Phill. Ev. 29. Taylor, Ev. (10th ed.), s. 967 *et seq.*

(*c*) 1 Phill. Ev. 29. Taylor, Ev. (10th ed.), s. 967 *et seq.* The Court usually considers not only whether the prisoners can be convicted without the evidence of the accomplice, but also whether they can be convicted with his evidence. If, therefore, there be sufficient evidence to convict without his testimony, the Court will refuse to allow him to be admitted as a witness. So if there be no reasonable probability of a conviction even with his evidence, the Court will refuse to admit him as a witness. Thus where several prisoners were committed as principals, and several as receivers, but no corroboration could be given as to the receivers, against whom the evidence of the accomplice was required; Gurney, B., refused to permit one of the principals to become a

After the indictment has been found and the accomplice has pleaded guilty he may be called for the prosecution. In R. *v.* Sparks (*d*), where one prisoner pleaded guilty, and an application was made to admit him as a witness against the other; Hill, J., directed the witnesses, who were relied upon to corroborate him, to be called first, and, if their evidence was sufficiently strong, then the accomplice might be examined as a witness.

It is a common practice after the indictment has been founded and the accused arraigned to offer no evidence against the accomplice, and on his acquittal to call him for the Crown (*e*).

Upon an indictment for rape, as soon as the jury were sworn, it was proposed, on the part of the prosecution, that one of the prisoners should be acquitted before the case was gone into, as he was intended to be called as a witness against the other prisoners, and upon this being objected to, on behalf of the other prisoners; Williams, J. (having conferred with Alderson, B.,) said: 'I had little doubt as to the course I ought to take, and my learned Brother entirely agrees with me that this is a matter very much of ordinary occurrence. In cases of this kind the Court, if it sees no cause to the contrary, is in the habit of relying on the discretion of the counsel who conduct the prosecution. I shall, therefore, in this case, entrust it to the discretion of the counsel whether he will have the prisoner acquitted before the case is gone into or not. I think it almost of course' (*f*).

Occasionally a *nolle prosequi* is entered against the accomplice during the trial and before verdict (*g*). If this is done the accomplice becomes a competent witness for the Crown.

On an indictment for murder against two persons, it was held that one of them, without being convicted or acquitted, might be called as a witness against the other, who alone was put on her trial. But Cockburn, C.J., said: 'I felt the force of what was said about the fellow prisoner coming forward to give evidence without having been first acquitted, or convicted and sentence passed. I think that was much to be lamented. In all such cases, where two persons are joined in the same indictment, and it is thought desirable to separate them in their trials in order that the evidence of the one may be taken against the other, in order to insure

witness. R. *v.* Mellor, Stafford Sum. Ass. 1833. So in R. *v.* Saunders, Worcester Spr. Assizes, 1842, on a motion to admit an accomplice, Patteson, J., said: 'I doubt whether I shall allow him to be a witness; if you want him for the purpose of identification, and there is no corroboration, that will not do.' And in R. *v.* Salt and others, Stafford Spr. Ass. 1843, where there was no corroboration of an accomplice, Wightman, J., refused to allow him to become a witness.

(*d*) 1 F. & F. 388.

(*e*) In R. *v.* Rowland, Ry. & M. 401. Upon an indictment for conspiracy the Court allowed an acquittal to be taken against some of the defendants in order that they might be called as witnesses for the prosecution. So formerly if an accomplice jointly indicted with others pleaded guilty, and was fined by the Court, and paid the fine (in a case where such fine might be imposed by way of punishment, and where the suffering the punishment restored the competency), he might be called as a witness by the other prisoners. R. *v.* Fletcher, 1 Str. 633. See also R. *v.* Sherman, Cas. (K.B.) temp. Hardwicke, 303.

(*f*) R. *v.* Owen, 9 C. & P. 83. At the conclusion of the opening, the prisoner was asked whether he would give evidence, and refused, and the case proceeded against all the prisoners. See 2 Hawk c. 46, s. 95.

(*g*) R. *v.* Feargus O'Connor, 4 St. Tr. (N.S.), 935, 1026, an indictment for seditious conspiracy. Rolfe, B., said: '*A nolle prosequi* is as good to the party as an acquittal.' *Sed quære*, and see Archb. Cr. Pl. (23rd ed.), 139.

the greatest possible amount of truthfulness on the part of the person who is giving evidence under such remarkable circumstances, I think it would be far better that a verdict of not guilty should be taken first, or if the plea of not guilty be withdrawn, and a plea of guilty received, that sentence should be passed, in order that the mind of the witness may be free from all corrupt influences which the fear of impending punishment and the desire to obtain immunity at the expense of the prisoner might be otherwise liable to produce' (*h*). And where R., B., and F. were jointly indicted for blasphemous libel, and B. applied for and obtained a separate trial, it was held that he could call R. and F. as witnesses on his behalf, although they ought not to be called as witnesses for the prosecution without taking a verdict of acquittal against them (*i*).

It being established that an accomplice is a competent witness, the consequence is inevitable, that if credit be given to his evidence, it does not as a matter of law, require confirmation from another witness (*j*). And therefore, in strictness, if the jury believe the evidence of an accomplice, they may legally convict a prisoner upon it, though it stands totally uncorroborated (*k*) in any material particular, whatever be the nature of the crime charged (*l*). It is for the jury to consider where there is anything in the witness' conduct to warrant their disbelieving him' (*m*). But with regard to the necessity for corroboration as a matter of caution to and by the jury, much must depend on the nature and gravity of the crime charged (*n*). It has long been adopted as a general rule of practice that the testimony of an accomplice ought to receive confirmation, and that, unless it be corroborated in some material part by unimpeachable evidence, the presiding judge ought to advise the jury to acquit the prisoner (*o*). This practice of requiring some confirmation of an accomplice's evidence in strictness rests only upon the discretion of the judge (*p*). And this, indeed, appears to be the only mode in which it can be made reconcilable with the doctrine already stated, that a legal conviction may take place upon the unsupported evidence of an accomplice. But the practice in question has obtained so much sanction from legal authority, that it 'deserves all the reverence of law' (*q*), and a deviation from it in any particular case would be justly considered of questionable propriety (*r*). A conviction of an unnatural offence was quashed on appeal on the ground that it was based on the

(*h*) Winsor *v.* R., L. R. 1 Q.B. 289.

(*i*) R. *v.* Bradlaugh, 15 Cox, 217, Coleridge, C.J.

(*j*) R. *v.* Jones, 2 Camp. 133, Ellenborough, C.J., R. *v.* Hastings, 7 C. & P. 152, Denman, C.J., Parke, J., and Alderson, B. *Re* Meunier [1894], 2 Q.B. 415, and see *Re* Crick [1907], 7 N. S. W. State Rep. 576, 593. R. *v.* Tate [1908], 2 K.B. 860, 861.

(*k*) *Re* Meunier, *ubi sup.* R. *v.* Atwood, 1 Leach, 464, also cited by Grose, J., in Jordaine *v.* Lashbrooke, 7 T. R. 609. R. *v.* Durham, 1 Leach, 478. R. *v.* Andrews, 1 Cox, 183. R. *v.* Avery, 1 Cox, 206. R. *v.* Stubbs, Dears. 555, *post*, p. 2290. R. *v.* Boyes, 1 B. & S. 311.

(*l*) R. *v.* Farler, 8 C. & P. 106. R. *v.* Boyes, 1 B. & S. 311. *Contra*, per Gibbs, Att.-Gen., *arguendo* in R. *v.* Jones, 31 St. Tr. 315. R. *v.* Tate [1908], 2 K.B. 680.

(*m*) R. *v.* Jarvis, 2 M. & Rob. 40, Gurney, B.

(*n*) R. *v.* Jarvis, *ubi sup.*

(*o*) R. *v.* Smith, 1 Leach, 479, note (*a*). See R. *v.* Farler, 8 C. & P. 106, Abinger, C.B. R. *v.* Dunne, 5 Cox, 507 (Ir.). *Ex parte* Meunier, *ubi sup.* R. *v.* Barrett [1908], 1 Cr. App. R. 64. Taylor, Ev. (10th ed.) s. 967.

(*p*) R. *v.* Jones, 2 Camp. 132, Ellenborough, C.J. R. *v.* Durham, *supra.*

(*q*) R. *v.* Farler, 8 C. & P. 106, Abinger, C.B..

(*r*) Taylor, Ev. (10th ed.) s. 967. 1 Phill. Ev. 32.

uncorroborated evidence of an accomplice, and the judge at the trial omitted to caution the jury against acting upon such evidence (*s*); and the Court of Criminal Appeal has verbally established the rule as one of law (*ss*).

The confirmation need not extend to every part of the accomplice's evidence, for there would be no occasion to use him at all as a witness, if his narrative could be completely proved by other evidence, free from suspicion. But the question is, whether he is to be believed upon points which the confirmation does not reach. And if the jury find some part of his evidence satisfactorily corroborated, this is a good ground for them to believe him in other parts as to which there is no confirmation (*t*). So far all the authorities agree; the only point on which any difference of opinion has been supposed to exist, relates to the particular part or parts of the accomplice's testimony which ought to be confirmed (*u*).

It is not sufficient to corroborate an accomplice as to the facts of the case generally. He should be corroborated as to some material fact or facts which go to prove that the prisoner was connected with the crime charged. And where several prisoners are jointly indicted, and the accomplice is corroborated as to some of them, although the jury may give credit to him as to those to whom the corroboration applies, they should be directed to pay no attention to the evidence of the accomplice as to those against whom there is no corroboration (*v*).

Upon an indictment for breaking into a warehouse and stealing a quantity of cheese, an accomplice proved that the thieves took a ladder from certain premises, and it was proved by a witness that the ladder was so taken away. It was then proposed to call other witnesses to confirm the accomplice as to the mode in which the felony was committed. Williams, J., said, 'You must shew something that goes to bring home the matter to the prisoners. Proving by other witnesses that the robbery was committed in the way described by the accomplice is not such confirmation as will entitle his evidence to credit, so as to affect other persons. Indeed, I think it is really no confirmation at all, as everyone will give credit to a man who avows himself a principal felon, for, at least, knowing how the felony was committed. It has been always my opinion that confirmation of this kind is of no use whatever' (*w*). Where the prisoner was indicted for stealing a lamb, and an accomplice proved that he assisted the prisoner in stealing the lamb, but the only evidence to confirm his statement was that of a witness, who found the skin of the lamb in the field where the lamb had been kept; it was held that the confirmation was insufficient; and upon its being submitted that there was evidence to go to the jury, and R. *v.* Hastings (*x*) being cited as shewing that the confirmation of the accomplice need not be

(*s*) R. *v.* Tate [1908], 2 K.B. 680. The Court adopted the rule laid down in Taylor, Ev. (10th ed.) s. 967.

(*ss*) Ibid.

(*t*) Ibid. s. 969. R. *v.* Barrett, 1 Cr. App. R. 64.

(*u*) Id. ibid.

(*v*) For earlier cases to the contrary, see R. *v.* Dawber, 3 Stark. (N. P.) 34. 2 Camp. 133. In R. *v.* Birkett, R. & R. 251. R. *v.* Swallow, report of the trials at York in 1814, cited. 1 Phill. Ev. 37 (8th ed.). R. *v.* Hastings, 7 C. & P. 152.

(*w*) R. *v.* Webb, 6 C. & P. 595.

(*x*) 7 C. & P. 152.

as to the party accused; Gurney, B., said: 'Although in some instances it has been so held, you will find that in the majority of recent cases it is laid down that the confirmation should be as to some matter which goes to connect the prisoner with the charge. I think that it would be highly dangerous to convict any person of such a crime on the evidence of an accomplice, unconfirmed with respect to the party accused' (*y*).

The corroboration must not only connect the prisoner and the accomplice together, but must be such as to shew that the prisoner was engaged in the transaction which forms the subject-matter of the charge under investigation (*z*).

The judge should direct the jury to acquit, if the accomplices evidence is not corroborated in some material particular, *i.e.* in some material particular which involves the guilt of the accused (*a*).

Upon an indictment for receiving a sheep knowing it to have been stolen, an accomplice proved that a brother of the prisoner and himself had stolen two sheep, one large, the other small, and that the brother gave one of them to the prisoner, who carried it into the house in which the prisoner and his father lived, and the accomplice stated where the skins were hid; on the houses of the prisoner's father and the accomplice being searched, a quantity of mutton was found in each, which had formed parts of two sheep corresponding in size with those stolen; and the skins were found in the place named by the accomplice. Patteson, J., said: 'If the confirmation had merely gone to the extent of confirming the accomplice as to matters connected with himself only, it would not have been sufficient. For example, the finding the skins at the place at which the accomplice said they were would have been no confirmation of the evidence against the prisoner, because the accomplice might have put the skins there himself. But here we have a great deal more; we have a quantity of mutton found in the house in which the prisoner resides, and that I think is such a confirmation of the accomplice's evidence as I must leave to the jury' (*b*).

(*y*) R. *v.* Dyke, 8 C. & P. 261.

(*z*) R. *v.* Farler, 8 C. & P. 106, and MSS. C. S. G. Abinger, C.B., said: 'In my opinion, corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only of the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house, and put a knife to your throat, and steal your property, it would be no corroboration that he had stated all the facts correctly; that he had described how the person did put the knife to the throat, and did steal the property; it would not at all tend to shew that the party accused participated in it.' See R. *v.* Addis, 6 C. & P. 388. R. *v.* Kelsey, 2 Lew. 45, Patteson, J. Taylor, Ev. (10th ed.) s. 970.

(*a*) R. *v.* Everest, 73 J.P. 269. R. *v.* Warren, ibid. 359. See R. *v.* Beauchamp, ibid. 223. In R. *v.* Wilkes, 7 C. & P. 272, Alderson, B., said to the jury: 'The confirmation of the accomplice as to the commission of the felony is really no confirmation at all, because it would be a confirmation as much as if the accusation were against you and me as it would be as to those prisoners who are now upon their trial. The confirmation, which I always advise juries to require, is a confirmation of some fact which goes to fix the guilt upon the particular person charged. You may legally convict on the evidence of an accomplice only, if you can safely rely upon his testimony; but I advise juries never to act on the evidence of an accomplice unless he is confirmed as to the particular prisoner who is charged with the offence.'

(*b*) R. *v.* Birkett, 8 C. & P. 732. The prisoner was acquitted. Assuming that the confirmation in this case shewed the prisoner to have been connected with the transaction, the fact of his being the receiver and not the principal seems to have been wholly uncorroborated. C. S. G.

Where the principal witness against two prisoners was an accomplice who was supported by other evidence in his statement against one of the prisoners, but not against the other; Alderson, B., told the jury that 'where there is one witness of bad character giving evidence against both prisoners, a confirmation of his testimony with regard to one is no confirmation of his testimony as to the other. If, therefore, you find there is a corroboration applicable to one prisoner, take it as against him; but unless it exists with regard to both, it seems to me that it would be unjust to give it a general effect' (*e*).

Stubbs, Wardle, and Wraithman were indicted for larceny of copper, and three accomplices were examined, but their evidence was not corroborated as to Stubbs, but only as to the other prisoners. It was argued on behalf of Stubbs that the jury ought to be directed that the evidence of the accomplices ought to have been corroborated as to Stubbs; but the chairman directed the jury that it was not necessary that the accomplices should be corroborated as to each individual prisoner; that their being corroborated as to material facts tending to shew that the other prisoners were connected with the larceny was sufficient as to the whole case, but that the jury should look with more suspicion at the evidence in Stubbs' case, where there was no corroboration, but that it was a question for the jury. Upon a case reserved upon the question whether this direction was right, Jervis, C.J., said: 'We cannot interfere in this case, although we may regret the result that has been arrived at. It is not a rule of law that an accomplice must be confirmed in order to render a conviction valid, and it is the duty of the judge to tell the jury that they may, if they please, act on the unconfirmed testimony of an accomplice. It is a rule of practice, and that only, and it is usual in practice for the judge to advise the jury not to convict on the testimony of an accomplice alone, and juries generally attend to the direction of the judge, and require confirmation. There is a further point in this case. Where an accomplice speaks as to the guilt of three prisoners, and is confirmed as to two of them only, the jury may no doubt, if they please, act on the evidence of the accomplice alone as to the third prisoner; but it is proper for the judge in such case to advise the jury that it is safer to require confirmation as to the third prisoner, and not to act on the accomplice's evidence alone; for nothing is so easy as for the accomplice, speaking truly as to all the other facts of the case, to put the third man in his own place; but a jury may, if they choose, act on the unconfirmed testimony of an accomplice: in this case they have acted on the evidence before them, and we cannot interfere.' Parke, B., said: 'During the time I have been on the bench, now more than a quarter of a century, I have uniformly laid down the rule of practice as it has been stated by the Lord Chief Justice. I have told the jury that it was competent for them to find a prisoner guilty upon the unsupported testimony of an accomplice, but that great caution should be exercised, and I have advised them, and juries have acted on that advice, not to find a prisoner guilty on such testimony unless it was confirmed. There has been a difference of opinion as to what

(*e*) R. *v.* Jenkins, 1 Cox, 177.

corroboration is requisite, but my practice has always been to direct the jury not to convict unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the identity of the prisoner. An accomplice necessarily knows all the facts of the case, and his story, when the question of identity is raised, does not receive any support from its consistency with these facts. The chairman in this case has departed from the usual practice, but the jury having acted upon the evidence, the Secretary of State can only interfere.' Cresswell, J., 'I agree in the view of the question taken by my Brother Parke, and have always acted upon it. You may take it for granted that the accomplice was present when the offence was committed, and there may therefore be no difficulty in corroborating him as to the facts, but that has no tendency to shew that any particular person who may be accused was there' (*d*).

In R. *v.* Boyes (*e*), where on an information for bribery which contained eight counts, each charging a distinct act of bribing different voters, it appeared that the witnesses went successively into a house, and into a back room, in which the defendant was seated, and after an interview with the defendant each of them passed into another room in which another person was seated, from whom each received the several sums mentioned in the several counts of the information, and then passed into the street and to the hustings and voted; it was objected that there was no corroborative evidence of each of the witnesses, and that the jury ought to be directed not to act upon the evidence of each of the witnesses, but to acquit the defendant. Martin, B., however, left the case to the jury as follows: 'Assume, for the purposes of the present discussion, that this man was speaking the truth. Is there any *law* which prohibits a jury from believing a man who (it must be assumed for the sake of argument) spoke the truth, simply because he is not corroborated? I know of none. I know of *no rule of law* myself, but there is *a rule of practice* which has become so hallowed as to be deserving of respect; I believe these are the very words of Lord Abinger—it deserves to have all the reverence of the law (*f*). This case is distinguishable from R. *v.* Stubbs, for they were there accessories properly so called, and all the persons were concerned in the same offence in which they came to give evidence; in this particular case it is not so, because all of these cases are separately gone into, and it is not one and the same offence; and if you think that all these witnesses have spoken the truth, then it is clear that each case is separate; each person giving money is a distinct offence. I own I think also that this is a very important point, and that it may be very doubtful whether or not the evidence in this case will be found to be of that corroborative character which the law requires' (*g*). The jury found a verdict of guilty on one count only; and on a motion for a new trial, the Court held that the direction to the jury was right, even supposing the witnesses could be considered

(*d*) R. *v.* Stubbs, Dears. 555.
(*e*) 1 B. & S. 311: 30 L. J. M. C. 301.
(*f*) See R. *v.* Farler, *ante*, p. 2288.
(*g*) This summing up is taken from the report in 5 L. T. (N. S.) 147, where it is much better given than in the report in 1 B. & S. 311.

as accomplices of the defendant. 'The law on this subject was correctly laid down in R. *v.* Stubbs. It is not a rule of law that an accomplice must be corroborated in order to render a conviction valid, but it is a rule of general and usual practice to advise juries not to convict on the evidence of an accomplice *alone*. The application of that rule, however, is matter for the discretion of the judge by whom the case is tried. Moreover, in this case, the Court thought there was corroborative evidence. It is not necessary that there should be corroborative evidence as to the very fact; it is enough if there be such as to confirm the jury in the belief that the accomplice is speaking the truth' (*h*).

Where a principal and receiver are jointly indicted, and an accomplice is corroborated as against the principal, but not as against the receiver, this is not sufficient to support the case against the receiver (*i*).

Where it was strongly contended that two accomplices had not been corroborated; Maule, J., said: 'Confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary. If, for instance, a burglary had been committed, and an accomplice gave evidence that a person charged was present when it was effected; if that person had been seen hovering about the premises some time before, or was seen in possession of some of the stolen property shortly after, that might be reasonable confirmation of the statement that the prisoner helped to commit the crime' (*j*).

Upon an indictment for stealing a sheet it appeared that the sheet was found in the house of the accomplice, who gave evidence to prove that the prisoners stole the sheet, and the wife of the accomplice was the only person to confirm the accomplice's statement; Park, J., said: 'Confirmation by the wife is, in a case like this, really no confirmation at all. The wife and the accomplice must be taken as one for this purpose. The prisoners must be acquitted' (*k*).

One prisoner was indicted for stealing, and two other prisoners for receiving, several pairs of shoes, knowing them to have been stolen. The only witness to prove the theft was an accomplice, who also proved the case against the receivers. As to the latter, she was confirmed, but there was no confirmation whatever as to her testimony against the principal. It was objected that even as to the receivers the confirmation was not sufficient in itself; but if it was, it would still be necessary to

(*h*) 'As to the distinction taken between R. *v.* Stubbs and this case, it seems to make no difference. If a man is charged with several offences in the same indictment, the evidence to prove each ought to be the same as if each were the subject of a separate indictment. In this case each act of bribery appears to have been proved by the party bribed alone; there, therefore, was no corroboration at all as to any one act of bribery. Suppose a servant were indicted for three larcenies from his master within six months, and three receivers gave evidence against him, but they were the only witnesses, it seems clear the case ought wholly to fail for want of any corroboration. See R. *v.* Pratt, 4 F. & F. 315.' C. S. G.

(*i*) R. *v.* Moores, 7 C. & P. 270.

(*j*) R. *v.* Mullins, 3 Cox, 526, Wightman, J., was present. Cf. R. *v.* Barrett, 1 Cr. App. R. 64.

(*k*) R. *v.* Neal, 7 C. & P. 168. In 1 Phill. Ev. 33, it is observed that in this case 'the circumstances of the case might have been such as to warrant this decision. But it may often happen that the evidence of the wife is so free from all suspicion, so independent of the evidence of the husband, so manifestly unconcerted and uncontrived, and so undesignedly corroborative of his evidence, that it might be proper not to consider the accomplice and his wife as one, but to act upon her evidence as sufficient confirmation.'

confirm the witness as against the principal; for if the case failed against her, the receivers would be entitled to an acquittal. Littledale, J., said: 'The confirmation as to the receivers is slight; but as there is no confirmation against the principal felon, I think the case fails altogether; there ought to be confirmation on that point before the jury can be asked to believe the witness's testimony' (*l*).

So where on an indictment against a prisoner for receiving stolen oats, a quantity of oats were found on the prisoner's premises, which the prosecutor believed to be his, but could not positively identify them, as they were mixed with peas, and the only other evidence was that of the thief, who had pleaded guilty; Pollock, C.B., advised the jury to acquit the prisoner, it being perilous to convict a person as receiver on the sole evidence of the thief. To do so would put it in the power of a thief, from malice or revenge, to lay a crime on any one against whom he had a grudge; and there was no adequate confirmation of the thief's evidence (*m*).

Although all persons who are present aiding and assisting at a prize fight are in point of law principals in the second degree in manslaughter if death ensues, yet they have been held not to be such accomplices as to require any evidence to confirm their testimony (*n*).

The practice of requiring confirmation where the case for the prosecution is supported by one accomplice, applies equally when two or more accomplices are brought forward against a prisoner (*o*).

Upon an indictment against two prisoners for maliciously shooting, and against a third as an accessory after the fact, a person proved that he had been employed by the accessory to remove the principals out of the way, and for this he had received money, and had hidden the principals in an outhouse, and there was no corroboration by any other witness as to these facts, and Gurney, B., left it to the jury to say whether there was anything in the witness's conduct to discredit him (*p*).

A person summarily convicted under section 1 of the Night Poaching Act, 1828 (9 Geo. IV. c. 69), has been considered as an accomplice requiring corroboration if called as a witness against his companions upon an indictment, under section 9 of the Act, founded upon the same transaction (*q*).

On an indictment against Chartists under the Treason Felony Act,

(*l*) R. *v.* Wells, M. & M. 326. It is not stated what the form of the indictment was, but it is conceived it must have alleged the receipt to be of the shoes 'so stolen as aforesaid,' so that an acquittal of the principal necessarily caused an acquittal of the receivers. See R. *v.* Woolford, 1 M. & Rob. 384. If there had been counts charging the receivers with a substantive felony, there seems no reason why the receivers might not have been convicted, though the principal was acquitted. See *ante*, p. 1481, and R. *v.* Field, *post*, p. 2293. C. S. G.

(*m*) R. *v.* Robinson, 4 F. & F. 43. R. *v.* Pratt, 4 F. & F. 315. In R. *v.* Durham, 1 Leach, 478, the Court said that a receiver was an accessory after the fact rather than an accomplice at the fact. But that case followed R. *v.* Atwood, *ante*, p. 2286, in holding that the circumstance of being an accomplice goes to credit only and does not render corroboration necessary in law.

(*n*) R. *v.* Hargrave, 5 C. & P. 170, Patteson, J. R. *v.* Young, 10 Cox, 371, a case of a sparring match, which Bramwell, B., thought was not illegal.

(*o*) R. *v.* Stubbs, Dears. 555, *ante*, p. 2290. R. *v.* Noakes, 5 C. & P. 326, Littledale, J., Bolland, B., and Alderson, J.

(*p*) R. *v.* Jarvis, 2 M. & Rob. 40.

(*q*) R. *v.* Farler, 8 C. & P. 106, *ante*, p. 2288.

1848 (11 & 12 Vict. c. 12), two witnesses admitted that they joined the conspirators simply for the purpose of betraying them, and each did so without the knowledge of the other, but both had been as active as any of the conspirators, endeavouring to persuade strangers to join them, and urging those who were members to deeds of violence. It was held that there was no rule of law which declared that their evidence required confirmation, nor any rule of practice which said that juries ought not to believe them. A spy may be an honest man; he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; and, if he does so, if he believes that there is no other method of counteracting the dangerous designs of wicked men, there is no impropriety in his taking upon himself the character of informer. The Government are justified in employing spies, and a person so employed does not deserve to be blamed if he instigates offences no further than by pretending to concur with the perpetrators. Under such circumstances they are entirely distinguished in fact and in principle from accomplices (*r*).

Whether the evidence brought forward to confirm the accomplice is a satisfactory and sufficient corroboration is a question for the jury (*s*).

An accomplice is a competent witness *for* as well as against his associates, even when they are severally indicted for the same offence, whether he is convicted or not (*t*). Where there is not any or very slight evidence against one of several persons indicted and tried together, the Court sometimes directs the jury to give their verdict as to him, and upon their acquittal of him admits his testimony for the others (*u*). Where one of two defendants on an indictment for an assault submitted and was fined, and paid the fine, Pratt, C.J., allowed him to be a witness for the other, considering the trial at an end with respect to him (*v*). Where one of two prisoners charged with housebreaking pleaded guilty, Coltman, J., held that this prisoner might be called as a witness by the other prisoner to prove that he was not present at the committing of the offence (*w*). And Erle, J., allowed a prisoner who pleaded guilty to an indictment for uttering a forged note, and against whom a previous conviction was proved, to be called as a witness for another prisoner; but he was previously sentenced, which Erle, J., considered to be the proper course (*x*).

Sect. IV.—How many Witnesses are Necessary.

As a general rule the testimony of a single witness is sufficient in law for conviction of any criminal offence (*y*), even though that single witness may have been the accomplice in guilt of the accused (*z*).

(*r*) R. *v.* Mullins, 3 Cox, 526, Maule and Wightman, JJ. R. *v.* Bickley, 73 J.P. 239: 2 Cr. App. R. 53.

(*s*) 1 Phill. Ev. 38. Where an accomplice swearing positively to several prisoners was confirmed as to some and not confirmed as to others; Vaughan, B., recommended the jury to acquit the latter, and they were accordingly acquitted, while those as to whom the accomplice was confirmed were convicted and executed. R. *v.* Field, Dick. Q. S. 520. R. *v.* Wilkes, 7 C. & P. 272, Alderson, B.

(*t*) See *ante*, p. 2282, note (*q*).

(*u*) 2 Hawk. c. 46, s. 98. R. *v.* Bedder, 1 Sid. 237.

(*v*) R. *v.* Fletcher, 1 Str. 633. R. *v.* Sherman, Cas. K.B. temp. Hardw. 303.

(*w*) R. *v.* George, C. & M. 111. See R. *v.* Lafone, 5 Esp. 155.

(*x*) R. *v.* Jackson, 6 Cox, 525.

(*y*) 2 Hawk. c. 46, s. 3. 4 Bl. Com. 357. Taylor, Ev. (10th ed.), ss. 952-971.

(*z*) As to corroboration of the evidence of accomplices, *vide supra*.

To this rule there are certain exceptions, all but one statutory.

Treason.—In most cases of high treason, and misprision of treason, no one can be convicted, unless by the oaths and testimony of two witnesses, either both to the same overt act, or the same treason; unless the party indicted willingly, without violence, and in open Court confesses his guilt (*a*). The confession contemplated is pleading guilty in open Court. Any other confession, whether made to persons in authority or not, is merely evidence in the case, and must be proved, like other facts, by two witnesses, and it will have its weight with the jury according to the circumstances, like any other extrajudicial confession (*b*). By the Treason Act, 1799 (39 & 40 Geo. III. c. 93), 'In all cases of high treason, when the overt act alleged in the indictment is the assassination of the King, or any direct attempt against his life, or against his person, the prisoner shall be tried according to the same order of trial, and upon the like evidence, as if he stood charged with murder' (*c*).

Perjury.—At common law the evidence of one witness is not sufficient to warrant a conviction for perjury, unless it is corroborated in some material particular by written documents or circumstantial evidence by one or more other witnesses. But for this rule, in such a case there would be only one oath against another (*d*).

Offences against Religion.—In prosecutions for blasphemy (9 Will. III. c. 35, s. 1) and for offences against 1 Eliz. c. 1, two witnesses are necessary (sect. 21), *ante*, Vol. I. p. 395. The rule in the case of perjury and these offences is probably derived from the canon law.

Personation at Elections.—To justify committal for trial for personation at a parliamentary or municipal election, it is necessary that not less than two creditable witnesses should depose that the defendant has knowingly personated and falsely assumed to vote in the name of another (*e*). The offence, in view of the electors' oath, is closely akin to perjury.

Offences against Females.—In the case of rape, corroboration is required in fact, but not as a matter of law (*f*). In the case of certain offences within sects. 2 and 3 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), a conviction may not be had on the evidence of one witness, unless the witness is corroborated in some material particular by evidence implicating the accused (*g*).

Unsworn Evidence.—Where a child of tender years is allowed by statute to give evidence unsworn, no conviction may be had on the unsworn evidence of the child, unless it is corroborated in some material particular by evidence implicating the accused (*h*).

(*a*) 7 & 8 Will. 3, c. 3, ss. 2, 4. R. *v.* McCafferty, 10 Cox, 603 (Ir.) R. *v.* Vaughan, 13 St. Tr. 485. Archb. Cr. Pl. (23rd ed.), 408. As to the rule applied in cases of treason concerning the coin (now obsolete), see R. *v.* Gahagan, 1 Leach, 42; 1 East, P. C. 129. Taylor, Ev. (10th ed.), ss. 952A–958.

(*b*) 1 East, P. C. 131. Fost. Cr. L. 240.

(*c*) See 57 Geo. III. c. 6, s. 4; 5 & 6 Vict. c. 51, s. 4. Taylor, Ev. (10th ed.) s. 958.

(*d*) R. *v.* Yates, C. & Mar. 132, 139. Coleridge, J., *vide ante*, Vol. i. p. 508. Taylor, Ev. (10th ed.) ss. 959, 963. Archb. Cr. Pl. (23rd ed.), 409.

(*e*) 6 & 7 Vict. c. 18, s. 88; 35 & 36 Vict. c. 33, s. 24.

(*f*) *Ante*, Vol. i. pp. 941, 943.

(*g*) *Ante*, Vol. i. p. 956.

(*h*) 8 Edw. VII. c. 67, s. 30, and Sched. 1, *ante*, Vol. i. pp. 919, 924, 2268.

Sect. V.—Swearing the Witnesses.

A person under *subpœna duces tecum* to produce documents need not be sworn, unless the party calling him wishes to examine him (*i*).

A witness to facts or opinion must, before he can give evidence, take the witnesses' oath, unless allowed by law to vouch for the truth of his evidence in some other manner (*j*).

At common law the proper method of administering the oath to a witness varies according to what the witness himself considers most obligatory (*k*); for 'as the purpose is to bind his conscience, every man of every religion should be bound by that form which he himself thinks will bind his own conscience most' (*l*).

Although it is highly desirable that a witness should be sworn according to the form which he considers most binding on himself, yet, if he takes the oath in the ordinarily used form, without objection, and upon being questioned whether he considers the oath taken as binding on his conscience, he answers in the affirmative, he cannot be further asked whether there is any other mode of swearing more binding on his conscience than that which he has already used (*m*). For if the witness says he considers the oath as binding on his conscience, he does, in effect, affirm that in taking that oath he has called his God to witness that what he shall say will be the truth, and that he has imprecated the Divine vengeance on his head if what he shall say afterwards is false: having done that, it is unnecessary and irrelevant to ask any further questions (*n*).

Where a negro, called as a witness, stated before he was sworn that he was a Christian, and had been baptised, it was held that he ought to be sworn without any other question being asked (*o*).

By the Oaths Act, 1838 (1 & 2 Vict. c. 105), '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

(*i*) Davis *v.* Dale, M. & M. 514, Tindal, C.J. R. *v.* Murlis, ibid. note, Gaselee and Taunton, JJ. Perry *v.* Gibson, 1 A. & E. 48. Somers *v.* Moseley, 2 Cr. & M. 477.

(*j*) See Taylor, Ev. (10th ed.) ss. 1378, 1382.

(*k*) Omichund *v.* Barker, Willes, 538, 549.

(*l*) Atcheson *v.* Everitt, 1 Cowp. 389, Lord Mansfield: and see the observations in Miller *v.* Salomons, 7 Cr. 475, to the effect that a judicial oath (for justice is of all countries and climes) is governed by the law of nations, and that as an oath is the personal act of the party taking it, if a witness be in a foreign land, his oath ought to be received as it would be received in his own country.

(*m*) Queen Caroline's case, 2 B. & B. 285.

(*n*) Ib. In Sells *v.* Hoare, 3 B. & B. 232, on an application for a new trial, it appeared that a witness who had been sworn as a Christian, on the Gospels, was a Jew. The Court refused to grant a rule, being unanimously of opinion that the oath as taken was binding on the witness both as a moral and religious obligation: and Richardson, J., said that if the witness had sworn falsely, he might be convicted of perjury under the oath he had taken.

(*o*) R. *v.* Serva, 2 C. & K. 53, Platt B.

administered in the form and with the ceremonies most commonly adopted' (*p*).

This Act makes it unnecessary to examine a witness (willing to be sworn) on *voire dire* as to his belief; and in any case he cannot be examined in detail as to the tenets of his religion (*q*); and by sect. 3 of the Oaths Act, 1888 (51 & 52 Vict. c. 46), '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.'

Where an oath is administered before a Court, judge, or magistrate, by a crier, clerk, or other person, the oath is in point of law administered by the Court, judge, or magistrate; for the person who actually administers the oath is the agent of the Court, judge, or magistrate, and when he administers the oath, the Court, judge, or magistrate administers it (*r*). In Courts of Assize the oath is usually administered by the judge's clerk.

A person called as a witness cannot object to be sworn on the ground that any questions which may be put to him might tend to criminate him but must be sworn, and must either answer the questions, or object to answer them, if he insists on any privilege in that respect (*s*).

English Form.—The usual form of the witnesses' oath is: 'The evidence you shall give to the Court and jury sworn between our Sovereign Lord and King and the prisoner at the bar [*in cases of treason and felony*, or 'the defendant,' *in cases of misdemeanor*], 'shall be the truth, the whole truth, and nothing but the truth. So help you God.' The witness holds a copy of the Gospels (or New Testament) in his right hand (*t*), ungloved,

(*p*) Oath in this Act does not include affirmation. In Acts passed after 1850, the expressions oath and swear include the words affirmation, declaration, affirm, and declare, in cases where the law allows affirmation, &c., instead of swearing. 52 & 53 Vict. c. 63, s. 4, *ante*, Vol. i. p. 3.

(*q*) R. *v.* Taylor, 1 Peake, 14. R. *v.* Serva, 2 C. & K. 53.

(*r*) See Phipson, Ev. (4th ed.), 430. In R. *v.* Tew, Dears. 429; 24 L. J. M. C. 62, where the Court overruled as unfounded, frivolous, and discreditable an objection that the oath was administered to the witnesses going before the grand jury, by the crier in open court, whereas it ought to have been administered by the Clerk of the Peace. Under 19 & 20 Vict. c. 54, witnesses called before the grand jury are sworn before the grand jury and not in open court.

(*s*) Boyle *v.* Wiseman, 10 Ex. 647; 11 Ex. 630; 24 L. J. Ex. 160.

(*t*) Mr. Greaves, in the 4th edition of this work, remarks that 'A very remarkable distinction exists between the manner in which English and South Welsh witnesses now-a-days take the book at the time they are sworn. An English witness always places his fingers under, and his thumb at the top of the book. A Welsh witness on the contrary, places his three fingers at the top, and his thumb under the book, whilst his little finger does not touch the book at all. And I have often observed witnesses in the box let the book remain on the top of the box with their three fingers upon the book until the time to kiss it arrived, when they raised it from the box to their lips. Now no doubt this practice originated from the ancient form of taking the oath with the hand raised (see Gen. xiv. 22), and which, in process of time, was changed first to laying the three fingers upon the book, and so taking the oath, and afterwards to raising the book and kissing it. There is no doubt that originally an oath was taken without touching anything; and Selden, Vol. ii. p. 1467, plainly shews that such was the custom among the early Christians, but he also shews that the custom of touching the book was derived from the Pagans.' See 3 Co. Inst. 165. Jacob's Law D. (Oath). 2 Hale, 279. Colt *v.* Dutton, 2 Sid. 6. More information on the subject of oaths may be found in 'Notes and Queries,' Vol. viii. pp. 364, 471, 605; Vol. ix. pp. 45, 61, 403; Vol. x. p. 271; Vol. xi. p. 232 (1st Ser.); and Vol. ii. p. 293 (3rd Ser.).

and with head uncovered, and when the oath has been recited to whom by the officer of the Court, kisses the book (*u*).

Roman Catholics often decline to take the oath, except on a version of the Gospels or Testament recognised by their Church, with a cross upon it (*v*).

Scotch Form.—By the Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 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 (*w*).

The form in general use in England for the purposes of this section is: 'I swear by Almighty God, as I shall answer to God at the Great Day of Judgment, that I will speak the truth, the whole truth, and nothing but the truth.' No book is used; but the witness uplifts his right hand (*x*).

Witnesses professing Christianity are not bound to take the oath according to either of the above forms (*y*). So a witness professing Christianity, but declining to swear on the New Testament, was allowed to be sworn upon the Old Testament upon his stating that he should consider such oath binding on his conscience (*z*).

Non-Christian Religions.—A person claiming to be sworn as a Jew, is sworn on the Pentateuch, usually with his head covered (*a*); a Mahomedan is sworn on the Koran (*b*); a Hindoo, according to his own peculiar forms (*c*); a Sikh on the holy book of his faith (*d*); a Parsee on the Zendavesta (*e*); a Chinaman usually by breaking a piece of crockery (*f*).

Affirmation or Declaration by Quakers, Moravians, &c.—By the Quakers and Moravians Act, 1833 (3 & 4 Will. IV. c. 49), s. 1, 'Every person of the persuasion of the people called Quakers and every Moravian be permitted to make his or her solemn affirmation or declaration, instead of taking an oath, in all places and for all purposes whatsoever where an oath is or shall be required, either by the common law,

(*u*) As to the history of kissing the book, which is peculiar to Courts deriving authority from English law, see Phipson, Ev. (4th ed.) 428. Best, Ev. (ed. 1906), p. 149. Kissing the book seems not to be an essential part of the oath.

(*v*) Stringer, on Oaths, 72. McNally, Ev. 97.

(*w*) A witness would seem to have been entitled at common law to be sworn in this manner. R. *v.* Mildrone, 1 Leach, 412.

(*x*) See Stringer on Oaths. Home Office Circular, 29th May, 1893, 37 Sol. Jo. 542. In Scotland the oath is administered by the presiding judge. In England the clerk or other officer of the Court repeats the words to the witness. (See 52 & 53 Vict. c. 10, s. 2.)

(*y*) R. *v.* Mildrone, *ubi sup.* R. *v.* McCarther, Peake (3rd ed.) 211.

(*z*) Edmonds *v.* Rowe, Ry. & M. 77, Bosanquet, Serjt.

(*a*) Omichund *v.* Barker, Willes, (C.P.) 538, 543. See Gomez *v.* Nunez, 2 Str. 821. But see R. *v.* Gilham, 1 Esp. 285. The adjuration at the end is 'So help me, Jehovah.'

(*b*) R. *v.* Morgan, 1 Leach, 54. Stringer on Oaths, 123.

(*c*) Omichund *v.* Barker, Willes, 528; 1 Chit. Cr. L. 591. Under the Indian Evidence Act (No. X. of 1873), Hindu and Mahometan witnesses make an affirmation instead of an oath (s. 6). As to Buddhist Oaths see Stringer, 122. Phipson, Ev. (4th ed.) 430.

(*d*) R. *v.* Moore, 61 L. J. M. C. 80: 17 Cox, 458.

(*e*) Stringer on Oaths, 124.

(*f*) R. *v.* Entrehman, C. & M. 248. See Stringer on Oaths, 125, as to the words used. For other forms see Phipson, Ev. (4th ed.) 429, 430, where it is said that the ceremonies used in swearing Chinamen in England are not used in China.

or by any Act of Parliament already made, or hereafter to be made'; and provides that 'if any such person making such solemn affirmation (*g*) or declaration shall be lawfully convicted, wilfully, falsely, and corruptly to have affirmed or declared any matter or thing, which if the same had been (*h*) in the usual form would have amounted to wilful and corrupt perjury, he or she shall incur the same penalties and forfeitures as by the laws and statutes of this realm are enacted against persons convicted of wilful and corrupt perjury, any law, custom, or statute to the contrary notwithstanding' (*i*).

By the Quakers and Moravians Act, 1838 (1 & 2 Vict. c. 77), 'It shall be lawful for any person who shall have been a Quaker or Moravian to make solemn affirmation and declaration in lieu of taking an oath, as fully as it would be lawful for any such person to do if he still remained a member of either of such religious denominations of Christians, which said affirmation (*j*) or declaration shall be of the same effect as if he or she had taken an oath in the usual form: and if any such person making any such solemn affirmation or declaration shall be convicted of having wilfully falsely and corruptly affirmed or declared any matter or thing which if the same had been sworn in the usual manner would have amounted to wilful and corrupt perjury, every such offender shall be subject to the same pains, penalties and forfeitures to which persons convicted of wilful and corrupt perjury are or shall be subject.'

Unbelievers, &c.—By the Oaths Act, 1888 (51 & 52 Vict. c. 64), s. 1, 'Every person objecting to be 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 (*k*), 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.'

Sect. 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.'

(*g*) The form of affirmation or declaration given by this statute is, 'I, A. B., being one of the people called Quakers [or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, as the case may be], do solemnly sincerely, and truly declare and affirm.'

(*h*) The word 'sworn' seems omitted here.

(*i*) 3 & 4 Will. IV. c. 82, relating to affirmation by Separatists, was repealed in 1890 (53 & 54 Vict. c. 33).

(*j*) The form of affirmation of declaration given by the Act is, 'I, A. B., having been one of the people called Quakers [or one of the persuasion of the people called Quakers, or of the united brethren called Moravians as the case may be], and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm.' The Act was passed in consequence of R. *v.* Doran, 2 Mood. 37. See R. *v.* Mooney, 5 Cox, 319 (Ir.).

(*k*) A witness, who states on inquiry that he has a religious belief, cannot lawfully affirm unless the taking of an oath is contrary to his religious belief. R. *v.* Moore, 61 L. J. M. C. 80, 17 Cox 458, where the proper mode of ascertaining whether a witness is entitled to affirm is stated.

It is for the judge and not for the officer of the Court to ascertain whether a witness is qualified to affirm instead of swearing (*l*). But no questions may be asked as to the details of the belief or want of belief of the person claiming to affirm (*m*).

Witness Ordered out of Court.—The Court, at the instance of either party, in criminal (as well as civil) cases, may order that the witnesses intended to be examined on either side shall remain out of court during the examination of the other witnesses (*n*). It was formerly held that if any person were present contrary to such order, he might not be examined (*o*). But a solicitor for any party to the case was not within the rule, and might remain, and still be admissible as a witness, his assistance being in most cases absolutely necessary to the proper conduct of a cause (*p*). It used to be considered that it was in the discretion of the judge whether he would allow the witness to be examined if he had been in court in defiance of an order to withdraw (*q*). But it is now settled that the Court cannot lawfully refuse to permit the examination of the witness, though he may be fined for disobeying the order to leave the court (*r*); and his wilful disobedience of the order may afford ground for comment on the value of his testimony (*s*).

If the prosecutor is to be examined as a witness, the Court will order him to leave the court as well as the other witnesses (*t*).

It sometimes happens that it is desirable that an argument as to the evidence of a witness should not be heard by him, and in such a case it is almost a right for the party desiring it to have the witness out of court while a discussion is going on as to his evidence (*u*).

Sect. VI.—Examination of Witnesses.

Swearing.—Before the evidence of a witness can be received, he must in open court (*v*) take an oath (*w*) or make an affirmation (*x*). In criminal cases affidavit evidence is not admissible in substitution for the oral evidence of the witness except in the case of certain depositions (*xx*).

(*l*) R. *v.* Moore, *ubi sup.*

(*m*) *Ante*, p. 2296.

(*n*) The order is made, on the application of a prisoner as an indulgence, not as a matter of right. 1 Chit. Cr. L. 618.

(*o*) Att.-Gen. *v.* Bulpit, 9 Price, 4. R. *v.* Wylde, 6 C. & P. 380, Parke, J.

(*p*) Pomeroy *v.* Baddeley, Ry. & M. 430, Littledale, J. Everett *v.* Lowdham, 5 C. & P. 91, Bosanquet, J. 'It is now the ordinary course to permit, not only attorneys, but professional or scientific persons, to remain in court, the rule being considered as not applying to witnesses of those descriptions.' C. S. G.

(*q*) Parker *v.* M'William, 6 Bing. 683. Beamon *v.* Ellice, 4 C. & P. 585, Taunton, J.

(*r*) Cobbett *v.* Hudson, 1 E. & B. 11. Chandler *v.* Horne, 2 M. & Rob. 423, Erskine, J. R. *v.* Webb, cor. Best, J. Mann. Dig. 324; 1 Stark. Ev. (3rd ed.) 189; 4. C. & P. 388 *n.* R. *v.* Colley, M. & M. 329.

(*s*) Anon. before Bayley, J., cited. M. & M. 329.

(*t*) R. *v.* Newman, 3 C. & K. 252, Campbell, C.J. Charnock *v.* Dewings, 3 C. & K. 378. See Selfe *v.* Isaacson, 1 F. & F. 194. In R. *v.* Sievier, Cen. Crim. Court, July 1908, the prosecutor was ordered to leave the Court with the other witnesses. The rule does not apply to a defendant in a criminal case, who in cases of felony must be present throughout the trial (unless removed for disturbing the Court, Archb. Cr. Pl. (23rd ed.) 186), and in misdemeanor is entitled to be and usually is present unless removed for disorderly conduct. R. *v.* Browne [1906], 70 J. P. 472.

(*u*) R. *v.* Murphy, 8 C. & P. 297, Coleridge, J.

(*v*) *Vide ante*, p. 2295. This rule does not apply to witnesses called before a grand jury, who are sworn in the grand jury room (19 & 20 Vict. c. 54).

(*w*) As to the form of the oath, *vide ante*, p. 2296. As to unsworn evidence by children, *vide* p. 2268.

(*x*) *Vide ante*, p. 2297.

(*xx*) *Ante*, pp. 2241, 2248.

Case for the Prosecution.—Counsel for the prosecutor (*g*) is not bound to call and examine all the witnesses whose names appear on the back of the indictment (*z*): nor is he limited to those witnesses (*a*).

A witness whose evidence is relevant, may be called by the prosecution, although he has not been before the magistrates (*b*). It is not a condition precedent to calling him that his name and the substance of his evidence should be given to the prisoner or his solicitor (*c*). But it is usual, and obviously fair, to give the prisoner due notice of intention to call witnesses not on the depositions; and if such notice has not been given, the judge may adjourn the trial (*d*).

(a) *Examination in Chief.*

Examination in Chief.—The witnesses called by each party are assumed to be put forward as witnesses of the truth.

After a witness has been regularly sworn or affirmed, the party who has called him proceeds to examine him in chief; respecting which examination the most important rule is, that leading questions must not be put to the witness; that is, questions which, being material to any of the points of the issue, plainly suggest to him the answer he is expected to make, or put to him disputed matters in a form enabling him to answer simply 'yes' or 'no' (*e*). But this objection is not allowed to be applied if the question is merely introductory, and one which, if answered by 'yes' or 'no,' would not be conclusive on any of the points of the issue; for it is necessary to a certain extent to lead the mind of the witness to the subject of the inquiry (*f*). The examination of witnesses for the prosecution is conducted by the advocate for prosecution. Witnesses for the defence are examined by the defendant or by his counsel, if any (*g*).

In an action of *assumpsit* against two, in order to prove that the defendants were partners, the first witness was asked whether one of them had interfered in the business of the other. And upon this question being objected to as leading, it was ruled that it might properly be asked (*h*). An affirmative answer to this question would not have been conclusive, for the defendant might have interfered, without making

(*y*) The prosecutor is not entitled himself to examine witnesses. Archb. Cr. Pl. (23rd ed.) 207.

(*z*) R. *v.* Vincent, 9 C. & P. 91. The judge may call them if the prosecutor does not. R. *v.* Thompson, 13 Cox, 181, Lush, J. See *post*, p. 2309, note (*v*).

(*a*) R. *v.* Ward, 2 C. & K. 759. *Vide post*, p. 2309.

(*b*) Ibid.

(*c*) R. *v.* Greenslade, 11 Cox, 412, Brett, J., after consulting Willes, J. R. *v.* Stiginani, 10 Cox, 552, appears not to report correctly the ruling of Willes, J.

(*d*) See R. *v.* Flannagan, 15 Cox, 403. Archb. Cr. Pl. (23rd ed.) 415.

(*e*) Phipson, Ev. (4th ed.) 454. Taylor, Ev. (10th ed.) s. 1404.

(*f*) A prisoner for felony was tried, but the jury were discharged, owing to their being unable to agree. On being put on trial before a second jury, the judge, at the prisoner's request, instead of having the witnesses examined, simply called and swore them, and read over his notes, allowing liberty to examine and cross-examine each witness thereafter. Held, that this was an irregular practice, and could not be cured even by the assent of the prisoner. R. *v.* Bertrand, L. R. 1 P. C. 520: 36 L. J. P. C. 51.

(*g*) According to certain authorities upon the trial of a misdemeanor, the defendant is not entitled to have counsel to cross-examine witnesses, when he reserves to himself the right of addressing the jury; but counsel may argue for him any points of law that arise, and may suggest the questions to be put to the jury. R. *v.* White, 3 Camp. 98. R. *v.* Parkins, Ry. & M. 166.

(*h*) Nicholls *v.* Dowding, 1 Stark. (N.P.), 81, Ellenborough, C.J.

himself a partner. So where the witness, called to prove the partnership of the plaintiffs, could not recollect the names of the component members of the firm so as to repeat them without suggestion, but said he might possibly recognize them, if suggested to him; Lord Ellenborough (alluding to a case tried before Lord Mansfield, in which the witness had been allowed to read a written list of names), ruled that there was no objection to asking the witness whether certain specified persons were members of the firm (*i*).

In R. *v.* De Berenger (*j*), an indictment for conspiracy, it became necessary for a witness (a post-boy, who had been employed to drive one of the actors in the fraud) to identify De Berenger with that person; and Lord Ellenborough held that for this purpose the counsel for the prosecution might point out De Berenger to the witness, and ask him whether he was the person. In R. *v.* Watson (*k*), upon its becoming necessary to identify three of the prisoners, it was objected that the attention of the witness was too directly pointed to them; but the Court held that the counsel for the prosecution might ask, in the most direct terms, whether any of the prisoners was the person meant and described by the witness. In Courteen *v.* Touse (*l*), where the plaintiff's son, being called as a witness for his father, was cross-examined as to the contents of a letter received by him from the plaintiff, which he swore had been lost, and mentioned some particular expressions as part of its contents; and witnesses were called on the part of the defendant to speak to the contents of the same letter; Lord Ellenborough ruled that the defendant's counsel might ask one of them, who had first exhausted his memory by stating all he recollected of the letter, whether it contained the particular expressions sworn to by the plaintiff's son; for otherwise, said his lordship, it would be impossible ever to come to a direct contradiction.

When, upon cross-examination, a witness has denied having used particular expressions, or having made a particular statement to another person, who is afterwards called on the part of the adverse party, for the purpose of contradicting the first witness, by proving that he actually did speak the words, or make the statement to him, it is very usual in practice for the counsel of the adverse party, in examining that other person in chief to ask him, in the first instance, whether the former witness, in conversing with him, said so and so, or made such and such a statement. And accordingly where a witness for the plaintiff, in cross-examination, had been asked as to some expressions he had used, for the purpose of laying a foundation for contradicting him, and had denied having used them; Abbott, C.J., held, that the defendant's counsel, having called a person to prove that the former witness had used such expressions, was entitled to read to his own witness the particular words from his brief (*m*).

(*i*) Acerro *v.* Petroni, 1 Stark. (N. P.), 100.
(*j*) 3 M. & S. 67.
(*k*) 2 Stark. (N. P.), 116, 128; 32 St. Tr. 1, 74.
(*l*) 1 Camp. 43.
(*m*) Edmonds *v.* Walter, 3 Stark. (N.P.) 7. 'In 2 Phill. Ev. 404, 405, it is endeavoured with great force to shew that leading questions under such circumstances are irregular. The practice, however, is perfectly well settled as stated in the text.' C. S. G. And see Taylor, Ev. (10th ed.) s. 1405.

But this mode of examination must not be applied to conversations which are evidence in themselves. A witness who was present at the time of the apprehension of the plaintiff by the defendant, was asked whether he had not used certain expressions in a conversation which then took place between the plaintiff and defendant, which he denied. Erskine, J., held that a person who was called to prove that the witness had said what he had denied could not be examined by counsel reading from his brief the very words which the witness had so denied having used, but that the examination must proceed in the usual way by asking what had passed (*n*). Where one witness has given an account of what a prisoner has said on a particular occasion, and another is called for the prisoner to give a different account, the proper course is to call upon him to give his version of the matter; and when he has done so, then to ask him whether this or that expression has been used; for this is not like the case of a proposed contradiction, where a witness has denied that certain specific words were used (*o*).

Examination as to Contents of Documents.—Subject to what is presently to be said (*p*), a witness may not be examined as to the contents of a written document not produced, unless production is dispensed with, or the party examining or cross-examining is in a position to give secondary evidence of its contents (*q*).

The rule applies even when it is shown that the documents are in the possession of the opposite party and that notice has been given to produce them (*r*). The rule is relaxed when the documents in question are voluminous and the question is with reference to the result of their inspection (*s*).

Where a witness called for plaintiff was asked on cross-examination by the defendant's counsel, who produced a letter purporting to be written by the witness, 'Did you not write that letter in answer to a letter charging you with forgery?' it was held that the question could not be put, as the letter to which that put to the witness was suggested to be an answer was not produced, nor its absence accounted for. For anything that appeared, the defendant's counsel might have the letter in his hand when he put the question (*t*).

(*n*) Hallett *v.* Cousens, 2 M. & Rob. 238.

(*o*) R. *v.* Fussell, 3 Cox, 291; 6 St. Tr. (N. S.), 723. Wilde, C.J., Maule, J., and Parke, B.

(*p*) *Post*, p. 2314.

(*q*) Meyer *v.* Sefton, 2 Stark. (N. P.), 274. Roberts *v.* Doxon, Peake (N. P.), 83. Sainthill *v.* Bound, 4 Esp. 74. Howell *v.* Locke, 2 Camp. 14. Phipson, Ev. (4th ed.) 462. See Taylor, Ev. (10th ed.) s. 462, and as to interposing such evidence out of its turn, s. 1447.

(*r*) Graham *v.* Dyster, 2 Stark. (N. P.), 23. Sideways *v.* Dyson, ib. 49.

(*s*) Taylor, Ev. (10th ed.) s. 462.

(*t*) Macdonnell *v.* Evans, 11 C. B. 930. The Court, however, studiously avoided laying down any general rule, Jervis, C. J., saying: 'It is unnecessary, as it seems to me, for the Court to lay down any general rule upon this subject.' During the argument, Maule, J., said: 'If you want the jury to know there was a letter containing a charge of forgery, the proper way to do so is by producing the letter itself'; and again, 'Suppose the witness had said: "I did write this letter in answer to another which is in court," good sense obviously requires that the letter should be produced, if it is wished to get at its contents': and in giving judgment, 'Suppose we assume that the paper was shewn to the witness, and he was asked, "Did you not say 'Yes' in answer to something contained therein?" can it be contended that the contents of the paper could not be shewn? It seems to me that if the document was present, the proper way of dealing with it would be to produce it, and then to ask the witness, "Did you not

Refreshing Memory.—A witness may refresh his memory by reference to any writing made or verified by himself (*u*) concerning, and contemporaneously with, the facts to which he testifies (*v*).

If the witness cannot speak to the fact from independent recollection, any further than as finding it entered in a book or paper, such book or paper ought to be produced, and if it be not admissible in evidence, the testimony of the witness amounts to nothing (*w*). Although in general the entries ought to have been made by the witness himself, yet if another wrote them, and the witness regularly examined them from time to time, soon after they were written, and while the facts stated in them were fresh in his recollection, he may refresh his memory by referring to them, as if he had written them with his own hand (*x*). Where, therefore, a witness had attended Chartist meetings for the purpose of obtaining information and communicating it to the Government, and within two hours after each meeting he detailed such information to an inspector, who took it down from his dictation, and some of the accounts were read over to him and some he read over himself, and he often saw what the inspector wrote, but did not see all, and he signed all the papers; and the inspector proved that he took down what the witness said as nearly as possible, and read the whole over to the witness; it was held that the witness might refresh his memory by these papers. If he could say that when his mind was so full of the circumstances, he ascertained that the paper correctly detailed them, it was immaterial whether he ascertained it by looking at the paper himself or by hearing it read over correctly by another person (*y*). A shorthand writer may refresh his memory by reference to his shorthand notes to the substance of which he is able to swear (*z*). Where a captain produced a ship's log, which was written by the mate, who was absent, but he had himself read the log about a week after it was written, when the matters contained in it were fresh in his mind, and he then thought it correct, it was held that he might refresh his memory by it (*a*). Where an editor of a paper proved that an article on the weather had been furnished by a gentleman, who was in the habit of writing such articles for that paper, and that the manuscript could not be found, and the writer stated that he had no recollection of

write so and so in answer to it?"' The court treated the question in this case exactly the same as if it had arisen on an examination in chief. In Boosey *v.* Davidson, 13 Q. B. 257, which was an action for the infringement of a copyright of certain airs in an opera, a witness was asked whether he had not seen printed copies of these airs in a particular shop; and it was held that the question could not be put, as the answer would be a statement of the contents of a written instrument, without accounting for its non-production. See Taylor, Ev. (10th ed.) s. 409.

(*u*) *e.g.* the diary of a solicitor. R. *v.* Dexter, 19 Cox, 360. The use of the writing to refresh memory is distinct from the use of the writing in cross-examination to check the oral evidence. The entries of police officers as to cases in which they are called as witnesses are used in both ways.

(*v*) Phipson, Ev. (4th ed.) 454. See R. *v.* Horne Tooke, 25 St. Tr. 120. Taylor, Ev. (10th ed.) s. 1406.

(*w*) Doe *v.* Perkins, 3 T. R. 749, explained in R. *v.* St. Martin's, Leicester, 2 A. & E. 210. Beech *v.* Jones, 5 C. B. 696. See Henry *v.* Lee, 2 Chit. (K.B.), 124.

(*x*) Burrough *v.* Martin, 2 Camp. 112. The entries were in a log-book. See Duchess of Kingston's case, 20 St. Tr. 619. Lawes *v.* Reed, 2 Lew. 152. R. *v.* Philpotts, 5 Cox, 329. R. *v.* Bird, 5 Cox, 11.

(*y*) R. *v.* Mullins, 3 Cox, 526, Maule and Wightman, JJ.

(*z*) R. *v.* O'Connell, 5 St. Tr. (N. S.), 1, 196, 197.

(*a*) Anderson *v.* Whalley, 3 C. & K. 54. Talfourd, J. See R. *v.* Stokes, 4 Cox, 451.

having furnished the particular article, but that the statements contained in the articles he had furnished were invariably true; it was held that the article might be used for the purpose of refreshing his memory (*b*). The prisoner was a time-keeper, and T. C. was a pay clerk in the employment of a colliery company. It was the duty of the prisoner every fortnight to give a list of the days worked by the workmen to a clerk who entered the days and the wages due in respect of them in a time-book. At pay time it was the duty of the prisoner to read out from the time-book the number of days worked by each workman, to T. C., who paid the wages accordingly. And T. C. saw the entries in the time-book while the prisoner was reading them out. Upon the trial of an indictment charging the prisoner with obtaining money by false pretences, it was held, that T. C. might refresh his memory by referring to the entries in the time-book in order to prove the sums paid by him to the workmen (*c*). But where the witness neither recollects the fact, nor the truth of the account in writing, and the writing was not made by him, his testimony, so far as it is founded on the written paper, would be objectionable as hearsay; the witness can be no more permitted to give evidence of his inference from what a third person has written, than from what a third person has said (*d*).

It is not essential that the memorandum should have been made at the very time of the transaction; it is enough if it has been made by the witness, or by another with his privity, at a time when the facts were fresh in the recollection of the witness, and that the reading such memorandum restores the recollection of the fact which had faded in the memory, or enables him to swear to the truth of the fact (*e*). When a witness refreshes his memory from memorandums, it is always usual, and very reasonable, that the adverse counsel should have an opportunity of looking at them, when he is cross-examining the witness (*f*).

A writing cannot be used to refresh the memory, if it appears to have been made for the purpose of the cause. Thus where a witness refreshed her memory by papers in her own handwriting, some of which were in the form of a deposition, which was drawn by the plaintiff's solicitor, whom she had requested to digest her notes and reduce them to some order; and, after he had done so, she transcribed and altered them whenever it was necessary, to make them consistent with her meaning; it was held that she ought not to have been allowed to refresh her memory by these notes (*g*).

(*b*) Topham *v.* M'Gregor, 1 C. & K. 320. Rolfe, B.

(*c*) R. *v.* Langton, 2 Q.B.D. 297: 46 L. J. M. C. 156.

(*d*) Taylor, Ev. (10th ed.) ss. 1410 *et seq.*

(*e*) Taylor, Ev. (10th ed.) s. 1407

(*f*) By Eyre, C.J., in R. *v.* Hardy, 24 St. Tr. 824. Sinclair *v.* Stevenson, 1 C. & P. 582. But if a paper is put into a witness's hands merely to prove a handwriting, the other side have no right to see it. Ibid., per Best, C.J. If a counsel, in cross-examination, put a paper into the witness's hand to refresh his memory, the opposite counsel has a right to look at it, without being bound to read it in evidence. And he may also ask the witness when it was written, without being bound to read it. R. *v.* Ramsden, 2 C. & P. 604, Tenterden, C.J. Howard *v.* Canfield, 5 Dowl. Pr. Rep. 417.

(*g*) Anon., cited in Doe *v.* Perkins, 3 T. R. 752. The case was in chancery, and the Lord Chancellor suppressed the depositions. In Steinkeller *v.* Newton, 9 C. & P. 313, a similar objection was made, but the point decided was that the paper was not written near enough to the transaction. See Taylor, Ev. (10th ed.) p. 1014.

Where, in order to prove the taking of a tenement, a witness produced a book containing an entry made by him of the terms of the taking, and stated that he had no memory of them but from the book, without which he should not of his own knowledge be able to speak to the facts, but on reading the entry he had no doubt that the facts really happened; the Court held that the witness might look at the entry to refresh his memory, and give parol evidence of the letting (*h*).

A receipt for money given on unstamped paper may be used by a witness, who saw it given, to refresh his memory (*i*). And where a witness who had received money and given a receipt for it, which could not be read in evidence for want of a proper stamp, had become blind, the receipt was allowed by Abbott, C.J., to be read over to him in court (he being informed that the paper was in his handwriting), in order to refresh his memory (*j*). To prove an act of bankruptcy committed some years back, a deposition made at the time by an aged witness was allowed by Lord Kenyon to be read to him for the same purpose (*k*). And where a witness was uncertain whether an execution was put in on May 4 or 5, Tindal, C.J., allowed his deposition, which had been made before the Commissioners of Bankruptcy on the 12th of the same month, to be used by the witness, to refresh his memory as to the date of the execution (*l*). So where a deed bore date June 20, and a witness could not recollect whether it was executed on the day of the date or not; Pollock, C.B., held that his examination taken on July 3, whilst the facts stated in it were fresh in his memory, and which was not in his handwriting, but was signed by him, might be used to refresh his memory (*m*). But a witness cannot refresh his memory by depositions, not taken contemporaneously, or nearly so, with the matters to which they relate (*n*).

Depositions in criminal cases are not available for the purpose of refreshing the memory of a witness (*o*), unless they are used for that purpose with the sanction of the Court (*p*). But they may, of course, be used to refresh the memory of the person who took them down (*q*). Copies of convictions of the witness may be put to him if he denies them (*r*).

Copies, &c.—The witness should, where possible, refresh his memory by

(*h*) R. *v.* St. Martin's, Leicester, 2 A. & E. 210, which explains Doe *v.* Perkins, 3 T. R. 749 (*ante*, p. 2304). The entry was made at the time of the taking.

(*i*) Rambert *v.* Cohen, 4 Esp. 213.

(*j*) Catt *v.* Howard, 3 Stark. (N. P.) 3. See also Jacob *v.* Lindsay, 1 East, 460.

(*k*) Vaughan *v.* Martin, 1 Esp. 440.

(*l*) Smith *v.* Morgan, 2 M. & Rob. 257. But Tindal, C.J., refused to allow the witness to look at more than the date of the transaction, as to which he was uncertain; as it would be leading a witness too much to attempt to bind him down to all that he had thus said.

(*m*) Wood *v.* Cooper, 1 C. & K. 645.

(*n*) Whitfield *v.* Aland, 2 C. & K. 1015, Wilde, C.J. No date is given in this case. Cf. R. *v.* Kinloch, 25 St. Tr. 934.

(*o*) R. *v.* Stokes, 4 Cox, 451, Williams, J., saying: 'The deposition is not contemporaneous with the facts deposed to, and does not fall within the description of memoranda and entries available for the purpose of refreshing a witness's memory.' In this case counsel for the prisoner proposed so to use the depositions. In R. *v.* Palmer, 5 Cox, 236, Pollock, C.B., said: 'A deposition is not the witness's own memorandum, made by him contemporaneously with the occurrence of the facts stated there, but a narrative taken down by somebody else from a statement subsequently made by him, and, therefore, although very good evidence for the purpose of contradicting him, it differs from the principle of the cases that relate to the refreshing the memory.'

(*p*) R. *v.* Williams, 6 Cox, 343.

(*q*) R. *v.* Mann, 49 J. P. 743.

(*r*) *Post*, p. 2321.

the original writings made while the events which it records were fresh in his memory. The decisions are not wholly clear or consistent as to the right to use copies. But the following rules appear to apply (*s*):

(1) If the original is in existence (*t*), and the witness has no independent recollection of the facts, a copy may not be used (*u*).

(2) Copies made or verified by the witness, while the facts were fresh in his memory, may be used as duplicates or quasi originals (*v*), without accounting for the absence of the original (*w*).

(3) On satisfactory proof of loss or destruction of the original, a copy duly verified by the witness or another may be used (*x*).

(4) Copies not verified as correct (*y*), or incomplete extracts made by witness or another person may not be used whether the original is or is not in existence (*z*).

Hostile Witness.—If a witness appears to be hostile or adverse (*a*), *i.e.* to be in the interest of the opposite party, or unwilling to give evidence, the judge may relax the rule against leading questions, and allow the examination in chief to assume something of the form of a cross-examination. It is entirely in his discretion to determine how far he will allow the examination in chief to be by leading questions (*b*). But in general,

(*s*) Phipson, Ev. (4th ed.) 456. See Taylor, Ev. (10th ed.) s. 1408.

(*t*) In Jones *v.* Stroud, 2 C. & P. 196. Best, C.J., refused to allow use of a copy made by the witness six months after the original, although the original was so covered with figures as to be illegible. On this case, see Talbot *v.* Cusack, 17 Ir. C. L. R. 213.

(*u*) Tanner *v.* Taylor, cited in Doe *v.* Perkins, 3 T. R. 749, where a witness produced a copy of a day-book which he had left at home; and Legge, B., held that if he could swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make use of it; but if he could not from recollection swear any further than as finding the matters entered in the book, then the original should have been produced. Bayley, J., is reported to have held that a witness cannot give a copy of a shop-book in evidence to prove facts contained in the shop-book, but if he was originally acquainted with the facts he might refer to such copy to refresh his memory. Anon. 1 Lew. 101. Cf. R. *v.* Harvey, 11 Cox 546, where Blackburn, J., refused to allow a bank clerk to refresh his memory by a memorandum of the numbers of some banknotes, though the memorandum was of an entry in the books of the bank made by the witness.

(*v*) Where a memorandum was made by a witness at the time on a rough piece of paper, and he copied it out more neatly, it was held that he might refresh his memory by the copy. R. *v.* Duffield, 5 Cox, 404.

(*w*) Where a clerk to a tradesman entered the transactions in trade as they occurred into a waste-book from his own knowledge, and the tradesman copied the entries day by day into a ledger, in the presence of the clerk, who checked them as they were copied; it was held that the clerk might use the entries in the ledger to refresh his memory, although the waste-book was not produced, nor its absence accounted for; as the entries in the ledger were in the nature of entries made by the clerk himself. Burton *v.* Plummer, 2 A. & E. 341, Patteson, J., said: "The copy of an entry, not made by the witnesses contemporaneously, does not seem to me to be admissible for the purpose of refreshing a witness's memory. The rule is, that the best evidence must be produced, and that rule appears to me to be applicable, whether the paper be produced as evidence in itself or used merely to refresh the memory.

(*x*) Alcock *v.* Royal Exchange Assurance 13 Q.B. 292; 18 L. J. Q.B. 121.

(*y*) 2 Phill. Ev. 414, citing a case mentioned by Kenyon, C.J., in Doe *v.* Perkins, 3 T. R. 752.

(*z*) See R. *v.* St. Martin's, Leicester, 2 A. & E. 210, 215, Patteson, J.

(*a*) See Greenough *v.* Eccles, 5 C. B. (N. S.) 786, *post*, p. 2307, note (*e*).

(*b*) Price *v.* Manning, 42 Ch. D. 372, overruling Clarke *v.* Saffery, Ry. & M. 126; Taylor, Ev. (10th ed.), s. 1404. In Bastin *v.* Carew, Ry. & M. 127, Abbott, C.J., allowed the cross-examination of an adverse witness, and said, "I mean to decide this, and no further—that in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted, in order best to answer the purposes of

the fact of a witness being an unwilling or adverse witness is to be ascertained by the nature of his evidence, his manner of answering and demeanor, before the unrestricted power of leading can be given; it is not enough, for instance, in a prosecution, that the witness is intimate with the prisoner, or that he had been informed against by the prosecutor, to justify the counsel in beginning at once with the cross-examination (*e*).

By the Criminal Procedure Act, 1865 (28 & 29 Vict. c. 65), s. 3, 'A party producing a witness shall not be allowed to impeach his character by general evidence of bad character (*d*), but he may, in case the witness shall, in the opinion of the judge, prove adverse (*e*), contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent (*f*) with his present testimony (*g*); 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 (*h*). The discretion of the judge under the section as to allowing the witness to be contradicted seems absolute (*i*).

Before the above Act, upon an indictment for murder, the counsel for the prosecution at first declined examining the prisoner's mother, but the judge thought it right to have her examined (her name being on the back of the indictment as having been examined before the grand jury), which was accordingly done, and she gave her evidence in favour of the prisoner; the judge ordered her deposition before the coroner to be read, in order to shew its inconsistency with her present testimony. And the twelve judges were afterwards of opinion that the judge had a right to call for the deposition, in order to impeach the witness's credit; and Lord Ellenborough and Mansfield, C.J., thought that the prosecutor had the same right (*j*).

justice.' R. *v.* Chapman, 8 C. & P. 558, Abinger, C. B. R. *v.* Murphy, 8 C. & P. 297, Coleridge, J. And see R. *v.* Smith, 2 Cr. App. R. 106.

(*e*) In R. *v.* Ball, 8 C. & P. 745, a witness called on the part of the prosecution contradicted the prosecutor as to the fact of the prisoner having been at her house on the night when the offence was committed, and it appeared that she was intimately acquainted with the prisoner, and that the prosecutor had informed against her for keeping her beerhouse open at improper hours; and on it being submitted that these facts raised such an inference of hostility towards the prosecutor, and of bias in favour of the prisoner, as to entitle the counsel for the prosecution to cross-examine her, Erskine, J., said: 'I think that the situation in which this witness stands towards either party, does not give the party calling the witness a right to cross-examine her, unless her evidence was of itself of such a nature as to make it appear that she was an unwilling witness.'

(*d*) As to the practice before this Act, see Ewer *v.* Ambrose, 3 B. & C. 750.

(*e*) A witness is not adverse within the meaning of this section, merely because his testimony is unfavourable to the party calling him. To be 'adverse' so as to entitle the party calling the witness to prove that he has made at another time a statement inconsistent with his present testimony, he must in the opinion of the judge be 'hostile.' Greenough *v.* Eccles, 5 C. B. (N. S.) 786: 28 L. J. C. P. 160. See Martin *v.* Travellers' Insurance Co., 1 F. & F. 505.

(*f*) See Jackson *v.* Thomason, 31 L. J. Q. B. 11. Ryberg *v.* Ryberg, 32 L. J. Mat. 112. R. *v.* Dibble, 72 J.P. 498.

(*g*) As to the former rule on this subject see Wright *v.* Beckett, 1 M. & Rob. 414. Dunn *v.* Aslett, 2 M. & Rob. 122. Holdsworth *v.* Mayor of Dartmouth, 2 M. & Rob. 153. Winter *v.* Bull, 2 M. & Rob. 357. Allay *v.* Hutchings, 2 M. & Rob. 358. Melhuish *v.* Collier, 15 Q.B. 878. Greenough *v.* Eccles, *supra*. R. *v.* Farr, 8 C. & P. 768.

(*h*) This section applies to criminal as well as civil proceedings the rule applied to civil proceedings by the Common Law Procedure Act, 1854, s. 23, which was repealed in 1892 (S.L.R.).

(*i*) Rice *v.* Howard, 16 Q.B.D. 681: 55 L. J. Q.B. 311.

(*j*) R. *v.* Oldrow, R. & R. 88.

If a witness gives evidence contrary to that which the party calling him expects, the party is at liberty to make out his own case by other witnesses, and to shew that the facts which his own witness had stated contrary to his interests were otherwise (*k*); 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 (*l*).

(b) *Cross-examination and impeaching Credit of Witnesses.*

There are three modes of impeaching the credit of a witness, besides the disproval of the facts or opinions to which he testifies: (1) Cross-examination; (2) By proof of previous statements, acts, or declarations by him, inconsistent with his evidence; (3) By attacking his character.

Cross-examination.—Cross-examination on behalf of the adverse party follows immediately on the completion of the examination in chief.

The object of cross-examination is to weaken, qualify, or destroy, the case of the opposing party and to establish the case of the party on whose behalf the cross-examination is made (*m*). Every party has a right to cross-examine all witnesses called by the opposing party, except—(1) persons called to produce documents under a *subpœna duces tecum*, who merely produce the document without being sworn, or if unnecessarily sworn (*n*); (2) Persons sworn by mistake, as to his ability to depose to matters in question (*o*), or whose examination is stopped by the judge before any material question has been put to them (*p*).

Witnesses called by the judge, and not by either party, may not be cross-examined without the judge's permission (*q*); but it is usual to give leave to cross-examine to a party adversely affected by the evidence of such witnesses (*r*).

The right of cross-examination as already stated is limited to witnesses who are actually called and sworn and give evidence for another party to the proceeding. Counsel for the prosecution is not bound to call every

(*k*) Ewer *v.* Ambrose, 3 B. & C. 749, 750, 751. Friedlander *v.* London Assurance Co., 4 B. & Ad. 193. Richardson *v.* Allan, 2 Stark (N. P.) 334. Alexander *v.* Gibson, 2 Camp. 555. In Lowe *v.* Jolliffe, 1 W. Bl. 365, the subscribing witness to a deed swore to the testator's insanity; yet the plaintiff was allowed to examine other witnesses in support of his case, to prove that the testator was sane. So in Pike *v.* Badmering, 2 Str. 1096 *cit.*, where the three subscribing witnesses to a will denied their hands, the plaintiff was permitted to contradict that evidence.

(*l*) Bull. (N. P.) 297.

(*m*) Phipson, Ev. (4th ed.) 460. Taylor, Ev. (10th ed.) s. 1462.

(*n*) Simpson *v.* Smith, 2 Phill. Ev. 397. Rush *v.* Smith, 1 Cr. M. & R. 94; 3 L. J. Ex. 355. See also Davis *v.* Dale, M. & M. 514. Evans *v.* Moseley, 2 Dowl. Pr. R. 364. Perry *v.* Gibson, 1 A. & E. 48. Summers *v.* Moseley, 2 Cr. & M. 477; 4 Tyrw. 158. R. *v.* Murlis, M. & M. 515. But if a witness is sworn, even if merely for the purpose of formal proof of a document, this makes him a witness for all purposes, and he may be cross-examined as to the whole of the case. Morgan *v.* Brydges, 2 Stark. (N. P.) 314. But see Phillipps *v.* Eamer, 1 Esp. 356. See Reed *v.* James, 1 Stark. (N. P.) 132.

(*o*) Wood *v.* Mackinson, 2 M. & Rob. 273. Rush *v.* Smyth, *ubi sup.* Clifford *v.* Hunter, 3 C. & P. 16. R. *v.* Brooke, 2 Stark. (N. P.) 472.

(*p*) Phipson, Ev. (4th ed.) 461. Creevy *v.* Carr, 7 C. & P. 64, Gurney, B.

(*q*) Coulson *v.* Disborough [1894], 2 Q.B. 316.

(*r*) R. *v.* Cliburn, 62 J.P. 232, Fulton, Recorder.

witness whose name is on the back of the indictment (*s*), but may call what witnesses he thinks proper (*t*). The prosecutor, however, ought to cause the witnesses to be present in court, because the prisoner may have neglected to bring them himself in consequence of their names being on the back of the bill (*u*). It was formerly the practice, where counsel for the prosecution did not call a witness whose name was on the back of the bill, for the judge to call the witness, in order that he might be cross-examined by the prisoner in the same way as if he had been called by the counsel for the prosecution (*v*); but it is now settled that where a witness who is not called by the counsel for the prosecution is called by the prisoner, he

(*s*) R. *v.* Woodhead [1847], 2 C. & K. 520, where Alderson, B., said that the judges had laid down this as a rule. R. *v.* Edwards, 3 Cox, 82. Erle, J. [1848]. R. *v.* Cassidy [1858] 1 F. & F. 79. Parke, B., after consulting Cresswell, J.

(*t*) R. *v.* Cassidy, *supra*. R. *v.* Edwards, *supra* and see *ante*, p. 2300.

(*u*) R. *v.* Woodhead, *supra*. R. *v.* Cassidy, *supra*.

(*v*) R. *v.* Simmonds, 1 C. & P. 84. Hullock, B. R. *v.* Whitbread, ibid. note (*a*). R. *v.* Bull, 9 C. & P. 22. R. *v.* Thompson, 15 Cox, 181. In R. *v.* Beezly, 4 C. & P. 220, Littledale, J., said that the counsel for the prosecution ought to call all the witnesses on the back of the bill; and in many cases on the Oxford Circuit learned judges have directed the counsel for the prosecution to call every witness on the back of the bill, and it has been treated as if the counsel for the prisoner had a right to have them all called by the counsel for the Crown, in order to enable him to cross-examine them. Indeed, the cases have gone further than this; as it has been held on several occasions that witnesses, not on the back of the bill, but who were acquainted with the facts of the case, ought to be called on the part of the prosecution. In R. *v.* Holden, 8 C. & P. 606, on an indictment for murder, Patteson, J., directed the daughter of the deceased, whose name was not on the back of the indictment, to be called, saying, 'Every witness who was present at a transaction of this sort ought to be called, and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusion as to the real truth of the matter.' And in the same case, it appearing that there had been a *post mortem* examination of the body of the deceased by a surgeon who was examined, and another surgeon who was in Court, and that there was some difference of opinion as to the cause of the death; Patteson, J., said: 'As the surgeon is in Court, I shall insist upon his being examined. He is a material witness who is not called on the part of the prosecution; and as he is in Court, I shall call him for the furtherance of justice.' And he was called and examined by the learned judge. In R. *v.* Chapman, 8 C. & P. 558, Lord Abinger, C.B., directed the name of the brother of the prisoner, who was present at the time when the murder was alleged to have been committed, to remain on the back of the bill, and said, the counsel for the prosecution would best discharge his duty by calling him as a witness on the trial. See also R. *v.* Orchard, ibid. note (*b*). In R. *v.* Stroner [1845], 1 C. & K. 650, the prosecutrix, on a trial for rape, stated that she immediately complained to her mistress, and that her clothes were afterwards washed by a woman, and neither of these persons were bound over to give evidence, and their names were not on the back of the indictment; but both were attending as witnesses for the prisoner; and Pollock, C.B., held that they must be both called for the prosecution, but that the counsel for the prosecution must be allowed every latitude in examining them. In R. *v.* Bodle, 6 C. & P. 186, Gaselee, J., and Vaughan, B., held that it was in the discretion of the judge whether a witness whose name is on the back of the indictment should be called for the prisoner's counsel to examine him before the prisoner was called on for his defence; and the father of the prisoner, having been examined before the coroner, and bound over to give evidence at the assizes against the prisoner for murder, the learned judges held that the father ought to be called; and he was called, and asked as to statements he had made respecting the murder, with a view of discrediting and contradicting him, and thereby raising a suspicion that the witness might have committed the murder himself; and it was held that as the father had not been examined by the counsel for the prosecution, and had been only called at the instance of the counsel for the prisoner, the latter could not be allowed to call witness to contradict him as to the different accounts he had given respecting the murder. In R. *v.* Vincent, 9 C. & P. 91; 3 St. Ir. (N.S.) 1037, Alderson, B., held that the calling such a witness in felony was discretionary, but it was a discretion always exercised, and he thought it might well be exercised in a case of misdemeanor. C. S. G.

must be considered his witness, as much as those subpœnaed and called by him (*w*). As the witness is the prisoner's witness, it follows that the counsel for the Crown may impeach his evidence in the same manner as if he had been subpœnaed and called by the prisoner (*x*).

Witnesses for co-Defendant.—The right to cross-examine applies to witnesses called on behalf of one defendant, whose evidence tends to criminate another; and extends to a defendant called as a witness on his own behalf, who by his evidence incriminates a co-defendant.

Upon the trial of Kroehl, Gibson, and Koech (*y*), for a conspiracy, the three defendants were defended separately, and Koech alone called witnesses, and examined to a conversation between himself and Kroehl. Counsel for the prosecution was proceeding to cross-examine as to another conversation between Koech and Kroehl, when counsel for Kroehl objected, on the ground that the effect might be to bring out a new case against Kroehl, although he had called no witnesses; and after the case for the Crown was finished, Abbott, J., said, that as Koech had called witnesses, he could not prevent the cross-examination as to any conversations that might affect Koech. It might be a matter for future consideration whether counsel for Kroehl, after such evidence, would have a right to address the jury upon it.

Woods and May (*z*) were indicted for manslaughter, and separately defended. Counsel for Woods addressed the jury, but called no witness, and then counsel for May addressed the jury and called witnesses, who threw the blame on Woods. It was held that the counsel for Woods should be allowed not only to cross-examine May's witnesses, but again to address the jury. The proper course was for Woods' counsel to cross-examine first, the counsel for the prosecution next, and the counsel for May to re-examine. At the close of the evidence, Woods' counsel would address the jury, confining himself strictly to the evidence adduced for May, and then the counsel for the prosecution would reply generally. So where Burdett and Luck (*a*) were tried for stealing wood, and in the course of the defence of Luck, Cox was called as a witness on his behalf, with a view of shewing that Luck was an innocent agent in taking the wood, and in so doing Cox gave evidence tending to criminate Burdett; Burdett's counsel claimed the right of cross-examining Cox, and then addressing the jury upon his evidence; but the sessions refused permission to cross-examine and address the jury, but offered to put through the

(*w*) R. *v.* Cassidy, 1 F. & F. 79. R. *v.* Woodhead, *ante*, p. 2309. The following cases, therefore, cannot be considered authorities any longer. R. *v.* Barley, 2 Cox, 191, where Pollock, C. B., after consulting Coleridge, J., insisted on the counsel for the Crown calling witnesses on the back of the bill. The dictum of Alderson, B., in R. *v.* Carpenter, 1 Cox, 72, that it was the duty of the prosecutor to put an adverse witness in the box. The ruling of Littledale, J., R. *v.* Beezly, 4 C. & P. 220 is that the counsel for the Crown was confined to questions which arose out of the cross-examinations of a witness whom he had directed to be called; and R. *v.* Harris, 7 C. & P. 581, so far as it may tend to shew that where the witness is called by the judge, the counsel for the Crown has no right to examine him.

(*x*) R. *v.* Woodhead, *supra*, Alderson, B.

(*y*) 2 Stark. (N. P.) 343.

(*z*) R. *v.* Woods, 6 Cox, 224. The Recorder, after consulting Cresswell and Williams, JJ. See R. *v.* Copley, 4 F. & F. 1097.

(*a*) R. *v.* Burdett, Dears. 431. See Beale *v.* Mouls, 1 C. & K. 1. On the same ground it would seem that one prisoner might call witnesses to contradict the witnesses called for another prisoner, if their evidence criminated him.

chairman such questions as Burdett's counsel suggested; it was held, on a case reserved, that, in this particular case, counsel for Burdett had a right to cross-examine Cox, and to cross-examine him without doing so through the Court, and had also a right to reply on his evidence. But the Court must not be understood as saying that he would have had that right if the evidence of Cox had not tended to criminate him. All the Court decided was, that in this particular case the course taken was wrong.

In R. *v.* Hadwen (*b*), two defendants were jointly indicted for offences under the Debtors Act, 1869. Both persons elected to give evidence on oath, and each gave evidence exculpating himself and inculpating his co-defendant. Counsel for each defendant claimed, but was not allowed to cross-examine the other defendant. Both defendants were convicted, and on a case reserved it was held both on principle and on the analogy of the decision above cited counsel for each defendant was entitled to cross-examine the other defendant upon the evidence given by him incriminating his co-defendant (*c*).

In cross-examination leading questions may be asked (*d*). But it is obvious that evidence obtained in cross-examination by such questions is very unsatisfactory, and open to much observation (*e*). And although the witness may be led on cross-examination to bring him directly to the point as to the answer, yet if he has betrayed an inclination to lean, and be favourable to the cross-examining party, it is not allowable to go the length of putting into the witness's mouth the very words which he is to echo back (*f*). But the practice has generally been to put leading questions in cross-examination to a witness, whether willing or adverse; and where a counsel was putting leading questions in the usual way to a witness who appeared favourable to the side of the counsel who was cross-examining him, and this was objected to; Alderson, B., said: 'I apprehend that you may put a leading question to an unwilling witness on the examination in chief at the discretion of the judge; but you may always put a leading question in cross-examination, whether a witness be unwilling or not' (*g*).

Counsel upon cross-examination cannot assume that the witness has made an assertion in his examination in chief, which was not in fact made (*h*), or put a question which assumes a fact not in proof (*i*).

The questions asked in cross-examination fall into three classes.

(1) Those directly or immediately relevant to matters in issue, as to which its cross-examining party may call evidence to contradict the witness (*j*).

(*b*) [1902], 1 K.B. 882 (C. C. R.), Alverstone, L.C.J., Lawrance, Bruce, and Kennedy, JJ. R. *v.* Hunting, 73 J. P. 12: 1 Cr. App. R. 77.

(*c*) Wright, J., (1902) 1 K.B. 888, expressed some doubts as to whether s. 1, (f.) (iii), of the Criminal Evidence Act, 1898, *ante*, p. 2271, abrogated the common law rule laid down in R. *v.* Payne, L. R. 1 C. C. R. 349; *ante*, p. 2270.

(*d*) 2 Phill. Ev. 406, Taylor, Ev. (10th ed.) s. 1431.

(*e*) Mr. Starkie, in his Treatise on Evidence, Vol. i. p. 197, mentions that he had heard Lord Tenterden express himself to this effect more than once.

(*f*) R. *v.* Hardy, 24 St. Tr. 755, Buller, J., referring to a rule laid down on the day before by Eyre, C.J., to the same effect.

(*g*) Parkin *v.* Moon, 7 C. & P. 408.

(*h*) Hill *v.* Coombe, Abbott, J., Manning's Digest, *tit.* 'Witness,' pl. 236.

(*i*) Doe *v.* Wood, Abbott, J., ibid. pl. 237. The objection was frequently taken and allowed during the proceedings in the House of Lords in Queen Caroline's case. 2 B. & B. 284. See the printed evidence.

(*j*) *Post*, pp. 2317, 2327.

(2) Questions not directly relevant to matters in issue, but put for the purpose of impeaching the credit of the witness, as to which the answer of the witness must be accepted and cannot be contradicted by evidence adduced by the cross-examining party (*k*).

(3) Questions absolutely vexatious, irrelevant, and oppressive, which the judge may disallow if they do not affect the credibility of the witness (*l*).

The right to ask questions in cross-examination does not necessarily entail a corresponding obligation on the part of the witness to answer them. The cases in which the witness is not compellable to answer are dealt with, *post*, p. 2331.

The credit of a witness may be impeached by giving evidence of his having said or written about the case which is at variance and inconsistent with his oral evidence given at the trial. Before such evidence can be put in the witness must be cross-examined as to the former statements. The cross-examination of a witness as to former statements, oral or written, is now in the main regulated by statute. The object of such examination is to impeach the credit of the witness by shewing that he has, at another time, made statements inconsistent with his evidence given at the trial (*m*).

Previous Statements.—Under the Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 4 (*n*), 'If a witness on 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'; *i.e.* he must be asked whether he has made the statement or declaration or held the conversation which it is proposed to prove (*o*).

This enactment is limited to statements relative or in some way relevant (*p*) to the subject matter of the trial, but is not in terms limited to oral statements. It will be observed that it does not prescribe or limit what may be asked, but only as to what matters contradictory evidence may be given. In the case of questions purely collateral to the issue, the cross-examining party must take the answer of the witness (*q*), and, although the questions go to the credit of the witness, may not contradict him.

Thus if a witness has been examined in chief as to some transaction

(*k*) *Post*, p. 2331. Cross-examination as to a fact otherwise irrelevant is not rendered admissible by the circumstance that the adverse counsel opened it without any attempt at proof. Lucas v. Novosilieski, 1 Esp. 296.

(*l*) The power to disallow such questions is recognised by rule in civil proceedings. R. S. C. [1883], O. 36, *r.* 38. See Taylor, Ev. (10th ed.) s. 1426, and is *exercised* in criminal cases.

(*m*) De Sailly *v.* Morgan, 2 Esp. 691. Christian *v.* Combe, *ib.* 489.

(*n*) This section applies to criminal as well as civil proceedings the rule applied to civil proceedings by the Common Law Procedure Act [1854], s. 23, which was repealed in [1892] S. L. R. See Ryberg *v.* Ryberg, 32 L. J. Mat. 112. Taylor, Ev. (10th ed.) p. 1047.

(*o*) Queen Caroline's case, 2 B. & B. 299. Carpenter *v.* Wall, 11 A. & E. 803.

(*p*) Greenough *v.* Eccles, 5 C. B. (N. S.), 286; 28 L. J. C. P. 160.

(*q*) *Post*, p. 2317.

supposed to have occurred between certain persons, and should admit that he had heard of such a thing, but does not know its cause, it would be irregular to prove his having made a declaration respecting the cause, in order to shew his knowledge of the cause, without first asking him in the cross-examination whether he had not made such a declaration; or if he had answered that he did not remember the transaction, it would be equally irregular, without such previous cross-examination, to prove declarations made by him respecting the transaction, for the purpose of shewing that he must have remembered it (*r*): for it would, in many cases, have an unfair effect upon the witness and upon his credit, and would deprive him of that reasonable protection which it is the duty of the court to afford to every person who appears as a witness, to allow proof of his former conversation without first interrogating him as to that conversation, and reminding him of it, in order to call up all the powers of his memory as to the transaction (*s*). And it is not enough to ask the general question, whether the witness has ever said so and so, because it may frequently happen that, upon the general question, he may not remember having said so; but the witness must be asked as to the time, place, and person involved in the supposed contradiction; because, when his attention is challenged to particular circumstances, he may recollect and explain what he has formerly said. Where, therefore, a witness had denied that he had ever said that he was in partnership with the defendant, but had not been questioned as to the particular person, or conversation; Tindal, C.J., refused to allow a witness to be asked whether on a particular occasion the witness had told him that he was in partnership with the defendant (*t*).

(*r*) Queen Caroline's case, 2 B. & B. 299.

(*s*) 2 B. & B. 300. Abbott, C.J., in delivering the opinion of the judges, added that, in any grave or serious case, if the counsel had, on his cross-examination, omitted to lay the necessary foundation, the Court would, of its own authority, call back the witness in order to give him an opportunity of doing so. Another reason why he ought to be cross-examined is, that he may have an opportunity of explaining his conduct, 2 B. & B. 314.

(*t*) Angus *v.* Smith, M. & M. 473. 'The witness was allowed to be recalled, and asked the particular question; and the same rule was laid down by Parke, B., in Crowley *v.* Page, 7 C. & P. 789, *post*, p. 2320, note (*a*), and in R. *v.* Pearce, Glo. Spr. Ass. 1829, MSS. C. S. G. Learned judges have in many instances allowed witnesses to be recalled in order to lay a foundation for the admission of such contradictory evidence. In R. *v.* Harris, Salop Spr. Ass. 1842, upon an indictment for murder, the prisoner had no counsel, and in his defence to the jury he alleged certain statements to have been made by the principal witness for the prosecution, and imputed that his son, who could prove the statements, had been prevented from attending to give evidence for him; and Patteson, J., stopped the trial, and ordered the son to be sent for, at the same time directing that no communication should be made to him of the matters as to which he was going to be examined. The prisoner having no attorney, and the son not having been examined by any one as to what statements he had heard the witness make, a difficulty arose as to the mode which was best to be adopted in the examination of the son, and the cross-examination of the witness, and the following mode was adopted as the best under the peculiar circumstances of the case:—The son was first examined by the editor, at the request of the learned judge, as to what he had heard the witness say, the witness being kept out of Court during such examination, and then the witness was called in and cross-examined by the editor as to the statements which the son had sworn that he had made. The jury acquitted the prisoner, although the evidence for the prosecution was very strong. This case has been mentioned, as it may serve as a guide for the practice in cases where the prisoner wishes to call witnesses to prove contradictory statements made by witnesses for the prosecution, without having laid the ground for so doing in a proper manner.' C. S. G.

By sect. 5 (*u*) '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 shewn to him; but if it is intended to contradict such witness by the writing (*v*) 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' (*w*).

This enactment applies to depositions before justices or coroners (*x*) as well as to letters or other statements made in writing or reduced to writing by the witness, and as to depositions supersedes the former practice (*y*). The same rule applies to the cross-examination of a witness on his deposition by counsel for the Crown as by counsel for the prisoner (*z*).

If the document is not in the possession of the cross-examining party, or of the court (as in the case of depositions transmitted by committing justices) notice to produce should be served on the defendant if it is in his custody, or a *subpœna duces tecum* on any other person who has it. Where the document is not made available to the cross-examining party by any means, the question then arises whether the judge has power

(*u*) This section, taken with s. 1 of the Act, applies to all criminal and civil proceedings. The rule applied to civil proceedings by the Common Law Procedure Act, 1854, s. 24, which was repealed in 1892 (S. L. R.). As to the practice before the above Act, see Queen Caroline's case, 2 B. & B. 286. R. *v.* Taylor, 8 C. & P. 726. R. *v.* Holden, 8 C. & P. 606. R. *v.* Edwards, 8 C. & P. 26. R. *v.* Price, 7 Cox, 405. R. *v.* Moir, 4 Cox, 279. R. *v.* Newton, 4 Cox, 262. R. *v.* Curtis, 2 C. & K. 763. R. *v.* Peel, 2 F. & F. 21.

(*v*) To contradict by the writing it must be put in evidence. R. *v.* Riley, 4 F. & F. 964. R. *v.* Wright, ibid. 967.

(*w*) Boyle *v.* Wiseman, 11 Ex. 360.

(*x*) See R. *v.* Barnett, 4 Cox, 269. R. *v.* Maloney, 9 Cox, 26, as to former law.

(*y*) The old rules as laid down by the judges in 7 C. & P. 676, were: 1. That where a witness for the Crown has made a deposition before a magistrate, he cannot, on his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and that such deposition must be read as part of the evidence of the cross-examining counsel. 2. That, after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in Court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and after the prisoner's counsel has addressed the jury, will be entitled to reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the Court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it. 3. That the witness cannot, in cross-examination, be compelled to answer whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event, the counsel for the prisoner may proceed with his cross-examination, and if the witness admits such statement to have been made, he may comment upon such omission, or upon the effects of it upon the other part of his testimony; or, if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

(*z*) R. *v.* Muller, 10 Cox, 43, Pollock, C.B., and Martin, B.

to compel its production. The words 'it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection,' are perfectly general, and, if they stood alone, would seem to give the judge such power; but they occur in the proviso to the preceding part of the clause, which seems plainly to contemplate that the document is in the hands of the cross-examining party: and they seem to have been introduced for the purpose of enabling the judge to prevent an improper impression being produced by a partial communication of the contents of the writing; and, therefore, it admits of serious doubt whether it would be held that the judge was empowered in such a case by this clause to compel the production of the writing. Then, suppose the writing not to be attainable in these cases, or that it is in the possession of some person who has not been subpœnaed to produce it, and is not present; in such a case, as the power to cross-examine as to any writing is given in perfectly general terms, there seems no doubt that the right to cross-examine would exist; but as, before any contradictory proof can be given, the attention of the witness is to be called to the parts of the writing (*a*), it seems to be clear that in such a case no contradictory proof will be admissible.

If a paper written by the witness is proved to have been lost or destroyed (in which case the only mode of contradicting him would be by producing afterwards some secondary evidence of the contents of the paper), the counsel may cross-examine the witness as to the contents of such paper (*b*). Where on the trial of an indictment which had been found at the Monmouth Special Commission, it was proved that at that Commission the depositions of the witnesses had been frequently produced, and that they had been mislaid, and that diligent search had been made for them several times, and they could not be found; Patteson, J., held that a witness might be cross-examined as to what he had said before the magistrates by a copy of the depositions, which was proved to be a correct copy (*c*).

A witness, who has mentioned a fact in his evidence, may be asked whether he had mentioned it on his examination in bankruptcy, without putting his examination into his hand, as the object is to shew that he did not mention the fact, and he may admit that if he chooses; if he does not ask for the examination to refresh his memory, he may answer without it if he chooses (*d*).

Whenever counsel puts a document into the hands of a witness, and asks him whether it is in his handwriting, and then proceeds to found any question on such document, the counsel on the opposite side has a right to see it; and the only case in which the opposite counsel has not this right is where counsel, after handing the document to the witness (and asking him whether it is his handwriting), goes no further (*e*).

If a letter or other writing be tendered in evidence for the purpose

(*a*) See Sladden *v.* Sergeant, 1 F. & F. 322.

(*b*) Taylor, Ev. (10th ed.) s. 1447.

(*c*) R. *v.* Shellard, 9 C. & P. 277.

(*d*) Ridley *v.* Gyde, 1 M. & Rob. 197; 9 Bing. 349, Tindal, C.J.

(*e*) Cope *v.* Thames Haven Dock Co., 2 C. & K. 757. See Taylor, Ev. (10th ed.) s. 1452. The words between brackets are inserted from the marginal note, and render the passage consistent with the regular practice.

of contradicting a witness, and a question is raised whether it was written by the party, it is for the judge to determine that question (*f*).

Practice before the Act.—In some cases before 1866, the counsel for the prisoner, on cross-examining a witness for the prosecution, offered to put into his hand his deposition, and then proposed to ask him whether, having looked at the paper, he still persevered in the statement already made in his evidence in Court; Parke, B., and Coltman, J., had some doubt as to the propriety of this course; but, it having been permitted by some judges, they thought it right to allow it. They, however, asked the opinion of the judges whether they were right, and the judges were of opinion that the course pursued was inexpedient, and that it ought not to be allowed in future (*g*). It seems to have been considered a fitting course for the judge to look at the depositions while the witnesses were under examination, and question them as to any discrepancy between them and their evidence (*h*); but in other cases judges have refused, where counsel were employed by the prisoner, to look at the depositions at all (*i*).

Where the witness could not read writing, the officer of the Court was allowed to read the depositions over to him (*j*). Where it was proved that the depositions had been regularly taken and returned to the Court, but after diligent search could not be found, cross-examination was allowed from copies certified as correct by the justice's clerk (*jj*). Where, when the prisoners were first brought before the magistrate charged with the felony, the witnesses were sworn, examined by the magistrate, and cross-examined by the prisoners, and written minutes of the examination and cross-examination were made by the clerk to the magistrates under the inspection of the magistrates, these minutes were then sent to the office of the clerk to the magistrates, and there delivered to a clerk named Tasker, who proceeded to write the depositions from the minutes. The witnesses attended in the office, and in the course of writing the depositions Tasker put some questions to each of them, for the purpose of rendering the depositions more correct, clear, and complete. The answers given to these questions were inserted in the depositions. The magistrate was not present, nor were the prisoners at the office of the clerk to the magistrates. The depositions having been thus written, the witnesses appeared again before the magistrates, and in the presence of the prisoners were resworn; the depositions were read

(*f*) Cooper *v.* Dawson, 1 F. & F. 550, Wightman, J. Boyle *v.* Wiseman, 11 Ex. 360.

(*g*) Anon. [1843], cited in R. *v.* Ford, 2 Den. 245, from the MSS. of Parke, B. R. *v.* Ford [1851], 2 Den. 245; 5 Cox, 184. R. *v.* Palmer [1851], 5 Cox, 236, Pollock, C.B. R. *v.* Brewer [1863], 9 Cox, 409, Blackburn, J.

(*h*) R. *v.* Edwards, 8 C. & P. 26. 'This is a course which has not unfrequently been adopted in cases where the prisoner has had no counsel, and in such cases it appears highly expedient, as prisoners rarely have copies of the depositions unless they are defended by counsel, and, even if they had, probably would not be able properly to avail themselves of any contradictions that might arise; and it is to be remembered that the depositions are returned to the judge for the express purpose of enabling him to judge as to the accuracy of the witnesses.' C. S. G.

(*i*) R. *v.* Thomas, 7 C. & P. 817, Parke, B., as stated 8 C. & P. 27, and that statement is correct. R. *v.* Holden, 8 C. & P. 606.

(*j*) R. *v.* Edwards, *ubi sup.* But see R. *v.* Tooker, 4 Cox, 93 (*b*). R. *v.* Matthews, ibid. 93, probably inaccurately reported. R. *v.* Ford, 2 Den. 245.

(*jj*) R. *v.* Shellard, 9 C. & P. 277.

over to them, and a full opportunity was afforded for cross-examination before the depositions were signed by the witnesses. Upon these circumstances appearing on the trial, the counsel for the prisoners proposed to ask one of the witnesses for the Crown this question, 'Did you not tell Mr. Tasker that you were watching the prisoner Christopher till a quarter before one o'clock?' The question was material, and had reference to what was said by the witness in answer to some question put by Tasker, as above stated, in the course of writing the depositions, and the witness's answer would, according to the evidence, appear on the depositions. The depositions were not read or tendered in evidence. The question was overruled by the Court; and it was contended, on a case reserved, that if it were a legal deposition, it only excluded an inquiry into what took place before the magistrate. It was answered that, if Tasker had taken down the answers, and the witness had signed them, that paper would exclude evidence of what was said, and that it was like a statement contained in a letter (*k*). Wilde, C.J., said: 'We think the question proper and legal, and that an answer should have been required. It is objected that the answer was to be found in a paper signed by the witness, which must be regarded as a deposition, having acquired that character from the circumstances under which it was made. But the ground upon which a deposition is exclusive evidence of a matter contained in it is the presumption that the magistrate has done his duty, and taken down all that was material in the testimony of the witness. But Tasker was a mere stranger; he could not, by any act of his, attach to the writing a character which would exclude parol evidence of what was so written; it does not become primary evidence of such matter: the witness's own words are the primary evidence of the statement. Suppose the witness had said something, and had then written it down himself, his writing would not exclude his speech. Why then should Tasker's writing do so? The whole argument was founded on an incorrect analogy. The conviction, therefore, was wrong' (*kk*).

Contradicting Witness.—If a witness answers a question which is wholly irrelevant, and therefore improperly asked on cross-examination, the cross-examining party may not call evidence to contradict that answer. The right to call evidence to contradict answers given to questions put to shake a witness' credit is limited to questions which not only go to his credit, but are also connected with the subject of inquiry, and if a witness is asked, on cross-examination, whether he has been guilty of a crime, or any conduct which would discredit him as a witness, but is unconnected with the matter in issue, and he denies it, his answer is conclusive (*l*).

So where, on the trial of an information charging a maltster with having used a cistern for making malt without having previously entered it, a witness was asked on cross-examination whether he had not said that the officers of the Crown had offered him £20 to say that the cistern

(*k*) It was also contended that the deposition was not a legal deposition at all; but no opinion was pronounced on this objection.

(*kk*) R. *v.* Christopher, 1 Den. 536; 19 L. J. M. C. 103. In the course of the argument Maule, J., said: 'Tasker usurped an authority. He can no more exclude parol evidence of the witness's statement by reducing it to writing than any one present at a seditious meeting can exclude parol evidence of words there spoken by choosing to make a memorandum of them.'

(*l*) *Ante*, p. 2312.

had been used, and he denied having said so; it was held that the evidence was inadmissible to prove that he had said so; for the contradiction would be on a matter wholly irrelevant, and would in no way affect the character of the witness (*m*).

Where on a trial for rape the prisoner called a witness, who stated that he could not speak English, and was accordingly sworn and examined in Irish, through an interpreter, and on cross-examination he again denied that he could speak English, and he also denied that he had spoken in English to two girls within the last few days, and these girls were called, and proved that he had so spoken to them in English. Upon a case reserved, it was held that the evidence of these girls ought not to have been admitted (*n*). But where a woman, who was the only witness to prove an abominable offence, swore that she did not know the prisoner previously, evidence was admitted that they knew each other well, and were, in fact, intimately acquainted (*o*).

Upon a trial for murder in Ireland, a witness identified the prisoner, and was cross-examined as to whether he had not stated that the prisoner was not the man. This he denied. The prisoner called A. and B. to prove that the witness had said to them that the prisoner was not the man. The prosecution were allowed to call C. and D., who were present at the alleged conversation with A. and B., to contradict them, and support the witness; but in the same case, a police constable having stated that a witness who identified the prisoner had previously told him that he could not identify him, and having said on cross-examination that he had reported this to his superior officers, May, C.J., refused to allow the superior officers to be called to rebut this statement (*p*).

Where in an action on a joint and several promissory note made by the father and grandfather of the defendant, who was sued as the administrator of his grandfather, the defence was that the plaintiff had forged the note in question, and also another note, in order to cover the forgery of the first note, and a charge had been preferred against the

(*m*) A. G. *v.* Hitchcock. 1 Ex. 91; 16 L. J. Ex. 259. Pollock, C.B., said: 'The test whether the matter is collateral or not is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence—if it have such a connection with the issue that you would be allowed to give it in evidence—then it is a matter on which you may contradict him. [But this seems to be much too narrow a rule, and so said O'Brien, J., in R. *v.* Burke, *infra*.] If you ask a witness whether he has not said so and so, and the matter he is supposed to have said, would, if he had said it, contradict any other part of his testimony, then you may call another witness to prove that he had said so, in order that the jury may believe the account of the transaction which he gave to that other witness to be the truth, and that the statement he makes on oath in the witness box is not true (more accurately, in order that the jury may disbelieve or doubt the statement of the witness). It must be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness's testimony; and if it is neither the one nor the other of these, it is collateral to, though in some sense it may be considered as connected with, the subject of inquiry.' The editor has inserted the parts between brackets. C. S. G.

(*n*) R. *v.* Burke, 8 Cox, 44 (Ir.) Three judges thought the evidence rightly received.

(*o*) R. *v.* Dennis, 3 F. & F. 502. The admissibility of the evidence was not disputed, and Byles, J., left it to the jury in favour of the prisoner.

(*p*) R. *v.* Whelan, 8 L. R. Ir. 314: 14 Cox, 595. The proper test appears to be whether the evidence is relevant or irrelevant, and the question is not one merely for the discretion of the judge and therefore it would seem that the latter ruling of May, C.J., cannot be supported. See R. *v.* Shaw, 16 Cox, 503.

plaintiff for the forgery before the magistrates, but dismissed; the defendant was examined as a witness, and was asked on cross-examination whether his father had not, after the charge was preferred against the plaintiff, said in his presence that 'he was sorry he had forgotten that he had signed two notes.' The defendant answered in the negative. It was held that the plaintiff's counsel could not call a witness, in whose presence the father had made the statement, for the purpose of shewing that the father had made the statement, and that the defendant had heard it; for the issue sought to be raised was purely collateral (*q*). So where in an action for an assault on the plaintiff's wife, she swore that the assault was of an indecent character; the defendant denied it, and on cross-examination denied other indecent assaults on some young persons; and evidence on the part of the defendant was tendered to disprove these imputations, which was objected to unless evidence was admitted in support of them; it was held that such evidence on the one side or the other was inadmissible, as the matter inquired into was quite collateral to the issue to be tried (*r*).

Partiality.—It is allowable to ask a witness in what manner he stands affected towards the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him, and prevent him from having an unprejudiced state of mind, and whether he has not used expressions imputing that he would be revenged on some one, or that he would give such evidence as might dispose of the cause in one way or the other; and if he denies it, evidence may be given as to what he said, not with the view of having a direct effect, but to shew what is the state of mind of that witness, in order that the jury may exercise their opinion as to how far he is to be believed (*s*). In an action on a promissory note (in which the defence appears to have been that the note was forged), the female servant of the plaintiff, who was one of the attesting witnesses to the note, was asked on cross-examination whether she did not constantly sleep in the same bed with the plaintiff, which she denied. Coleridge, J., held that a witness might be called by the defendant to contradict her; as the question was whether the witness had contracted such a relation with the plaintiff as might induce her the more readily to conspire with him to support a forgery; just in the same way as if she had been asked if she was the sister or daughter of the plaintiff, and had denied that. But if the question had been whether the witness had walked the streets as a common prostitute, that would have been a collateral issue, and, if she had denied it, she could not have been contradicted (*t*).

If the misconduct imputed relates to the subject of inquiry, as, if a witness for the Crown is asked whether he had not said that he would

(*q*) Palmer *v.* Trower, 8 Ex. 247. Alderson, B., said: 'It is a statement made in the presence of the defendant of a fact not within his own knowledge; if it had been made in the presence of the grandfather, who is represented by the defendant, the case might have been different.'

(*r*) Tolman *v.* Johnstone, 2 F. & F. 66, Cockburn, C.J., after consulting the other judges of Q.B.

(*s*) A. G. *v.* Hitchcock, 1 Ex. 93; 16 L. J. Ex. 259, Pollock, C.B.

(*t*) Thomas *v.* David, 7 C. & P. 350. In Melhuish *v.* Collier, 15 Q.B. 883, Coleridge, J., said: 'The principle I went upon in Thomas *v.* David was that the fact was one that the defendant might have proved in chief.'

be revenged on the prisoner, and would soon fix him in gaol (*u*), or whether he had not made declarations to procure persons corruptly to give evidence in support of the prosecution (*v*), evidence may be called to contradict him if he denies the words or declarations imputed to him. Thus where on an indictment for an indecent assault on a girl, another girl denied in cross-examination that two letters were in her handwriting; and on the part of the prisoner, the suggestion was that the charge was the result of a conspiracy among the children and their parents; it was held that it might be proved that these letters were in the handwriting of the girl, and that the letters might be read; but that they were only evidence for the purpose of detracting from the credit of the girl (*w*).

Where on one trial the jury were discharged, and on the second trial a witness admitted in cross-examination that she had been in England and had prosecuted for a felony; it was held that it might be proved that on the former trial she had denied that she had ever been in England or had prosecuted there; for, no matter whether the question was relevant or irrelevant to the present issue, it went to the consistency of her evidence on the two trials (*x*).

If the witness declines to answer a question proposed to him, on the ground that the answer might tend to criminate him, and the court is of opinion that he cannot be compelled to answer, the adverse party has also, in this instance, his subsequent opportunity of tendering his proof of the matter, which is received, if by law it ought to be received (*y*).

Where a witness said on cross-examination that he had no recollection of a certain declaration one way or the other, without expressly denying it; Tindal, C.J., held that a person could not be called to prove the declaration; saying that he had never heard such evidence admitted in contradiction, except when the witness had expressly denied the declaration (*z*). But in a later case where a witness neither admitted nor denied a verbal statement relevant to the matter at issue; Parke, B., held that evidence was admissible to shew that the witness had made such a statement (*a*). This matter appears to be settled by sect. 4 of Denman's Act (*ante*, p. 2312) (*b*).

(*u*) R. *v.* Yewin, 2 Camp. 638.

(*v*) Queen Caroline's case, 2 B. & B. 311.

(*w*) R. *v.* M'Gavaran, 6 Cox, 64, Williams, J. The letters spoke of sticking to the charge made against the prisoner, but there was no proof that they had been delivered to the person to whom they were addressed.

(*x*) R. *v.* Rorke, 6 Cox, 196 (Ir.), Lefroy and Monahan, C.JJ.

(*y*) Queen Caroline's case, 2 B. & B. 313, 314.

(*z*) Paine *v.* Beeston, 1 M. & Rob. 20.

(*a*) Crowley *v.* Page, 7 C. & P. 789. He said: 'Evidence of statements by witnesses on other occasions relevant to the matter at issue, and inconsistent with the testimony given by them on the trial, is always admissible, in order to impeach the value of that testimony; but it is only such statements as are relevant that are admissible, and in order to lay a foundation for the admission of such contradictory statements, and to enable the witness to explain them, and, as I conceive, for that purpose only, the witness may be asked whether he ever said what is suggested to him, with the name of the person to whom or in whose presence he is supposed to have said it, or some other circumstance sufficient to designate the particular occasion. If the witness, on the cross-examination, admits the conversation imputed to him, there is no necessity for giving other evidence of it; but if he says he does not recollect, that is not an admission, and you may give evidence on the other side to prove that the witness did say what is imputed, always supposing the statement to be relevant to the matter at issue. This has always been my practice, and if it were not so you could never contradict a witness who said he could not remember.'

(*b*) See R. *v.* Whelan, 8 L. R. (Ir.) 314; 14 Cox, 595.

The credit of a witness may be impeached, not only by giving evidence to prove statements made by him at variance with his testimony, but by calling witnesses to prove his declarations and acts touching the subject matter of inquiry (*c*). The rules above stated, as to the necessity of a previous cross-examination of the witness whom it is proposed to discredit, apply equally to this method of discrediting him. So that if it is intended to offer evidence of former declarations of a witness, or of acts done by him, though not with a view to contradict his statement upon oath in examination in chief, but with a view of discrediting him as a corrupt witness; in this case also the witness should be first cross-examined as to such declarations, or acts (*d*); for an opportunity must be afforded the witness of explaining his conduct before evidence can be adduced to impeach his credit by proof of the fact. Thus where the witness's moral character is relevant to the issue, expressions of the witness may be proved without putting them to him in cross-examination, if they tend merely to disgrace the witness by shewing that he has made unbecoming declarations; but even if they be of such a nature, they must be put to him in cross-examination, if they tend likewise to contradict some part of the witness's evidence. Therefore in an action for seducing the plaintiff's daughter, which the daughter proved, it was held that the defendant could not give evidence that she had talked of another person as her seducer and the father of her child, unless she was first asked in cross-examination whether she ever used those expressions (*e*).

Attacking Character.—A witness may in cross-examination, or if adverse (by leave of the judge), be asked questions the answers to which may tend to criminate or degrade him. But it is his privilege (*f*) to object and refuse to answer a question if the answer would tend to expose him to criminal or penal consequences (*g*) in respect whereof he has not been sued, prosecuted, acquitted or pardoned (*h*) (see *post*, p. 2331), or the proceeding is statute barred (*i*). The rule as to criminating questions does not apply to convictions, the penal consequences having already been incurred. But a defendant who has given evidence on his own behalf may not be cross-examined as to previous convictions except in the cases specified in the Criminal Evidence Act, 1898 (61 and 62 Vict. c. 36), *ante*, p. 2271.

Convictions.—By the Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 6, 'a witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal parts) 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

(*c*) Queen Caroline's case, 2 B. & B. 311.

(*d*) 2 B. & B. 311.

(*e*) Carpenter *v.* Wall, 11 A. & E. 803.

(*f*) R. *v.* Coote, L. R. 4 P. C. 599; 42 L. J. P. C. 45. R. *v.* Kinglake, 11 Cox, 499. It is not the privilege of the party who calls him to take the objection.

(*g*) *Vide* 14 & 15 Vict. c. 99, s. 3; *ante*, p. 2270.

(*h*) R. *v.* Boyes, 1 B. & S. 311; 30 L. J. Q. B. 302.

(*i*) Roberts *v.* Allat, M. & M. 192. Att.-Gen. *v.* Cunard, 4 T. L. R. 177.

by the deputy or clerk of such 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' (*j*).

This enactment is qualified by the Criminal Evidence Act, 1898 (*k*), as to the cross-examination of an accused person who elects to give evidence for the defence.

Degrading, but not Criminating, Questions.—As to questions which are asked, upon cross-examination, for the purpose of throwing discredit on a witness, and which tend merely to disgrace and degrade him, without subjecting him to a penalty or criminal charge, the authorities are conflicting on the point whether he is compellable to answer them (*l*). The older authorities are against the view that he must answer. In *Peter Cook's case* (*m*), on an indictment for high treason, the prisoner, in order to challenge a juryman, asked him if he had not said he was guilty and would be hanged. Treby, C.J., overruled the question, and said: 'You may ask upon the *voire dire* (*n*) whether he has any interest in the cause; nor shall we deny you liberty to ask, whether he be fitly qualified according to law by having a freehold of sufficient value; but that you may ask a juror or witness every question that will not make him *criminous*, that is too large. Men have been asked, whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny, but they have not been obliged to answer; for, although their answer in the affirmative will not make them criminal, or subject them to punishment, yet they are matters of infamy, and if it be an infamous thing, that is enough to preserve a man from being bound to answer. A pardoned man is not guilty; his crime is purged. But merely for the reproach of it, it shall not be put upon him to answer a question, whereon he will be forced to forswear or disgrace himself. So persons have been excused from answering, whether they have been committed to Bridewell as pilferers or vagrants, &c.; yet to be suspected is only a misfortune and shame—no crime. The like has been observed in other cases of odious and infamous matters, which are not crimes indictable' (*o*).

So in R. *v.* Layer (*p*), the Court would not allow the witness to be examined on the *voire dire*, as to whether he had been promised a pardon or reward for swearing against the prisoner; and Pratt, C.J., said, 'If the objection goes to his credit, must he not be sworn, and his credit left to the jury? No person is to discredit himself, but is always taken to be

(*j*) This section applies both to criminal and civil proceedings. The rule laid down as to civil proceedings by s. 25 of the Common Law Procedure Act, 1854, which was repealed in 1892 (S. L. R.). As to the practice before 1854, see Henman *v.* Lester, 12 C. B. N. S. 776; 31 L. J. C. P. 370; and Queen Caroline's case, 2 B. & B. 288, 292.

(*k*) *Ante*, p. 2271.

(*l*) Taylor, Ev. (10th ed.) s. 1459.

(*m*) 13 St. Tr. 311.

(*n*) *Ante*, p. 2262.

(*o*) In R. *v.* Parker, 1 Cox, 76, after referring to this opinion, Creswell, J., said: 'I think it is desirable that some uniform rule of practice should be laid down by the judges on this point since there are so many contradictory dicta respecting it.' In that case he ruled the question whether a witness had been convicted of crime was of an infamous nature, and need not be answered. Such cases are now governed by 28 & 29 Vict. c. 18, s. 6.

(*p*) 16 St. Tr. 93.

innocent till it appear otherwise.' In R. *v.* Freind (*q*), a trial for high treason, it was held that a witness could not be asked whether he was a Roman Catholic, because he might subject himself to penalties by his answer. Treby, C.J., said: 'No man is bound to answer any questions that will subject him to penalties or to infamy.' In R. *v.* Lewis (*r*), which was an indictment for an assault, the prosecutor, in the course of cross-examination, was asked if he had not been in the House of Correction in Sussex, and Lord Ellenborough, C.J., interposed, and said, that that question should not be asked; that it was formerly settled by the judges, among whom were Treby, C.J., and Powell, J., both of whom were great lawyers, that a witness was not bound to answer any question, the object of which was to degrade, or render him infamous. In M'Bride *v.* M'Bride (*s*), an action of *assumpsit*, counsel for the defendant was proceeding to cross-examine a witness for the plaintiff as to her living in a state of concubinage with the plaintiff; Lord Alvanley interposed, and said he thought questions as to general conduct might be asked, but not such as went immediately to degrade the witness. His lordship added: 'I do not go so far as others may. I will not say a witness shall not be asked to what may *tend* to disparage him; that would prevent an investigation into the character of a witness, which it may often be of importance to ascertain. I think those questions only should not be asked which *have a direct and immediate* effect to disgrace or disparage the witness.'

In R. *v.* O'Coigley (*t*), a trial for high treason, where a witness was asked, on cross-examination, how many informations he had laid, for the purpose of throwing an imputation on him as a common informer, whereupon he appealed to the protection of the Court: it was held that the question should not be repeated or followed up by another.

In R. *v.* Hodgson (*u*), an indictment for a rape upon Harriet Halliday, the prosecutrix was cross-examined by the prisoner's counsel, who put these questions to her: 'Whether she had not before had connection with other persons?' and 'Whether she had not before had connection with a particular person (named)?' It was objected that she was not obliged to answer these questions; and Wood, B., allowed the objection, on the ground that she was not bound to answer them, as they tended to criminate and degrade her. And, on a case reserved, it was held that the objection was properly allowed (*v*).

Much that was said in these cases related to criminating questions. The decisions are by 28 & 29 Vict. c. 18, s. 6, *ante*, p. 2321, rendered no longer of authority as to convictions of the witness. And the tendency of modern practice is to compel the witness to answer questions which suggest discredit or degradation, but not liability to prosecution, if, in the opinion of the judge, the question has any real bearing on the credibility of the witness (*w*).

Even where a witness is not compellable to answer degrading questions,

(*q*) 13 St. Tr. 1.
(*r*) 4 Esp. 225.
(*s*) 4 Esp. 242.
(*t*) 26 St. Tr. 1191, 1353.
(*u*) R. & R. 211. But see R. *v.* Barker, 3 C. & P. 589.
(*v*) See R. *v.* Holmes, L. R. 1 C. C. R. 334: 41 L. J. M. C. 12. R. *v.* Pitcher, 1 C. & P. 85.
(*w*) R. *v.* Edwards, 4 T. R. 440. Cundell *v.* Pratt, M. & M. 108. Taylor, Ev. (10th ed.) ss. 1460, 1461, 1462. Frost *v.* Holloway, MS. 2 Phill. Ev. 428.

the questions may legally be asked (*x*). In Rose *v.* Blakemore (*y*), where a witness for the plaintiff refused to answer a question, whether he had published a particular handbill, on the ground that he had been threatened with a prosecution for the publication; and the counsel for the defendant, in his address to the jury, put it to them that the witness really must have been concerned in the publication, for that a denial of it, if he could deny it, would not injure him; Abbott, C.J., interposed and said, that no such inference ought to be drawn, and that there was an end of the protection of a witness, if a demurrer to the question were to be taken as an admission of the fact inquired into. And in Lloyd *v.* Passingham, Lord Eldon expressed a similar opinion (*z*).

If the question is one tending to degrade, and the witness answers it, the cross-examining party must be satisfied with the answer, and will not be allowed to falsify it by evidence (*a*); if the question is merely collateral to the point in issue (*b*); for if it is relevant to it, and the witness denies the thing imputed, evidence may be called to contradict. Thus where a witness for a prosecution in larceny had been asked, in cross-examination, whether he had not been charged for robbing his master, and whether he had not afterwards said he would be revenged of him, and would soon fix him in gaol, and had denied both; Lawrence, J., ruled, that as to the former, his answer must be taken as conclusive; but that as the words were material to the guilt or innocence of the prisoner, evidence might be adduced that they were spoken by the witness (*c*).

On an indictment, which was prosecuted by the attorney-general, a police-officer, on cross-examination, stated that he had attended a meeting by the direction of the commissioners of police, and that his instructions were to attend the meeting and report, and that he attended the meeting and reported; he was asked whether he attended as a spy, and the question was objected to. Campbell, C.J., said: 'I am of opinion that it is irregular, not on the ground that the witness is called on to criminate himself, and may refuse to answer, but on the ground that he is called upon to draw an inference from the facts. It will be open to the counsel for the prisoner to denominate the witness a spy hereafter if he think fit; but I am of opinion that he cannot ask the witness, "Did you go as a spy?"' (*d*).

It makes no difference in the right of a witness to protection from

(*x*) Taylor, Ev. (10th ed.) s. 1436.

(*y*) Ry. & M. 382. See R. *v.* Watson, 2 Stark. (N. P.) 157: 32 St. Tr. 1.

(*z*) 16 Ves. 59, 64: 33 E. R. 906. See the note of the reporters in Rose *v.* Blakemore, in which doubts are ably expressed, with deference to such high authorities, whether these *dicta* be not inconsistent with the general principles on which the rules concerning the right of witnesses to refuse an answer to questions have been established.

(*a*) R. *v.* Watson, 2 Stark. (N. P.) 149, 151, 158: 32 St. Tr. 1. R. *v.* Clarke, 2 Stark. (N. P.) 242, Holroyd, J. Harris *v.* Tippett, 2 Camp 637, Lawrence, J. In Harris *v.* Tippett the witness being called for the defendant, was asked whether he had not attempted to dissuade a witness examined for the plaintiff from attending the trial. The question, therefore, it might be argued, was not altogether collateral, but so connected with the cause that other witnesses might be called to contradict him. See Queen Caroline's case, 2 B. & B. 311, and the cases where a prosecutrix in rape has been contradicted by other witnesses, *ante*, p. 2318.

(*b*) For the Court will not try a collateral issue as to the conduct imputed to the witness.

(*c*) R. *v.* Yewin, 2 Camp. 638; see also Queen Caroline's case, 2 B. & B. 313, and *ante*, p. 2320.

(*d*) R. *v.* Barnard, 1 F. & F. 240.

being compelled to answer incriminating or degrading questions that he does not make the claim until he has answered in part. He is entitled to protection at whatever stage of the examination he chooses to claim it (*e*).

(c) *Re-examination.*

The object of re-examining a witness being merely to explain the facts stated by the witness on cross-examination, or to restore his credit so far as it has been shaken by cross-examination (*f*), he cannot be re-examined as to any facts unconnected with it; but if any material question has been omitted in the examination in chief, the practice is to suggest it to the court, who will put it to the witness, or decline to do so, at its discretion (*g*).

After a witness has been cross-examined respecting his former statements and declarations, for the purpose of affecting his credit, there is a right to re-examine him so far as to give him an opportunity of explaining such statements and declarations. Thus if that which the witness has stated in answer to the question on his cross-examination arose out of the inquiries of the person with whom he had the conversation, the witness may be asked in re-examination what those inquiries were (*h*). And he may also be asked what induced him to give to that person the account which he has stated in the cross-examination (*i*).

But this, it should seem, is the limit of such a re-examination. Abbott, C.J., in delivering his opinion in Queen Caroline's case, said: 'I think the counsel has a right, upon a 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 suited to the purpose of explaining either the expressions or the motives of the witness' (*j*).

He also said: 'I distinguish between a conversation which a witness may have had with a party to the suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the subject-matter of the suit, are in themselves evidence against him in the suit and, if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination; provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as

(*e*) R. *v.* Garbett, 1 Den. 236, 2 C. & K. 474, which overrules numerous contrary *dicta* and decisions, *e.g.*, East *v.* Chapman, M. & M. 46. Dixon *v.* Vale, 1 C. & P. 278. See Taylor, Ev. (10th ed.) p. 1064, note 3.

(*f*) In a colonial case, where, on the charge of sodomy with a boy, the boy's mother had in cross-examination stated that she had not told her husband of the condition in which she had found the boy, it was held that the judge or counsel for the Crown might properly ask the mother to explain the reason for not telling the father, as the answer unexplained would tend to impeach her credit. R. *v.* Kelly [1907], 7 N. S. W. State Rep. 518.

(*g*) Taylor, Ev. (10th ed.) s. 1474.

(*h*) 2 B. & B. 295.

(*i*) Ibid.

(*j*) 2 B. & B. 297.

evidence against a party, without giving to the party, at the same time, the benefit of the entire residue of what he said on the same occasion. But the conversation of a witness with a third person is not in itself evidence in the suit against any party to the suit. It becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations, and by the motive under which he made them; but when once all which had constituted the motive and inducement, and all which may shew the meaning of the words and declarations has been laid before the court, the court becomes possessed of all which can affect the character or credit of the witnesses, and all beyond this is, in my opinion, irrelevant and incompetent' (*k*).

But the distinction thus drawn was after full consideration overruled, and a safer and more intelligible principle adopted, *viz.* that re-examination is to be confined to shewing the true colour and bearing of the matter elicited by cross-examination, and that new facts or new statements, not tending to explain the witness' previous answers, ought not to be admitted (*l*). Thus where an accomplice being cross-examined with a view to throw discredit on his testimony, confessed that he had committed two robberies the same night as the one charged in the indictment, and on re-examination it was proposed to ask him as to the particular circumstances attending those robberies, and the persons in whose company they were committed, in order to shew that the prisoners were the persons; Littledale, J., refused to allow it, observing that the cross-examination having been only with a view to the witness' discredit, it was not competent to the counsel for the prosecution, on re-examination, to ask questions not arising out of such cross-examination (*m*), in order to criminate the prisoners.

(d) *Recalling Witnesses.*

Though counsel for the prosecution had closed his case, and counsel for the defence has taken an objection as to a defect in the evidence, the judge is at liberty to make any further inquiry of the witnesses he thinks fit, in order to answer the objection (*n*). In R. *v.* Remnant (*o*), on a case reserved for the opinion of the judges, none of them seemed to have any doubt but that it was competent and proper for the judge to do so.

It is reported to have been ruled by Lord Kenyon (*p*), that where a witness has been examined by one party, and cross-examined by the

(*k*) 2 B. & B. 297, 298. The other judges except Best, J., agreed with the Chief Justice; but the Lord Chancellor and Lord Redesdale were of the same opinion with Best, J., and differed from the other judges, inasmuch as they thought that the entire conversation ought to be admitted, not as evidence of any fact that might be asserted in the course of it, but solely and simply as explanatory of the witness's motives, and as setting his character and credit in a fair, full, and impartial point of view.

(*l*) In Prince *v.* Samo, 7 A. & E. 627, an action for malicious arrest, a witness called for the plaintiff stated on cross-examination that the plaintiff had instituted a prosecution for perjury against a witness examined against him in the action in which he had been arrested, and that the plaintiff had said that he had been remanded by the Insolvent Debtors Court. On his re-examination it was proposed to ask him whether the plaintiff had not also, on the trial of the indictment, sworn that the advance in question was a gift and not a loan; but Denman, C.J., ruled that the question could not be put, and the Court held that the ruling was right.

(*m*) R. *v.* Fletcher, 1 Lew. 111.

(*n*) Taylor, Ev. (10th ed.) s. 1477.

(*o*) R. & R. 136.

(*p*) Dickinson *v.* Shee, 4 Esp. 67.

other, and the latter has afterwards occasion to call the same witness back as part of his own case, the privilege of cross-examination continues, and leading questions may be put to him. But the mode of examination under such circumstances is now regulated according to the disposition and temper manifested by the witness, by the discretion of the presiding judge (*q*).

Where on a trial for burglary, there was no counsel for the Crown, Taunton, J., after the examination of witnesses to facts on the part of the prisoners, recalled a witness for the prosecution, and then, addressing prisoner's counsel, inquired if he had any question to ask upon it, saying that, although he as judge had recalled the witness for the purposes of justice, he thought it right that prisoner's counsel should have the opportunity of cross-examining the witness again (*r*).

(e) *Rebutting Evidence.*

The question whether any particular evidence ought to be admitted in reply, after the close of the case for the defence, rests in the discretion of the court, which will be exercised with a view to attain the ends of justice according to the circumstances of the case (*s*).

The general rule is, that the evidence in reply must bear directly or indirectly upon the subject matter of the defence, and ought not to consist of new matter unconnected with the defence, and not tending to controvert or dispute it (*t*). This rule is made for the purpose of preventing confusion, embarrassment, and waste of time; but it rests entirely in the discretion of the judge whether it ought to be strictly enforced or remitted, as he may think best for the discovery of truth and the administration of justice (*u*).

Where on an indictment for larceny, the case for the Crown rested merely on the fact of the stolen property being found in the house of the prisoner soon after it was lost, and a witness for the defence proved that the prisoner bought the property from a third person, who was called by the counsel for the Crown to prove not only that the prisoner did not buy the property of him, but that he saw the prisoner steal it; it was held that his evidence was only admissible as far as it went to destroy the case set up on the part of the prisoner, that is, to shew that the prisoner did not buy the property of him (*v*). So where the defence of the prisoners was an *alibi*, *viz.* that they were at a public-house, a considerable distance from where the offence was committed, and it was proposed on the part of the Crown to prove in reply that the prisoners were seen near the spot at which the robbery was committed, and that, therefore, they could not have been in the public-house; Taunton, J., rejected the evidence, saying: 'Proving that the parties were near the place at which the offence was committed is evidence in chief, and not evidence in reply. Whatever is a confirmation of the original case cannot be given as evidence in reply; and the only evidence which can be given as evidence in

(*q*) See Bastin *v.* Carew, Ry. & M. 127, Abbott, C.J.

(*r*) R. *v.* Watson, 6 C. & P. 653.

(*s*) Wright *v.* Willcox, 9 C. B. 650. Doe *v.* Bower, 15 Q.B. 805.

(*t*) Taylor, Ev. (10th ed.) s. 301.

(*u*) Ibid.

(*v*) R. *v.* Stimpson, 2 C. & P. 415, Garrow, B. In Phill. Ev. 410, it is said: 'This was carrying the rule very far, as the fact of seeing the prisoner steal the goods would be strong evidence that he did not buy them.'

reply is that which goes to cut down the case on the part of the defence, without being any confirmation of the case on the part of the prosecution' (*w*). But where on a similar indictment a similar defence was set up, Alderson, B., permitted a person who had been robbed on the road near the place where the prosecutor was robbed, to prove not only that he saw the prisoner there, but the whole circumstances under which he met the prisoner (*x*). Where in an action for an injury occasioned by the defendant through negligently driving a carriage, the plaintiff's witnesses described the carriage as having been driven by the defendant when the accident occurred at Layton, and other witnesses spoke to the defendant having been seen in the neighbourhood of Layton about the time in question; and the defendant called witnesses to prove that, at the time in question, he was at Richmond, and the plaintiff then tendered other witnesses to shew that the defendant was not at Richmond, but at Layton; Denman, C.J., held that it would perhaps have been more correct had the plaintiff, in the first instance, called the witnesses then tendered, but he did not think that he could, even at this period of the case, exclude the evidence from the jury, which certainly went to contradict the defendant's *alibi* (*y*). Where on an indictment for horse stealing the defence was an *alibi*, which went to shew that the prisoner, on March 7 and 8, was at places many miles from the place where the horses were stolen, and on March 9 returned home; Tindal, C.J., permitted a witness to be called to prove that the prisoner, when taken into custody on March 10, said that he had been at home ever since the Wednesday before (*z*).

Where on a trial for robbery the prosecutor proved that he had lost a large quantity of blood from his head, and that his assailant had put his arm round his neck, and the prisoner's coat appeared to have been recently stained with blood on the collar and sleeve, and the prisoner called a witness, who swore that on the day before the robbery he had observed that the prisoner's coat was bloody, and that the prisoner had told him the blood had flowed from a hare which he had carried over his shoulder; it was held that the statement of the prisoner before the magistrate, in which he had given a different account of the marks of blood, was admissible in reply to the evidence given by the prisoner (*a*).

Where the plaintiff brought an action against the defendant for imprisoning her on a false charge of stealing chaff, which was found in her drawer, and two witnesses called by the plaintiff stated that they had sold her chaff similar to that found in her drawer, and the defendant's witnesses pointed out marks shewing that the chaff found in the plaintiff's drawer corresponded with that belonging to the defendant, and mentioned in particular that linseed was mixed with the chaff, which was said to be

(*w*) R. *v.* Hilditch, 5 C. & P. 299.

(*x*) R. *v.* Briggs, 2 M. & Rob. 199. 'R. *v.* Hilditch does not appear to have been cited. It may have been thought that the evidence of the second robbery was not essential on the part of the prosecution until the *alibi* was set up, and that that rendered the proof of the second robbery essential. See the cases collected *ante*, p. 2101, *et seq.*' C. S. G.

(*y*) Briggs *v.* Aynsworth, 2 M. & Rob. 168. See a learned note to this case by the reporters. And see R. *v.* Frost, 9 C. & P. 159; 4 St. Tr. N. S. 85.

(*z*) R. *v.* Findon, 6 C. & P. 132.

(*a*) R. *v.* White, 2 Cox, 192. Pollock, C.B., after consulting Coleridge, J.

unusual; it was held that the plaintiff might prove in reply that linseed mixed with chaff had been previously sent to the plaintiff (*b*).

Where counsel for the Crown has, *per incuriam*, omitted to put in a piece of evidence before commencing his reply, and the course of justice might be interfered with if the evidence were not given, the Court may permit the evidence to be given (*c*).

(f) *Impeaching Witnesses Character by Direct Proof.*

The credit of a witness may be impeached by proof of his general character (*d*); general evidence only of bad character, and not evidence as to particular facts, can be employed (*e*); for if it were allowable to give evidence of particular collateral facts to affect the credit of the witness, the inquiry might branch out into an indefinite number of issues. Besides which, although a witness may be supposed capable of defending his general character, no man can come prepared to give an answer to particular facts, which might be sworn against him to impeach his character, without any previous notice given to him (*f*). The proper mode, therefore, of examining a witness, who is called to discredit a previous witness by proof of his character, is to ask whether the present witness has had the means of knowing the former witness' general character, and whether, from such knowledge, he would believe him on his oath (*g*). In order to answer this question negatively it is not necessary that the witness should ever have heard such person give evidence on oath, as the real question is whether the witness has such a knowledge of the person's character and conduct as enables him conscientiously to say that it is impossible to place any reliance on any statement that such person may make (*h*). It has been held upon an indictment for perjury that a witness for the defendant could not be asked whether, from having heard a witness for the prosecution give evidence on the trial of a former cause, he considered that the testimony of that witness could be relied on; nor whether he ever heard him commit perjury; nor whether he would not believe the witness because he had heard him commit perjury; as the witness must speak for the general character (*i*).

Where upon an indictment for stealing money it was opened on the part of the Crown that an accomplice and one Mercer would be called as witnesses; Park, J., both before and after those persons were called, allowed the prisoner's counsel to ask the other witnesses for the prosecution whether the accomplice and Mercer were not persons of very bad character (*j*).

The other party may cross-examine the witness against character as to his means of knowledge, and the grounds of his opinion, or may attack his general character (*k*).

(*b*) Wright *v.* Willcox, 9 C. B. 650.
(*c*) R. *v.* White, *ante*, p. 2328.
(*d*) Taylor, Ev. (10th ed.), ss. 349, 1470a.
(*e*) R. *v.* Watson, 2 Stark. (N. P.) 149: 32 St. Tr. 1. R. *v.* Rookwood, 13 St. Tr. 139. Bull. (N. P.) 296.
(*f*) Bull. (N. P.) 296.
(*g*) R. *v.* Brown, L. R. 1. C. C. R. 70: 36 L. J. M. C. 59.
(*h*) R. *v.* Bispham, 4 C. & P. 392, Parke, J., and Garrow, B.
(*i*) R. *v.* Hemp, 5 C. & P. 468. Denman, C. J.
(*j*) R. *v.* Nichols, 5 C. & P. 600.
(*k*) Taylor, Ev. (10th ed.), ss. 1472, 1473.

Where a witness on cross-examination stated that he had become bail for a witness who had been previously examined, and he believed it was on a charge of keeping a gaming-house; in order to prevent any impression being thereby made against the character of the previous witness, Gaselee, J., and Taunton, J., allowed the previous witness to be recalled, and asked whether the charge of keeping the gaming-house was in fact a true charge or not (*l*).

A party cannot bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross-examination, or by the testimony of other witnesses (*m*). Thus where a witness for one party asserts one thing, and a witness for the other party asserts the contrary, and direct fraud is not imputed to either, evidence to the good character of either witness is not admissible (*n*). But if the character of a witness has been impeached (although, according to some authorities, upon cross-examination only), evidence on the other side may be given in support of the character of the witness by general evidence of good conduct (*o*). Where two attesting witnesses to a will, impeached on account of fraud in procuring it, were dead, and a surviving attesting witness was called, and spoke to a fraudulent execution, evidence was admitted of the general good character of the deceased witnesses (*p*); and Lord Ellenborough, in approving of that decision, observed that if they had been alive they might have been produced, and their characters would have appeared on cross-examination; and being dead, justice required that an opportunity should be given of shewing what credit was to be given to their attestation (*q*). Whether in answer to proof of statements made by a witness in variance with his testimony at the trial, evidence may be given by the party who called the witness, that he affirmed the same thing on other occasions, and is still consistent with himself, is a point on which there are conflicting authorities (*r*). The better opinion seems to be that such evidence is not admissible, except in cases where counsel on the other side imputes a design to misrepresent from some motive of interest or relationship. In order to repel such imputations it may be proper to shew that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts (*s*). Thus where Neville was indicted for perjury committed on the trial of Barnes for setting fire to a rick, and Heming swore that Barnes was with him at a distance from the rick, but on cross-examination admitted that, on the trial for arson, he had given a

(*l*) R. *v.* Noel, 6 C. & P. 336.

(*m*) Bishop of Durham *v.* Beaumont, 1 Camp. 207. Taylor, Ev. (10th ed.) s. 1473.

(*n*) 1 Camp. 207.

(*o*) Taylor, Ev. (10th ed.) s. 1473. Bate *v.* Hill, 1 C. & P. 100. In R. *v.* Clarke, 2 Stark. (N. P.) 242, Holroyd, J., where the prosecutrix, upon an indictment for an attempt to commit a rape, having been cross-examined as to having been sent to the house of correction on a charge of theft, evidence of her subsequent good conduct was admitted in support of the prosecution. But see Dodd *v.* Norris, 3 Camp. 519.

(*p*) Doe *v.* Stephenson, 3 Esp. 284, Eldon, C.J. Doe *v.* Walker, 4 Esp. 50, Kenyon, C.J. Provis *v.* Reed, 5 Bing. 435.

(*q*) 1 Camp. 210.

(*r*) Gilb. Ev. 135. Bull. (N. P.) 294.

(*s*) 2 Phill. Ev. 445. 1 Stark. Ev. 253. Taylor, Ev. (10th ed.) s. 1474. See also the opinion expressed by Bayley, J., in Wiben *v.* Law, 3 Stark. (N. P.) 63. See also 'Hearsay,' *ante*, p. 2079.

different account, which tended to support the charge against Barnes; he said, however, that the day after the fire he had told the facts to Morgan, a constable, as he now stated them, and that he had been induced to make a false statement on the trial for arson; it was held that Morgan might be called to prove that Heming had made a statement to him the day after the fire for the purpose of setting up the witness, but that the particulars of the statement could not be asked by the counsel for the Crown (*t*).

Where in the course of a trial for rape a witness called by the prosecution stated in cross-examination that the prosecutrix had told her that the prisoner had hurt her with his finger, Day, J., after consulting Cave, J., allowed the counsel for the prosecution to ask the witness, in re-examination, if she had not told the prosecutrix's mother that the prosecutrix had said to her that the prisoner had had forcible connection with her (*u*).

Sect. VII.—Privilege of Witness not to answer certain Questions.

There are certain matters as to which a witness is privileged from answering, and to which the obligation of the witness to speak the whole truth does not extend.

1. **Conjugal Confidences.**—There is no power to compel one spouse to disclose communications made to him or her by the other spouse during the marriage (*v*).

2. **Professional Confidences.**—Communications received by professional men in professional confidence are to a certain extent privileged from disclosure by them. Medical practitioners in England are not privileged from disclosing confidential communications made to them by patients (*w*).

Ministers of Religion.—There is much authority for holding that there is no privilege to protect disclosures made to ministers of religion.

In R. *v.* Sparks (*x*), Buller, J., allowed a confession to be given in evidence which had been made by a Roman Catholic prisoner to a Protestant clergyman. But in du Barré *v.* Livette (*x*), Kenyon, C.J., said he should have paused before admitting such evidence. In Butler *v.* Moore (*y*), a confession to a Roman Catholic priest was held not to be privileged. In R. *v.* Hay (*z*), Hill, J., committed a Roman Catholic priest for refusing to state from whom he had received a stolen watch,

(*t*) R. *v.* Neville, 6 Cox, 69, Williams, J. cf. R. *v.* Coll, 24 L. R. Ir. 522, "where a witness was re-examined to shew that he had on the former occasion made a statement alleged then not to have been made by him. It was held not necessary to put in the depositions on which the statement, if made, should have been recorded.

(*u*) R. *v.* Little, 15 Cox, 319.

(*v*) 61 & 62 Vict. c. 36, s. 1 (*d*), *ante*, p. 2271 (criminal proceedings). 16 & 17 Vict. c. 83, s. 3; (civil proceedings). Taylor, Ev. (10th ed.) s. 909A. The old cases prevented a wife even after divorce *a vinculo* from giving evidence against her husband as to matters which happened during coverture. Monroe *v.* Twisleton, Peake, Ev. Appendix. Aveson *v.* Kinnaird, 6 East, 192, Ellenborough, C.J., "So a widowe annot be called by the defendant to disclose conversations between herself and her late husband, in an action by his executors. Doker *v.* Hasler, Ry. & M. 198, ruled by Best, C. J. But see Beveridge *v.* Minter, 1 C. & P. 364, and *ante*, p. 2022.

(*w*) R. *v.* Gibbons, 1 C. & P. 97. Duchess of Kingston's case, 20 St. Tr. 355, 572. Wilson *v.* Rastall, 4 T. R. J. 53.

(*x*) Cited in Du Barré *v.* Livette, Peake 109 (3rd ed.): 4 T. R. 756.

(*y*) McNally, Ev. 253 (Ir.).

(*z*) 2 F. & F. 4.

which he stated he had received in connection with the confessional. But the priest had not been asked to disclose anything that had been disclosed to him in the confessional. In Broad *v.* Pitt (*a*), Best, C.J., after recognizing this decision, said: 'I, for one, will never compel a clergyman to disclose communications made to him by a prisoner, but if he chooses to disclose them I shall receive them in evidence.' In R. *v.* Griffin (*b*), the chaplain of a workhouse was called to prove certain conversations he had had with the prisoner as to injuries she had inflicted on her child, for whose murder she was being tried, when he visited her as her spiritual adviser; Alderson, B.: '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 any proper legal means of 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.' No case was cited.

Disclosures to gaol chaplains or other ministers of religion from contrition, remorse, or the like, are said not to fall within the class of confessions rendered inadmissible by inducement from a person in authority (*c*).

Lawyer and Client.—The law attaches so sacred an inviolability to professional communications between a client and his legal advisers, that as a principle of public policy such communications are not to be disclosed at any period of time, neither after their employment has ceased by dismissal or otherwise, nor after the cause in which they were engaged is entirely concluded (*d*). The privilege is subject to the limitation that no court can be called upon to protect communications which are in themselves part of criminal or unlawful proceedings (*e*), only those communications which pass between solicitor and client in professional correspondence and in the legitimate course of the professional employment of the solicitor are privileged; communications made to a solicitor by his client, although in professional confidence in the course of the professional employment of the solicitor, are not privileged from disclosure, if made before the commission of a crime, for the purpose of being guided or helped in the commission of it (*f*). The privilege of not being examined on such subjects is the

(*a*) 3 C. & P. 548.

(*b*) 6 Cox, 219.

(*c*) R. *v.* Gilham, 1 Mood. 186. See Taylor, Ev. (10th ed.) ss. 879, 916, *re* Keller, 22 L. R. Ir. 158, 160. Archb. Cr. Pl. (23rd ed.)

(*d*) Bullivant *v.* Att.-Gen. for Victoria [1901], A. C. 196. Greenough *v.* Gaskell, 1 My. & K. 98, and see Lord Say and Sele's case, 10 Mod. 41. Wilson *v.* Rastall, 4 T. R. 753, Buller, J. Sloman *v.* Herne, 2 Esp. 695. R. *v.* Withers, 2 Camp. 578. Parkhurst *v.* Lowten, 2 Swanst, 194, 221. Richards *v.* Jackson, 18 Ves. 474.

(*e*) Bullivant *v.* Att.-Gen. for Victoria [1901], A. C. 196.

(*f*) R. *v.* Cox and Railton, 14 Q.B.D. 153. This decision approves Russell *v.* Jackson, 9 Hare, 387; Gartside *v.* Outtram 26 L. J. Ch. 113, and overrules on this point Cromack *v.* Heathcote, 2 B. & B. 4; Doe *v.* Harris, 5 C. & P. 592; and R. *v.* Smith, 1 Phill. and Arn. Ev. 118. See also Annesley *v.* Earl of Anglesey, 17 St. Tr. 1139, 1226, 18 St. Tr. 1094. In *re* Postlethwaite, 35 Ch. D. 722, where a solicitor and his client were charged with fraud, a claim of privilege as to communications between them was disallowed; and the same rule was applied in Williams *v.* Zuebrada Rail. Co. [1895], 2 Ch. 751, where the solicitor was not alleged to be privy to the fraud.

privilege of the client, and not of the solicitor or counsel (*g*); and it never ceases. 'It is not sufficient,' said Buller, J. (*h*), 'to say that the cause is at an end; the mouth of such a person is shut for ever.' And it makes no difference that the client is not in any shape party to the cause before the Court (*i*).

The privilege is strictly confined to communications made to counsel and solicitors, or their clerks and intermediaries between them and the client (*j*). A person who acts as an interpreter (*jj*) or agent (*k*), between the solicitor and his client, or the solicitor's clerk (*l*), cannot be called on to reveal a confidential communication; for they stand precisely in the same situation as the solicitor himself, and are considered as his organs.

A banker (*m*), agent (*n*), steward, servant, or private friend, is bound to disclose a communication, however confidential (*o*). And where a clerk to the commissioners of the property-tax was required to prove

(*g*) 10 Mod. 41. Bull. (N. P.) 284. But if the client waives his privilege, the witness may be examined. Merle *v.* More, Ry. & M. 390. But the client is not considered as waiving it by calling his solicitor as a witness. 1 Phill. Ev. 163, citing Waldron *v.* Ward, Styl. 449. Vaillant *v.* Dodemead, 2 Atk. 524.

(*h*) Wilson *v.* Rastall, 4 T. R. 759. 'The first duty of a solicitor is to keep the secrets of his clients.' Taylor *v.* Blacklow, 3 Bing. (N. C.) 235, Gaselee, J. He ought, therefore, 'to consider his lips sealed with a sacred silence' as to all confidential communications, Tindal, C.J., ibid. And see Petrie's case and du Barré *v.* Livette, Peake, 78 case, cited 4 T. R. 756. A solicitor, therefore, who, without his client's consent, discloses a confidential communication, is 'guilty of a gross breach of a great moral duty,' per Vaughan, J., Taylor *v.* Blacklow, and is liable to an action for any injury that may arise from such disclosure. Ibid. Or he may be punished by the Court to which he belongs, admitted *arguendo*. Ibid. Two learned barons, however, in Hibberd *v.* Knight, 2 Ex. 11; 17 L. J. Ex. 119, expressed an opinion that if an attorney chose *voluntarily* to disclose a confidential communication, the Court would receive the evidence. These observations were merely *obiter dicta*, and seem to have arisen from an erroneous impression of the facts in Marston *v.* Downes, 6 C. & P. 381; 1 A. & E. 31. The former of these reports correctly states what occurred on the trial, and certainly the attorney did not volunteer any statement of the contents of any deed, and upon the observations in Hibberd *v.* Knight being cited in Newton *v.* Chaplin, 10 C. B. 356, Maule, J., said: 'I presume that the learned barons did not mean that the attorney may in all cases betray his own client.' The matter, however, seems to be set at rest by Cleave *v.* Jones, 7 Ex. 421, as it was there held that an attorney could not give in evidene on his own behalf a confidential communication in an action against his client. In Volant *v.* Soyer, 13 C. B. 231, 22 L. J. C. P. 83, Jervis, C.J., raised a doubt whether the Evidence Act, 1851 (14 & 15 Vict. c. 99), had not taken away the ground of objecting to the production of a document on the ground of its having been received professionally; but Maule, J., said that 'The right, which a client has always enjoyed, of being protected from a breach of professional confidence, remains the same. I think the protection still continues unimpaired, so far as regards the prohibition to the attorney to give evidence of the contents of, or to produce documents belonging to, his client.'

(*i*) R. *v.* Withers, 2 Camp. 578.

(*j*) Wilson *v.* Rastall, 4 T. R. 758. R. *v.* Duchess of Kingston, 20 St. Tr. 355. Where a witness had taken an oath to a prisoner that he would not reveal what the prisoner should tell him, Patteson, J., said: 'These oaths are very wrong and wicked, but still they are not binding, and every person, except counsel and attorneys, is compellable to reveal what they may have heard; and counsel and attorneys are only excepted because it is absolutely necessary, for the sake of their clients, that communications to them should be protected'; and admitted the confession. R. *v.* Shaw, 6 C. & P. 372.

(*jj*) Du Barré *v.* Livette, Peake 78; 4 T. R. 756.

(*k*) Parkins *v.* Hawkshaw, 2 Stark. (N. P.) 239.

(*l*) Taylor *v.* Forster, 2 C. & P. 195. See Webb *v.* Smith, 1 C. & P. 337.

(*m*) Lloyd *v.* Freshfield, 2 C. & P. 329. As to the production of bankers' books, *vide ante*, p. 2152.

(*n*) Slade *v.* Tucker, 14 Ch. D. 824.

(*o*) Vaillant *v.* Dodemead, 2 Atk. 524. Lord Falmouth *v.* Moss, 11 Price, 453. Wheeler *v.* Le Marchant, 17 Ch. D. 681; 50 L. J. Ch. 795.

the defendant to be a collector, and he objected, because he had taken an oath of office not to disclose what he should learn as clerk concerning the property-tax, except with the consent of the commissioners, or by force of an Act of Parliament, it was held that he was bound to give his testimony, and that the evidence which a witness was called upon to give in a court of justice was to be considered as an implied exception in the Act (*p*).

It has been held that a person consulted confidentially on the supposition of his being a solicitor, when in fact he is not one, is compellable to answer (*q*). And propositions which the solicitor of one party has been professionally entrusted to make to another party may be proved by another witness who was present when they were delivered (*r*). And a solicitor may be called upon by a plaintiff to state a conversation in which the defendant proposed a compromise to the plaintiff, although the witness attended on that occasion as solicitor for the defendant (*s*). So where the plaintiff and defendant went together to the plaintiff's attorney's office, and had a conversation in the presence of the attorney's clerk, it was held that this conversation was not a privileged communication, but might be proved by the clerk, and that a letter written by the clerk in consequence of instructions given by the defendant in the course of that interview was admissible, as that was an act done (*t*). So where an act is done in pursuance of a bargain between two parties and in the presence of the solicitors of each of them, the communication made by one party to his solicitor, relating to that act in the presence of the other party and his solicitor, is not privileged. The defendant, in the presence of his solicitor, and one Clark and his solicitor, Vallance, signed a note, and it was held that Vallance might prove that the note was given by the defendant to Clark in consideration of his withdrawing all opposition to the defendant's passing his last examination as a bankrupt (*u*). And communications made to a person, by profession a solicitor, but not employed as such in the particular business which is the subject of inquiry, are not privileged, though they may have been made confidentially (*v*).

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

(*q*) Fountain *v.* Young, 6 Esp. 113; *sed quære*, whether this would be so where the client has acted *bonâ fide* and without negligence.

(*r*) Gainsford *v.* Grammar, 2 Camp. 10.

(*s*) Griffith *v.* Davies, 5 B. & Ad. 502. Parke, J., said: 'This is not a confidential disclosure, but an open communication from one adversary to another, witnessed by the attorney of one party. In Gainsford *v.* Grammar, it was ruled that the Court might properly reject the attorney's evidence of what his client said to him, but not his statement of what he himself afterwards said to the opposite party.'

(*t*) Shore *v.* Bedford, 5 M. & G. 271.

(*u*) Weeks *v.* Argent, 16 M. & W. 817.

(*v*) Wilson *v.* Rastall, 4 T. R. 753, 760, and see *post*, p. 2342. In a trial at nisi prius at Westminster, an attorney who had drawn an agreement between a sheriff and his under-sheriff, being produced to prove a corrupt agreement between them, was not compelled to discover the matter. Holt, C.J., cited a case whereupon a covenant to convey as counsel shall advise, *et consilium non dedit advisamentum* being pleaded, conveyances made by the advice of a scrivener being tendered and refused, was allowed to be good evidence upon this issue; for a scrivener is a counsel to a man with whom he will advise, if he be instructed and educated in the way of practice, otherwise of a gentleman, parson, &c. Anon. [1693], Skin. 404. In Turquand *v.* Knight, 2 M. & W. 98, 6 L. J. Ex. 4, it appeared that Knight had applied to an attorney to procure him a loan of money, and it was contended that where an attorney was employed to raise money, that was not such an employment as brought him within the rule; and that here he was acting as a scriviner only. Lord Abinger, C.B.,

Where two parties employ the same solicitor, a communication by one to him in his common capacity is not privileged, but may be used by the other (*w*). And where a party employs a solicitor who is also employed by the other side, the privilege is confined to such communications as are clearly made to him in the character of his own solicitor (*x*).

The privilege of the client is not limited to cases where he has employed the solicitor in a suit or cause, pending or contemplated, but extends to all such communications as are made by him to the solicitor in his professional character and with reference to professional business (*y*).

In Cromack *v.* Heathcote (*z*), an attorney, to whom an application had been made to draw an assignment of goods, which he declined to do, was not allowed to disclose that circumstance, a question having arisen whether an assignment subsequently drawn by another attorney, was fraudulent. Richardson, J., said, that if an attorney were to be consulted on the title to an estate, he would not be at liberty to disclose any information thus communicated to him to the prejudice of his client. In Walker *v.* Wildman (*a*), Leach, V.-C., considered the protection to extend to every communication made by the client to his counsel or attorney or solicitor for professional purposes (*b*).

In Turquand *v.* Knight (*c*), Alderson, B., said: 'The rule seems to be correlative with that which governs the summary jurisdiction of the courts over attorneys. In *Ex parte* Aitken (*d*), that rule is laid down thus: "Where an attorney is employed in a matter wholly unconnected with his professional character, the Court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him; but where the employment is so connected with his professional character, as to afford a presumption that his character formed the ground of his employment by the client, there the Court will exercise this jurisdiction." So where the communication made relates to a circumstance so connected with the employment as a solicitor, that the character formed the ground of the communication, it is privileged from disclosure.' Thus communications made in relation to the sale and purchase of estates are protected; a solicitor, therefore, who has been employed in the purchase and sale of estates, cannot be asked as to a communication made to him by the party who employed him (*e*). So a solicitor who, being resorted to by a borrower to raise money for him, perused on the part of the

said: 'As to the point of this document being brought to him in the character of a scrivener, Lord Nottingham laid it down that he would not compel a scrivener to disclose the communications made to him.' Harvey *v.* Clayton, 2 Swanst. 221 (*n*).

(*w*) Baugh *v.* Cradocke, 1 M. & Rob. 182, Patteson, J. Cleve *v.* Powell, 1 M. & Rob. 228, Denman, C.J., saying: 'either party has a right to the disclosure.'

(*x*) Perry *v.* Smith, 9 M. & W. 681, Parke, B.; in which case it was held that the same attorney having been employed upon the sale of an estate by the vendor and purchaser, a communication from the purchaser of the attorney, asking him for time to pay the purchase money, was not privileged. See Griffith *v.* Davies, per Parke, J., *ante*, p. 2334, note (*s*).

(*y*) Greenough *v.* Gaskell, 1 My. & K. 98; 39 E. R. 618. Pearce *v.* Foster, 15 Q. B. D. 114. Phill. Ev. (7th ed.), 143.

(*z*) 2 B. & B. 4.

(*a*) 6 Madd. 47.

(*b*) From Brard *v.* Ackerman, 5 Esp. 120, and Robson *v.* Kemp, 5 Esp. 52, it appears that Ellenborough, C.J., was of the same opinion. These cases are qualified by the limitation laid down in R. *v.* Cox, 14 Q. B. D. 153, *ante*, p. 2332.

(*c*) 2 M. & W. 98.

(*d*) 4 B. & Ald. 47. See also *Ex parte* Yeatman, 4 Dowl. Pr. R. 304.

(*e*) Mynn *v.* Joliffe, 1 M. & Rob. 326, Littledale, J.

proposed lender the abstracts of the borrower, was not allowed to give evidence concerning them (*f*). But where a treaty had been entered into by B. with E. for the exchange of lands, and an abstract was handed by the attorney of E. to the attorney of B., and he compared it with the title deeds, and the attorney of B. on being called upon to produce the abstract stated that his client claimed to be entitled to the property under the contract of exchange, and that he held the abstract as part of the evidence of the contract, and had not applied to his client for leave to produce the abstract, but was ready to do so, if the judge thought he ought, and the judge answered that there appeared no sufficient reason why he should not, it was held that the abstract was properly produced (*g*).

A solicitor is not bound to produce, or to answer any questions concerning the nature or contents of, a writing entrusted to him professionally by his client; and the judge has no right to look at the writing to see if the objection to produce it or to disclose its contents be well founded or not; for the mere statement of the solicitor that he received the document from his client professionally is enough to protect it (*h*). But where an attorney refused to produce a deed on the ground that it was one of his clients' title deeds, and his clients had instructed him not to produce it, the privilege was allowed; but the judge directed him to produce the deed and permit a witness to read the endorsement on it, but not the deed itself, for the purpose of identification; it was held that the judge did right, for the privilege is only not to produce the instrument for the purpose of disclosing its contents (*i*).

A communication made to a solicitor, if confidential, is privileged in whatever form made; if it would be privileged when communicated in words spoken or written, it will be privileged equally when conveyed by means of sight instead of words (*j*). Where, therefore, the attorney of a defendant, at the suggestion of his counsel in consultation, obtained a deed from the defendant, and in the presence of his counsel, and for their information, ascertained its contents, it was held that he was not bound to state its contents (*k*). So letters between a defendant and his country

(*f*) Doe *d.* Peter *v.* Watkins, 3 Bing. (N. C.) 421. And see Taylor *v.* Blacklow, 3 Bing. (N. C.) 235.

(*g*) Doe *d.* Lord Egremont *v.* Langdon, 12 Q. B. 711.

(*h*) Volant *v.* Soyer, 13 C. B. 231. Phipson, Ev. (4th ed.), 188.

(*i*) Phelps *v.* Prew, 3 E. & B. 430. Coleridge, J., said that the process of identification might at times involve a disclosure of the contents of the instrument; and when it did it was objectionable. But in this case it did not involve any disclosure of the contents, and was like the case of disclosing a blot of red ink on the back of a deed.

(*j*) 1 Phill. Ev. 169, citing Robson *v.* Kemp, 5 Esp. 54, where it was held that an attorney could not give evidence as to the fact of the destruction of an instrument which he had been admitted in confidence to see destroyed. In Wheatley *v.* Williams, 1 M. & W. 533, it was held that an attorney is not compellable to state, when examined as a witness, whether a document shown to him by his client in the course of a professional interview was then in the same state as when produced on the trial, *e. g.*, whether it was then stamped or not; and Abinger, C.B., said, 'Suppose an attorney when searching for a deed belonging to his client, found another deed which might operate to the client's prejudice, can it be said that he would be bound to produce it? If, therefore, a document be exhibited to an attorney, in pursuance of a confidential consultation with his client, all that appears on the face of such document is a part of the confidential communication.'

(*k*) Davies *v.* Waters, 9 M. & W. 608.

or town solicitors, and letters between his country and town solicitors, are privileged (*l*).

A solicitor will not be allowed to produce a deed which has been deposited with him confidentially in his professional character; and if the deed has been obtained out of his hands for the purpose of being produced in evidence by another witness, it cannot be received. But where a solicitor entrusted confidentially with a document communicates its contents to, or allows a copy of it to be taken by another, it would seem that the secondary evidence so obtained may be produced (*m*), even if the communication was a violation of professional confidence, or inspection of the document was accidentally obtained (*n*). Where a vendor had a draft of conveyance made by his own attorney, from which the deeds were afterwards prepared, and the attorney was paid for this business by the vendor and purchaser in moieties by agreement, but the latter employed an attorney on his own part to look over the draft, which remained afterwards with the vendor's attorney; the Court of King's Bench held that such draft was confidentially deposited with the latter by the purchaser as well as the vendor, and could not be produced on a trial against the interest of the purchaser's devisees, though with the consent of the vendor and his attorney (*o*). And even if a solicitor has on one occasion produced a deed entrusted to him by a client under the erroneous compulsion of one tribunal, he will not be bound to produce it before another tribunal (*p*). So where an attorney, attending under a *subpœna duces tecum*, stated that he had a deed in his custody as attorney, but that his clients had instructed him not to produce the deed, which was one of their title deeds, and he, therefore, refused to produce it, it was held that he was not bound to produce it (*q*). So where upon an indictment for perjury alleged to have been committed on the trial in a County Court with reference to the writing on a paper then produced, an attorney was called under a *subpœna duces tecum* to produce such paper; he had been attorney for the prisoner in the County Court, and had received this paper from the prisoner for the purpose of conducting the case in County Court as his attorney, and he claimed a lien on the paper for his costs; Coltman, J., held that the attorney's possession was the possession of the prisoner, and that he ought not to produce it (*r*). There have been several decisions with respect to the privilege of a solicitor not to produce forged documents entrusted to him by a client. Under sect. 46 of the Forgery Act, 1861, forged instruments may be seized under a search warrant (*s*). It is difficult to see how in the face of this enactment any privilege can exist which would entitle a solicitor to refuse to produce such a document if in his possession. The rule at first laid down was that as the prisoner could not be made to produce the forged document, it was privileged in the hands of his solicitor.

(*l*) Reid *v.* Langlois, 1 Mac. & Gord. 627. 41 E. R. 1408. Goodall *v.* Little, 1 Sim. (N. S.) 155. And see Penruddock *v.* Hammond, 11 Beav. 59; 50 E. R. 589. Blenkinsop *v.* Blenkinsopp, 10 Beav. 277, E. R. as to cases for counsel, &c. Vent *v.* Pacey, 4 Russ. 193: 38 E. R. 778.

(*m*) Lloyd *v.* Mostyn, 10 M. & W. 478, Parke, B., questioning Fisher *v.* Heming, MS., 1 Phill. Ev. 170, Bayley, J.

(*n*) Calcraft *v.* Guest [1898], 1 Q. B., 759.

(*o*) Doe *d.* Strode *v.* Seaton, 2 A. & E. 171.

(*p*) Nixon *v.* Mayoh, 1 M. & Rob. 76.

(*q*) Phelps. *v.* Prew. 3 E. & B. 431.

(*r*) R. *v.* Hankins, 2 C. & K. 823.

(*s*) *Ante*, p. 1678.

In R. *v.* Smith (*t*), on a prosecution for forging a promissory note, an attorney who had acquired possession of the note in his professional character from the prisoner was not compelled or allowed to produce it, although subpœnaed so to do, and although he was not employed professionally for the prisoner at the trial, but was originally consulted about the note, for the purpose of suing the party upon it whose name was charged to be forged (*u*). But this decision was definitely overruled in R. *v.* Cox and Railton (*v*). In R. *v.* Avery (*w*), on a trial for forging a will, a solicitor stated that he was applied to by the prisoner to act as his solicitor is raising some money; and that he was the solicitor of the prisoner in raising the money as well as of W. in the advance of it; that the prisoner made an application to him. It was objected that this was a privileged communication, as the party was the solicitor for the prisoner; and R. *v.* Smith was relied upon. Patteson, J.: 'I think that the case cited is not law (*x*), and that the solicitor may be examined to shew what was the transaction between the parties, and what led to that transaction; but I will reserve the point for the consideration of the judges, if I should hereafter think it necessary to do so.' The witness then stated that the prisoner proposed to mortgage some land, which had been left him by his aunt, and that the prisoner told him the title deeds had been burnt, but that he gave him a paper which he said was his aunt's will. It was again objected that, as the will had been delivered to the witness by the prisoner while he was attorney for the prisoner, he ought not to produce it; Patteson, J., 'I think he is bound to do it.' The will was produced and read, and it was the will alleged to be forged.

In R. *v.* Farley (*y*), upon an indictment for forging a will, it appeared that the wife of the prisoner, by his direction, took a will purporting to be the will of W. W. (not the will in question, but another forged will) to C., a solicitor, and asked if he could advance her husband some money upon mortgage of property under the will of her father, W. W. She left the will with C., who afterwards returned it to her husband, and communicated to him what had passed with his wife. C., while the will was in his possession, had made an exact copy of the will, and the prisoner had had notice to produce it, and, not producing it, the copy was tendered in evidence. C. said, that at the time the will was produced to him he was not acting as attorney of the prisoner, and did not charge for the interview, but if he had been acting as his attorney he should have made a charge; if he had found the security sufficient, he should have advanced the money; he was in no other way acting as the prisoner's

(*t*) Holroyd, J., MS. 1 Phill. Ev. 171.

(*u*) In Weeks *v.* Argent, 16 M. & W. 817, Parke, B., said, 'All that R. *v.* Smith decides is that the possession of the attorney for the prisoner was the possession of the prisoner, so that if the prisoner did not suffer him to produce it, secondary evidence of it would have been admissible for the purposes of criminal justice.'

(*v*) 14 Q.B.D. 153, 174, *ante*, p. 2332.

(*w*) 8 C. & P. 596.

(*x*) In R. *v.* Tylney, 1 Den. 319, Patteson, J., said that this observation was too strong, and that R. *v.* Smith and R. *v.* Avery were distinguishable. In R. *v.* Avery the indictment charged the intent to be to defraud Williams and the attorney in different counts. The prisoner was convicted, but no sentence passed on the indictment for forgery, the prisoner being sentenced on an indictment charging the transaction as a false pretence. See also 1 Phill. Ev. 171.

(*y*) 1 Den. 197: 2 C. & K. 313.

solicitor. It was objected that the interview with the prisoner's wife was confidential, and that the conversation, which then took place, and the copy of the will, were not admissible; but the evidence was admitted. And, upon a case reserved, the judges held that the communication was not privileged (*z*).

In R. *v.* Hayward (*a*) the prisoners were convicted of uttering a forged will. One of them having possessed himself of some title deeds from the house of the deceased, placed the forged will in the midst of them, and sent them to his attorney for the ostensible purpose of asking his advice upon the title deeds; but as Pollock, C.B., clearly thought, in order that the attorney might find the will among them, and act upon it, which he did by producing it on various occasions in the presence of that prisoner. It was afterwards produced before the justices at the preliminary inquiry, and returned to the attorney. He was called upon at the trial, and required to produce the will, which he did without objection, and handed it to the officer of the court. It was objected that it was a privileged communication, and ought not be to read. Pollock, C.B., overruled the objection, and, upon a case reserved, the judges thought that the will was not put into the attorney's hands in professional confidence, and that the rule as to privileged communications between attorney and client did not apply.

In R. *v.* Tylney (*b*), on an indictment for forging the will of W. Tuffs, an attorney, who had possession of the will, stated that the prisoner had consulted him, on a previous occasion, about some professional matters, on which he had advised her, though he had never made any charge for that advice, and that she afterwards brought a paper (the forged will) with her, and he judged from what she said that she came to consult him as to that document; that it was for the purpose of enforcing that document: he said further: 'she did not come to consult me as to what her rights were, but that I might enforce her rights under it.' It was objected on behalf of the prisoner that the attorney could not be allowed to produce the document. Coltman, J., considered the effect of the attorney's evidence to be, that the document was committed to him, not to be kept as a confidential deposit, but in order that it might be exhibited in court for the purpose of enforcing her rights, and thought it, under the circumstances, advisable to receive the document in evidence with a view to obtaining the opinion of the judges on the point; which was reserved, but no opinion was given upon it, as the case went off on another point (*c*).

(*z*) Pollock, C.B., in the course of the argument, asked, 'Do you mean that a man may always apply to an attorney to discount a forged bill with impunity?'

(*a*) 2 C. & K. 234: 2 Cox, 23. S. C., as R. *v.* Jones, 1 Den. 166.

(*b*) 1 Den. 319: 3 Cox, 160.

(*c*) Parke, B., said, 'the expression "for the purpose of enforcing the document" seems ambiguous. Suppose it was delivered to the attorney for the express purpose of shewing that the tenant in possession might give up the possession to the forger of the will? Supposing, on the other hand, a man gives his title deeds to an attorney to enable him to bring an action of ejectment, he ought not, perhaps, to shew them adversely to his client.' In the report of this case, 3 Cox, 160, Wilde, C.J., said, 'If title deeds are entrusted to an attorney as an attorney, can it be doubted that he is not at liberty to produce them?' Denman C.J., 'But if a forged and false instrument is given to an attorney, ought he not to take it to a magistrate?' Wilde, C.J., 'I apprehend the magistrate could not receive the statement.'

In R. *v.* Brown (*d*), where on an indictment for forgery it appeared that the prisoner had charged one Brittain with forgery, and had employed an attorney to conduct that prosecution, who had been served with a *subpœna duces tecum* to produce certain documents in this prosecution, and who, being called as a witness, stated that the documents had come into his possession as attorney for the prosecution in R. *v.* Brittain, in which case he was retained by the prisoner as attorney for the prosecution. It was urged for the Crown that an attorney cannot refuse to produce documents deposited with him by a person charged with an offence in respect of such documents, otherwise justice might be defeated. Were the privilege here sought to be established granted, conviction might be impossible, by reason of the non-production of the forged document; and Willes, J., held that the documents must be produced.

In R. *v.* Dixon (*e*), it was held that an attorney, who had been served with a *subpœna duces tecum* out of the Crown Office to produce certain vouchers which his client, a Mr. Peach, had exhibited and relied upon before a Master in Chancery, and which *subpœna* had been served on the attorney in order to found a prosecution for forgery against his client, was not bound to produce the vouchers in question (*f*).

The privilege does not attach to everything which the client says to his solicitor; the test is, whether the communication is necessary for the purpose of carrying on the proceeding in which the solicitor is employed; if it is necessary it becomes privileged (*g*), but if it is not it may be disclosed. Thus a solicitor may be examined like any other witness to a fact which he knew before his retainer, that is, before he was addressed in his professional character (*h*), or where he has made himself a party to the transaction (*i*), or where he is questioned as to a collateral fact which he might have known without being entrusted as the solicitor in the cause (*j*). Thus he may prove his client's handwriting, though the knowledge was obtained from witnessing his execution of the bail bond in the action (*k*). And he may be called to prove his client's identity (*l*). And if he is a subscribing witness to a deed he may be examined concerning the execution (*m*). But he ought not to

(*d*) [1862], 9 Cox, 281. The prisoner was undefended, no case was cited and the report does not state what the documents were.

(*e*) 3 Burr. 1687, cited by Lord Ellenborough in Amey *v.* Long, 9 East, 485.

(*f*) See also Laing *v.* Barclay, 3 Stark. (N. P.) 38. Harris *v.* Hill, 3 Stark. (N. P.) 140; 1 Dowl. & Ry. (N. P.) 17. R. *v.* Upper Boddington, 8 Dowl. & Ry. 726.

(*g*) Gillard *v.* Bates, 6 M. & W. 547. There an attorney was sued for work and labour in issuing an execution, and the defence was that he was employed by B., and not by the defendant, and it was held that the plaintiff's agent, an attorney, might be asked whether the plaintiff had not said, on introducing B. to him, that he, the plaintiff, had been employed by B. to issue the execution in question and that this was not a privileged communication.

(*h*) Cuts *v.* Pickering, 1 Vent. 197. Lord Say and Sele's case, 10 Mod. 41. Taylor, Ev. (10th ed.) s. 931.

(*i*) Duffin *v.* Smith, Peake, 108. Robson *v.* Kemp, 5 Esp. 52.

(*j*) Bull. (N. P.) 284. 1 Phill. Ev. 175. Taylor, Ev. (10th ed.) s. 935.

(*k*) Hurd *v.* Moring, 1 C. & P. 372, Abbott, C. J.

(*l*) Studdy *v.* Saunders, 2 Dow. & Ry. 347; but see Parkins *v.* Hawkshaw, 2 Stark. (N. P.) 239.

(*m*) Doe *v.* Andrews, 2 Cowp. 846. Robson *v.* Kemp, 4 Esp. 235; 5 Esp. 52. Weeks *v.* Argent, 16 M. & W. 817. If an attorney puts his name to an instrument as a witness, he makes himself thereby a public man, and is no longer clothed with the character of an attorney: his signature

be permitted to discover any confessions which his client may have made to him on such head (*n*). So if the solicitor were present when his client was sworn to an answer in chancery, upon an indictment for perjury, he would be a witness to prove the fact of taking the oath, for it is a fact in his own knowledge, and no matter of secrecy committed to him by his client (*o*). So the solicitor of one of the parties may be examined as to the contents of a written notice which had been received by him in the course of a cause, requiring him to produce papers (*p*); for the privilege only extends to confidential communications from the client, and not to those from collateral quarters, although made to him in consequence of his character as a solicitor. So a solicitor conducting a cause in court may be called as a witness by the opposite side, and asked who employs him, in order to shew the real party, and so let in his declarations (*q*). So a solicitor may be called and asked whether he has not a particular document in his possession, in order to let in secondary evidence, if the document is not produced (*r*). And where an action on a promissory note had been compromised by the defendant's paying part of the money, and giving a warrant of attorney to confess judgment for the residue, and in the interval between the time when the warrant of attorney was given, and the time the money became due according to the defeasance thereof, the plaintiff told his attorney in the suit that he was glad it was settled, for that he had not given consideration for the note, and he knew it was a lottery transaction; it was held, that the attorney was admissible to prove this conversation in an action to recover back the money (*s*). The communication, said Lord Kenyon, was not made by the client in confidence as instructions for conducting his cause; on the contrary, the purpose in view had been already obtained, and what was said was in exultation to his attorney for having before deceived him as well as his adversary, and for having obtained his suit.

Where a prisoner being in custody on a charge of forgery wrote a letter to a person, desiring him to ask Mr. G. or any other solicitor, whether the punishment of forging a bill is the same where the names of the parties are entirely fictitious, as where the names are those of real persons: it was held that this letter was not a privileged communication (*t*).

Foster had charged Brown before a magistrate with embezzlement, and had produced his day-book and cash-book, which were examined

binds him to disclose what passed at the execution of the instrument, but not what took place in the concoction and preparation of the deed: per Ellenborough, C.J., 5 Esp. 54.

(*n*) Bull. (N. P.) 284.

(*o*) Bull. (N. P.) 284, 285. But he is not bound to speak to the particulars of a bill of exchange entrusted to him by his client; for the existence of such a bill is not a mere fact, but consists of circumstances, which he came to be acquainted with from the delivery of the bill to him by his client. Brard *v.* Ackerman, 5 Esp. 120, Ellenborough, C.J.

(*p*) Spencelcy *v.* Schulenburgh, 7 East, 357.

(*q*) Levy *v.* Pope, M. & M. 410, Parke, J.

(*r*) Coates *v.* Birch, 2 Q. B. 252. Dwyer *v.* Collins, 7 Ex. 639; though it appears that he obtained it from his client in the course of a communication with reference to the cause. Bevan *v.* Waters, M. & M. 235, Best, C.J. So a solicitor's clerk may be asked whether he has not received a particular paper from his client. Eicke *v.* Nokes, M. & M. 303, Lord Tenterden, C.J.; Duffin *v.* Smith, Peake, 108, by Lord Kenyon.

(*s*) Cobden *v.* Kendrick, 4 T. R. 432.

(*t*) R. *v.* Brewer, 6 C. & P. 363, Park, J.

both by Brown's counsel and the magistrate, and no entry of the sum alleged to have been embezzled was found in them. Brown was remanded on bail, and at that time he had a key of the counting-house in which the books were kept. When brought again before the magistrate the day book was again produced, when there was found in it, in the handwriting of Brown, an entry of the sum in question; and the charge was dismissed. Brown then brought an action against Foster for a malicious prosecution, and it was held that on the trial of that action, the counsel of Brown might be called to prove that the entry was not in the book on the first hearing before the magistrate; for the counsel of Brown did not acquire his knowledge of the contents of the book from his client; and he was only called upon to say what he himself saw upon the document, not what was communicated to him by his client (*u*).

Where in an action against the managing director of a projected railway company, by a shareholder, to recover his deposits on the ground of fraudulent misrepresentations and failure of consideration, an attorney, who had been served with a *subpœna duces tecum* to produce the minute-book of the company, declined to produce it, on the ground that he had received it, after the company had ceased to exist, from a member of the provisional committee, for the purpose of defending him in an action brought against him as such; it was held that he was not bound to produce it, although it was contended that the plaintiff was equally interested in the book with the person from whom the attorney received it (*v*). It follows from this decision that, where an attorney holds a document for a client, he cannot be compelled to produce it by a person who has an equal interest in it with his client. So also confidential communications made by a party to his attorney or counsel do not cease to be privileged by the fact that the attorney or counsel afterwards becomes interested as devisee of the property, to the title of which such communications related (*w*).

Where in an action on a promissory note it appeared that the plaintiff, being employed by the defendant as her attorney, had written to ask her for information in order to assist him in preparing a case for the opinion of counsel; it was held that he could not give in evidence an account of moneys paid and received, which had been sent to him in consequence of his letter, for the purpose of taking his case out of the Statute of Limitations (*x*).

The privilege is also confined to communications to the solicitor in his character of solicitor; and, therefore, a communication made to him, or question asked him by his client, not for the purpose of getting his *legal* advice, but to obtain information as to a matter of fact, is not

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

(*v*) Newton *v.* Chaplin, 10 C. B. 356. Wilde, C.J., after consulting Coltman, Maule, Cresswell, and Williams, JJ. The question was argued before the Court, but no express decision given on it. However, Maule, J., observed, 'A man has a document in his possession, the disclosure of which may utterly ruin him. For his necessary defence in another action, he confides it to his attorney. Is it to be said that the attorney is bound to produce it because some other person whom he, the attorney, does not represent, and has no connection with, has an interest in it?' 'The privilege of the person who delivered the book to the attorney, as to the book, was the same in the hands of the attorney as if he had kept the book in his own hands.'

(*w*) Chant *v.* Brown, 7 Hare, 79: 68 E. R. 32.

(*x*) Cleave *v.* Jones, 7 Ex. 421.

privileged. As where a client asked his attorney whether he could safely attend a meeting of his creditors, called on the attorney's suggestions, and the attorney advised him to remain at his office for the present, and he accordingly remained there two hours to avoid being arrested; it was held that the attorney might prove all these facts, in order to shew an act of bankruptcy, in an action by his client's assignees (*y*).

If a solicitor or counsel be called by his own client to give evidence, he is not privileged from cross-examination on the same matter as to which he was examined in chief, although it were a confidential communication made professionally; but the cross-examination must not extend beyond that matter (*z*).

Where a party refuses to produce a document, and is justified in so doing, he cannot be compelled to disclose its contents; for it would be perfectly illusory for the law to say that a party was justified in not producing a deed, but that he was compellable to give parol evidence of its contents; that would give him, or rather his client through him, merely an illusory protection, if he happened to know the contents of the document, and would be only a roundabout way of getting from every man an opportunity of knowing the defects there might be in the deeds and titles of his estates (*a*).

With respect to the mode of determining the question whether the communication be privileged or not, 'in general it is the solicitor who declines to give the evidence, on the ground of professional confidence. But it is competent for the client to take the objection, and call witnesses to prove the incompetency, and the judge is to determine the law arising from the facts' (*b*). Where, therefore, it was proposed to put in a written account on the part of the plaintiff, it was held that the defendant was entitled to interpose, and put in evidence a letter of the plaintiff, and examine a witness to prove that the account was confidentially communicated by the defendant to the plaintiff as her attorney (*c*).

Public Interest in Non-disclosure.—There are, besides conjugal and professional confidences, a number of cases in which, for reasons of public policy, information is not permitted to be disclosed (*d*). The Attorney-General cannot be compelled to disclose his reasons for filing an *ex-officio information* (*e*).

Informers.—Courts of justice will not permit witnesses to be asked the names of those from whom they receive information as to frauds on the revenue (*f*). And the rule of public policy which protects a witness

(*y*) Bramwell *v.* Lucas, 2 B. & C. 745. See Annesley *v.* Lord Anglesea, 1743, 17 How. St. Tr. 1139: 9 Harg. St. Tr. 391, before the Barons of the Exchequer in Ireland.

(*z*) Vaillant *v.* Dodemead, 2 Atk. 524. R. *v.* Levison, 11 Cox, 152.

(*a*) Davies *v.* Waters, 9 M. & W. 608, Alderson, B. Hibberd *v.* Knight, 2 Ex. 11. Marston *v.* Downes, 6 C. & P. 381; 1 A. & E. 31.

(*b*) Cleave *v.* Jones, 7 Ex. 421, Martin, B.

(*c*) Cleave *v.* Jones, *supra*, Erle, J., at the trial, and sanctioned by the Court above; and per Rolfe, B., at the first trial of the same cause. Hereford Sum. Ass. 1849. MSS. C. S. G.

(*d*) See Phipson, Ev. (4th ed.) 177. Taylor, Ev. (10th ed.) ss. 939, 940.

(*e*) R. *v.* Horne, 11 St. Tr. 283.

(*f*) Home *v.* Bentinck, 2 B. & B. 162, Dallas, C. J. R. *v.* Hardy, 24 St. Tr. 199, 753. But where a person officiously interferes to inform any of the constituted authorities of alleged abuses, the communication is not privileged; and, if untrue, may be considered malicious and actionable. Robinson *v.* May, 2 Smith (K.B.) 3.

from being asked such questions as would disclose the informer, if he be a third person, equally applies to questions which would disclose whether the witness is himself the informer, or the nature of the information. Therefore a witness for the Crown in a revenue prosecution cannot be asked in cross-examination, 'Did you give the information?' (*g*). In many trials for high treason the same course has been adopted; and if parties were willing to disclose the sources of their information, they would not be suffered to do it by the judges (*h*). 'If the name of an informer,' said Buller, J., in R. *v.* Hardy (*i*), 'were to be disclosed, no man would make a discovery, and public justice would be defeated.' And this privilege not only protects the actual informer himself, but those questions which tend to the discovery of the channels by which the disclosure was made to the officers of justice, are not permitted to be asked. Thus a person who has been employed to collect secret information for the executive government (*j*), or for the service of the police, is not allowed to reveal the name of his employer, or the nature of the connection between them (*j*); or the names of any persons to whom he has communicated his information for the purpose of its being transmitted (*k*), whether those persons were magistrates, or concerned in the administration of government, or were merely the channel through which information was conveyed to government (*l*).

In A. G. *v.* Briant (*m*), Pollock, C.B., during the argument, said: 'In ordinary prosecutions the name of the sovereign is used; but it may be used by any prosecutor; and probably the rule does not apply at all to such cases. But there may be reasons of state policy, whenever the government is directly concerned; and then the rule applies whatever be the offence. Where, however, on an indictment for administering corrosive sublimate with intent to murder, it appeared that some communication had been made to the police, on which they searched a privy used only by the prisoner, and found in the soil a phial containing corrosive sublimate, and on the trial the policeman was asked from whom he had received the information, and he stated that all the police had received printed instructions, one of which forbade them to name persons from whom any information was received; and he therefore refused to say who were his informants unless ordered to do so by his superintendent. Cockburn, C.J., ordered him to answer the question, and he answered that he had it from two girls, who were not called for the prosecution (*n*).

'Witnesses may not be asked and will not be allowed to state facts or to produce documents, the disclosure of which would be prejudicial to

(*g*) A. G. *v.* Briant, 15 M. & W. 169.

(*h*) 2 B. & B. 162.

(*i*) 24 St. Tr. 753.

(*j*) A shorthand writer sent to Ireland by the government. R. *v.* O'Connell, 1 Cox, 403.

(*k*) 24 St. Tr. 811.

(*l*) R. *v.* Watson, 2 Stark. (N. P.) 136; 32 St. Tr. 1, Abbott, J. Stone's case, as cited by Lord Ellenborough, C.J., 2 Stark. (N P.) 136.

(*m*) *Supra.*

(*n*) R. *v.* Richardson, 3 F. & F. 693. Cockburn, C.J., pointed out that it was most material to the ends of justice that the persons should be named, as they could have stated how it was that they came to know that the bottle was where it was found, and perhaps could have given some clue as to the person who put it there.

the public service' (*o*). The ground of privilege being official secrecy or confidence, secondary evidence is not admissible.

Official Secrets.—Upon this ground the Attorney-General of Upper Canada was not allowed to be asked as to the nature of a communication made by him to the governor of the province (*p*). So the orders given by the governor of a colony to a military officer under his command ought not to be produced (*q*), nor official correspondence between a colonial governor and a secretary of state (*r*), nor between one officer of state and another in his official capacity (*s*). Abbott, C.J., refused to admit in evidence the report of a military court of inquiry, in an action of libel by an officer, respecting whose conduct the court had been appointed to inquire; and his decision was confirmed on error (*t*). And Ellenborough, C.J., would not permit the contents of a letter, written by an agent of government to Lord Liverpool, then Secretary of State, or his lordship's answer, to be produced as evidence (*u*). In R. *v.* Watson, an officer of the Tower of London was not allowed to prove that a plan of the Tower, produced by the defendant, was accurate (*v*).

But a letter written by a private individual to a public officer (the chief secretary of the Postmaster-General) complaining of the misconduct of a person under him, does not fall within the preceding cases. They were all cases of communication made by and between ministers and officers of government, and in the course of the discharge of a public duty by the person making the communication (*w*).

A prosecution instituted or carried on by the Director of Public Prosecutions (*x*) is a public prosecution, and the Director, if called as a witness at the trial, or during any proceedings arising out of the trial, is entitled to refuse to disclose the names of persons from whom he has received information, and the nature of the information received, unless the judge is of opinion that the disclosure of the name of the informant, or of the nature of the information, is necessary or desirable in order to shew the prisoner's innocence. This rule is one of public policy and is not a matter of discretion, and it makes no difference that the Director is willing to answer the questions. He ought not be to allowed to do so (*y*).

The question whether the production of a document would be 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 if he attends and states that in his opinion the production of the document would be injurious to the public service, the judge ought not to compel the production of it. If indeed the head of the department does not attend personally to say that the production will be injurious, but sends the

(*o*) See Phipson, Ev. (4th ed.) 175.
(*p*) Wyatt *v.* Gore, Holt (N. P.) 299, Gibbs, C. J.
(*q*) Cooke *v.* Maxwell, 2 Stark. (N. P.), 185.
(*r*) Hennessy *v.* Wright, 21 Q. B. D. 509.
(*s*) Chatterton *v.* Secretary of State for India [1895], 2 Q. B., 189.
(*t*) Home *v.* Bentinck, 2 B. & B. 130. Dawkins *v.* Ld. Rokeby, L. R. 8 Q. B. 253; 42 L. J. Q. B. 63.
(*u*) Anderson *v.* Hamilton, 2 B. & B. 156 (*n*).
(*v*) 2 Stark. (N. P.) 148; 32 St. Tr. 1.
(*w*) Blake *v.* Pilfold, 1 M. & Rob. 198, Taunton, J.
(*x*) *Vide ante*, p. 1924.
(*y*) Marks *v.* Beyfus, 25 Q. B. D. 594.

document to be produced or not, as the judge may think proper, or sends a subordinate with the document with instructions to object, but nothing more, the case may be different (*z*).

Privy Council.—In the Case of the Seven Bishops, the clerk of the privy council was compelled to state what passed in the Council Chamber, and even what was said by the King himself, although the counsel for the Crown objected to it (*a*). And the same evidence was allowed in Lord Stafford's case (*b*). But in Layer's case (*c*), it seems to have been considered that the minutes taken before the privy council were not to be divulged; and that the two other cases above cited were decided under the strong feelings which the circumstances of the times had produced; and the latter in particular has been considered as a very unwarrantable departure from law and justice (*d*).

Grand Jury.—A clerk attending upon a grand jury is not to be compelled to reveal that which was given them in evidence (*e*); and the jurors themselves are bound by oath not to disclose what passes before them; but it has been held that a grand juryman may be called to prove who was the prosecutor of an indictment; for it is a question of fact, the disclosure of which does not infringe on his oath (*f*). But where the grand jury returned a bill of indictment containing ten counts for forging and uttering the acceptance of a bill of exchange, with an endorsement, 'a true bill on both counts': Patteson, J., would not allow one of the grand jury to be called as a witness, after the prisoner's trial had commenced, and after the grand jury had been discharged, to explain their finding (*g*). And the Court of King's Bench have refused to receive an affidavit from a grand juryman as to the number of grand jurors who concurred in finding a bill (*h*).

In a case noted in Blackstone, one of the grand jury heard a witness swear in court, upon the trial of a prisoner, directly contrary to the evidence which he had given before the grand jury; and immediately communicated the circumstance to the judge, who, upon consulting the judge in the other court, was of opinion that public justice in this case required that the evidence which the witness had given before the grand jury should be disclosed; and committed the witness for perjury, to be tried upon the testimony of the grand jury. It was held that the object of this concealment was only to prevent the testimony produced before them from being contradicted

(*z*) Beatson *v.* Skene, 5 H. & N. 838, 29 L. J. Ex. 430. Martin, B., dissented, thinking that whenever the judge is satisfied that the document may be made public without prejudice to the public service, the judge ought to compel its production, notwithstanding the reluctance of the head of the department to produce it. Beatson *v.* Skene was followed by Darling, J., in Williams *v.* Star Newspaper Co., 24 T. L. R. 297, where privilege was claimed by the Home Office for a report on the exhumation of a corpse. In Dickson *v.* Earl of Wilton, 1 F. & F. 419, where a clerk from the War Office was called to produce a letter written by a commanding officer of a regiment to his immediate superior, but submitted on behalf of the Secretary of War whether it ought to be produced, Campbell, C.J., held that it ought. See Dawkins *v.* Lord Rokeby, L. R. 7 H. L. 444.

(*a*) 12 St. Tr. 183.

(*b*) 3 St. Tr. 1381.

(*c*) 16 St. Tr. 93.

(*d*) 1 Phill. Ev. 182.

(*e*) 12 Vin. Abr. Evidence B., *a*, 5.

(*f*) Sykes *v.* Dunbar, Selw. (N. P.), 1059, Kenyon, C.J. Freeman *v.* Arkell, 1 C. & P. 137.

(*g*) R. *v.* Cooke, 8 C. & P. 582.

(*h*) R. *v.* Marsh, 6 A. & E. 236.

by subornation of perjury on the part of the persons against whom bills were found. This was a privilege which might be waived by the Crown (*i*). And where the prisoner was indicted for perjury in evidence given before the grand jury on a bill of indictment, a police constable, who was in the grand-jury room at the time the evidence was given, was called to prove the evidence of the prisoner, and it was urged that one of the grand jury would not be allowed to give the evidence, and that if this witness were allowed to do so, it would be doing that indirectly which could not be done directly; Tindal, C.J., held that the evidence might be given, as it was for the purposes of public justice (*j*).

In R. *v.* Watson (*k*), a witness was questioned by the counsel for the prisoner as to his having produced and read a certain writing before the grand jury, and Ellenborough, C.J., said that he had considerable doubt upon the subject: he remembered a case in which a witness was questioned as to what passed before the grand jury, and though it was a matter of considerable importance, he was permitted to answer. But it has since been held that a witness for the prosecution in a case of felony may be asked on cross-examination whether he has not stated certain facts before the grand jury, and that the witness is bound to answer the question (*l*), as to evidence of petty jurors, *vide ante*, Vol. I. p. 604.

Parliamentary Privilege.—A witness was not allowed by Lord

(*i*) 4 Bl. Com. 126, Christian's note. There appears to be very little weight in the reason assigned for the concealment even before passing of the Trials for Felony Act 1836, (*ante*, p. 1998), because the prisoner had in far the greater number of cases heard the evidence of the witnesses before the magistrates, and there is still less weight now, since the prisoner is entitled to copies of the depositions. The oath itself seems not to apply to the facts proved before the grand jury; as far as regards this subject, it is 'the King's counsel, your fellows' and your own, you shall keep secret.' 4 Chit. Cr. L. 183. C. S. G. This view is not in accord with that expressed in Taylor, Ev. (10th ed.) s. 943.

(*j*) R. *v.* Hughes, 1 C. & K. 519. In 2 Rolle Abr. 77 (F.) 1, it is said, 'if a man empanelled and sworn on the Grand Inquest discover to strangers the evidence given to him and the rest of the jurors for the King, this is an offence punishable by fine and imprisonment on an indictment. Smithe & Hill's case (Mich. 15 Jac. I. 1617). And the clerks of the Crown Office said that this is usual.' In 27 Ass. pl. 63, a grand juryman was indicted as a felon for discovering what took place before the grand jury; but it was said that some justices held that this was treason: he was arraigned, however, for felony only, and acquitted: and a *quære* is added as to what the judgment would have been if he had been convicted. In the Poulterers' case, 9 Co. Rep. 55 b, the judges heard the evidence given to the grand jury openly in court. In the Earl of Shaftesbury's case, 8 How. St. Tr. 817: 3 Harg. St. Tr. 417, on a bill of indictment for high treason, the evidence was given in public before the grand jury, who doubted as to the legality of the proceeding; but Pemberton and North, C. JJ., both declared that it had always been the practice to examine the witnesses publicly before the grand jury whenever it had been requested by those who prosecuted for the King. This practice seems strongly to shew that any person not a grand juror is competent to prove what he has heard a witness state before the grand jury; for it cannot be doubted that any of the public present in Court when the grand jury heard the evidence openly might prove what he heard. Shaftesbury's case is said to have been the last instance of such a procedure. 4 Bl. Com. 302, (Ed. Christian).

(*k*) 32 St. Tr. 107; 2 Stark. (N. P.) 116. See Taylor, Ev. (10th ed.) s. 943.

(*l*) R. *v.* Gibson, C. & M. 672, Parke, B. It has been held that when the grand jury have found a bill, the judges before whom the case comes on to be tried ought not to inquire whether the witnesses were properly sworn before they went before the grand jury, and it seems that an improper mode of swearing them will not vitiate the indictment, as the grand jury are at liberty to find a bill upon their own knowledge merely. R. *v.* Russell, C. & M. 247. Gurney, B., and Wightman, J.; and Wightman, J., added that Denman, C.J., and himself had decided the same point the same way on the Northern Circuit.

Ellenborough to be asked as to the expressions or arguments which a member of the House of Commons had made use of in the House; for, said his lordship, it would be a breach of duty in the witness (who was a member himself), and a breach of oath, to reveal the councils of the nation (*m*); but as to the fact of the plaintiff's having taken part in the debate, he was bound to answer (*n*). So a member may prove who acted as speaker on a particular occasion (*o*).

In 1818 the following resolutions were passed by the House of Commons: 'Resolved, *nemine contradicente*, that all witnesses examined before this House, or any committee thereof, are entitled to the protection of this House in respect of anything that may be said by them in their evidence. Resolved, *nemine contradicente*, that no clerk or officer of this House, or shorthand writer employed to take minutes of evidence before this House, or any committee thereof, do give evidence elsewhere in respect of any proceeding or examination had at the bar or before any committee of this House, without the special leave of the House' (*p*).

Since these resolutions it has been held that a member of the House whose acts as teller on a division is not an officer of the House; and if a member be asked how another member voted on a particular occasion, he will not be compelled to answer if he decline doing so, and have not the leave of the House to give evidence (*q*).

Judicial Privilege.—A judge (*r*) is a competent but not a compellable witness to prove matters which arose before him on a former trial (*s*).

The same rule applies to arbitrators and to the advocates in a case (*t*)

But an arbitrator may be called to prove what was claimed or admitted by the parties before him on a reference (*u*): or to prove his own mistakes, etc. (*v*), or whether he included matters not within the reference (*w*), but not to give evidence of concessions made by one party during the reference for peace and to end the suit (*x*), nor to state the grounds of his award or his intention in giving it (*y*).

Incriminating Disclosures.—At common law a witness may be asked (*z*) but has the privilege of refusing to answer a question put to him or to produce private documents (*a*), if his answer or the production of the documents would *tend* to expose him to a penalty, or to any kind of

(*m*) Plunkett *v.* Cobbett, 5 Esp. 137; 29 St. Tr. 71, 72.

(*n*) Ibid.

(*o*) Chubb *v.* Salomons, 3 C. & K. 75, Pollock, C. B.

(*p*) See 2 C. & K. 483. During the recess it has been the constant practice of the Speaker to grant such leave on the application of the parties to a suit. See also 55 & 56 Vict. c. 64.

(*q*) Chubb *v.* Salomons, 3 C. & K. 75. Pollock, C. B., after consulting the other Barons.

(*r*) Taylor, Ev. (10th ed.) s. 938.

(*s*) Duke of Buccleuch *v.* Met. Bd. of Works. L. R. 5 H. L. 418; 41 L. J. Ex. 137.

(*t*) Curry *v.* Walter, 1 Esp. 456: 1 B. & P. 533.

(*u*) Martin *v.* Thornton, 4 Esp. 181, Lord Alvanley. Duke of Buccleuch *v.* Met. Board of Works, *ubi. sup.*

(*v*) *Re* Whiteley and Roberts' Arbitration [1891], 1 Ch. 558.

(*w*) Duke of Buccleuch *v.* Met. Board of Works, *ubi sup.*

(*x*) Slack *v.* Buchanan, Peake (N. P.), 6. Westlake *v.* Collard, Bull. (N. P.), 236. Martin *v.* Thornton, *ubi. sup.*

(*y*) O'Rourke *v.* Railway Com., 15 A. C. 371. *Re* Whiteley and Roberts, *ubi sup.*

(*z*) See Taylor, Ev. (10th ed.) s. 1368, and the observation of the judges in R. *v.* Watson, 2 Stark. (N. P.), 149; 32 St. Tr. 1. R. *v.* Holding & Wade, O. B., [1821], Bayley, J., Archb. Cr. Pl. (22nd ed.) 373.

(*a*) Spokes *v.* Grosvenor Hotel Co. [1897], 2 Q. B. 124. The privilege does not extend to public documents in the official custody of the witness. Bradshaw *v.* Murphy, 7 C. & P. 612.

punishment, or to a criminal charge (as, for instance, if he be asked whether he has been guilty of theft, fraud, bigamy (*b*), maintenance (*c*), criminal libel (*d*), or any offence subjecting him to a penalty or criminal proceeding (*e*). The rule is based on the same principle as that which at common law prevents examination of accused persons (*f*).

Thus a witness is not bound to answer whether he wrote an advertisement referring to libellous letters which a prosecutor had received; and though he is bound to answer whether he knows in whose handwriting it is, he is not bound to name the person, as it may be himself (*g*). An accomplice who is admitted to give evidence against his associate in guilt, though bound to make full and fair confession of the whole truth respecting the subject-matter of the prosecution, is not bound to answer with respect to his share in other offences, in which he was not concerned with the prisoner; for he is not protected as to such offences (*h*). A witness in custody upon a charge of felony cannot be compelled to answer the question, 'Have you not *said* that you committed the offence for which you are now in custody?' (*i*). So where a witness stated that he was in a room which he had let to a club on a night on which it was alleged that money had been lost by gaming; it was held that he was not bound to answer the question, 'Was there a roulette table in the room?' as his answer might tend to involve him in the danger of being indicted as the keeper of a common gaming house (*j*).

The privilege of refusing to answer incriminating questions is that of the witness alone, and neither party to the suit can take any advantage therefrom. The privilege does not entitle the witness to refuse to incriminate other persons, if to do so would not tend to incriminate himself (*k*). The witness himself must make the objection to answering (*l*), and counsel for the adverse party may not object in favour of the witness, nor argue the objection that the answer to a question would incriminate him (*m*); though the judge may inform the witness that he need not answer, and he must pledge his oath that the answer would tend to criminate him (*n*). The claim may be made at any stage in the

(*b*) Harvey *v.* Lovekin, 10 P. D., 122.

(*c*) Alabaster *v.* Harness, 70 L. T. Rep. 375.

(*d*) Lamb *v.* Munster, 10 Q. B. D. 110.

(*e*) See 14 & 15 Vict. c. 99, s. 3 (*ante*, p. 2270 *n*), and the cases collected, Taylor, Ev. (10th ed.) s. 1368. The protection is not confined to questions where the answer would lead to an immediate conclusion of guilt, but extends to all questions that tend to criminate the witness, 'and the reason is that the party would go from one question to another; and though no question might be asked, the answer to which would directly criminate the witness, yet they would get enough from him whereon to found a charge against him.' R. *v.* Slaney, 5 C. & P. 213, Tenterden, C.J. Thus where a witness in an action by the endorsee against the drawer of a bill, where the defence was usury, was asked whether the bill had ever been in his possession before, and the witness said he thought his answer would have a tendency to convict him of the offence of usury, for which he had been indicted, it was held that he was not bound to answer the question. Cates *v.* Hardacre, 3 Taunt, 424. See Maloney *v.* Bartley, 3 Camp. 210.

(*f*) See Phipson, Ev. (4th ed.) 193. Taylor, Ev. (10th ed.) s. 1453.

(*g*) R. *v.* Slaney, 5 C. & P. 213, Tenterden, C. J.

(*h*) West's case, MS. 2 Phill. Ev. 419.

(*i*) R. *v.* Pegler, 5 C. & P. 521, Park & Littledale, JJ.

(*j*) Fisher *v.* Ronalds, 12 C. B. 762.

(*k*) Kelly *v.* Colhoun [1899], 2 Ir. Rep. 199.

(*l*) R. *v.* Coote, L. R. 4 P. C. 599; 42 L. J. P. C. 45. Thomas *v.* Newton, M. & M. 48 *n.*, Tenterden, C. J.

(*m*) R. *v.* Adey, 1 M. & Rob. 94. Thomas *v.* Newton, *ubi sup.*

(*n*) Lamb *v.* Munster, 10 Q. B. D. 110; 52 L. J. Q. B. 46.

proceedings (*o*). A witness called on the part of the Crown to prove bribery against the defendant, refused to give evidence on the ground that his evidence would tend to criminate himself; the objection being overruled by the judge, he gave his evidence. It was held, that the defendant could not object that such evidence was improperly received (*p*). This privilege does not apply to a person under trial for crime who elects to give evidence on his own behalf. The extent of his obligation to answer incriminating questions is defined by the Criminal Evidence Act, 1898 (*q*). The privilege does not entitle the witness to refuse to be sworn (*r*).

A Civil Liability.—The privilege protects a witness from answering if the answer would expose him to a penalty or forfeiture enforceable by civil proceedings (*s*). Until 1806 doubts were entertained as to how far a witness was compellable to answer a question, whereby he might subject himself to a civil action, or charge himself with a debt. These doubts were removed by the Witnesses Act, 1806 (46 Geo. III. c. 37) by which it is declared and enacted, that 'a witness cannot by law refuse to answer any question relevant to the matter in issue, the answering of which has no tendency to expose him to a penalty or forfeiture of any nature whatsoever (*s*), by reason only, and on the sole ground that the answering such questions may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his Majesty, or any other persons (*t*). It would seem that a witness is still privileged from answering any question, the answer to which might subject him to a forfeiture of his estate (*u*).

To entitle 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 (*v*).

But 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; as there is no doubt that a question, which might appear at first sight very innocent, might, by affording a

(*o*) R. *v.* Garbett, 1 Den. 236.

(*p*) R. *v.* Kinglake, 11 Cox. 499.

(*q*) *Ante*, p. 2271.

(*r*) Boyle *v.* Wiseman, 10 Ex. 647; 11 Ex. 360.

(*s*) Jones *v.* Jones, 22 Q. B. D. 425 (pound breach). Hobbs *v.* Hudson, 25 Q. B. D. 232 (fraudulent removal of goods to avoid distress).

(*t*) See R. *v.* Woburn, 10 East, 395. Adams *v.* Batley, 18 Q. B. D. 625. Mayor &c. of Derby *v.* Derbyshire Council Council [1897]. A. C. 556. There is a distinction between the obligation of a witness, since this statute, to answer questions, though they may subject him to civil suits; and his obligation to produce writings, &c., under a *subpœna duces tecum*. For if a *subpœna duces tecum* is served, the party must bring his deeds into court in obedience to the *subpœna*, although, if he states that they are his title deeds, no judge will ever compel him to produce them. Pickering *v.* Noyes, 1 B. & C. 263.

(*u*) May *v.* Hawkins, 11 Ex. 210; 24 L. J. Ex. 309. Chester *v.* Wortley, 18 C. B. 239; 25 L. J. C. P. 117. Earl of Mexborough *v.* Whitwood Colliery Co. [1897], 2 Q. B. 111; and see Taylor, Ev. (10th ed.) s. 1453. A distinction is drawn between forfeiture of an estate and its determination by conditional limitation. Miller *v.* Waterford [1904], 2 Ir. Rep. 421.

(*v*) R. *v.* Boyes, 1 B. & S. 311, approved in *ex parte* Reynolds, 20 Ch. D. 294. In Osborn *v.* London Dock Co., 10 Ex. 698, Parke, B., said this was the opinion of the majority of judges in R. *v.* Garbett, 1 Den. 236. See also Bartlett *v.* Lewis, 12 C. B. (N. S.) 249. Adams *v.* Lloyd, 3 H. & N. 332.

link in a chain of evidence, become the means of bringing home an offence to the party answering (*w*).

The danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things,—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. A merely remote and naked possibility, out of the ordinary course of law, such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice (*x*).

The grant of a pardon for an offence removes the privilege of a witness of not answering incriminating questions, if relevant (*y*), but where the adverse party is attacking the witness, he is justified in refusing to answer what would disgrace him, although he has obtained a pardon (*z*).

Where a witness had received a certificate under an Act (*a*) protecting witnesses who had made a true disclosure touching corrupt practices at the election of members of parliament, it was held that the witness was bound to answer, whether he had received any sums of money from a person charged with bribery, as that certificate protected him from all penal actions, penal disabilities, and criminal prosecutions of every kind (*b*). Under certain statutes a witness may be compelled to answer criminating questions, *e.g.* The Bankruptcy Acts, 1883 and 1890 (*c*), and the Larceny Act, 1861 (ss. 77–85) (*d*).

(*w*) R. *v.* Boyes, *supra*, Osborn *v.* London Dock Co., *supra*.

(*x*) R. *v.* Boyes, *supra*, where, after a pardon of bribery, it was held that the risk of impeachment was not sufficient to protect the witness from answering.

(*y*) Ibid.

(*z*) Ibid. per Crompton, J., who said that this was the distinction between R. *v.* Boyes and R. *v.* Reading, 7 St. Tr. 259, 296, where the question was put in the cross-examination of a witness for the Crown; and the Earl of Shaftesbury's case, 8 St. Tr. 817, where the question was put by a grand juror to test the character of a witness. See M. & M. 193, note (*b*).

(*a*) 15 & 16 Vict. c. 57, s. 19, repealed in 1863 by 26 & 27 Vict. c. 29 s. 10. The corresponding enactment now in force is 46 & 47 Vict. c. 51 s. 59, *vide ante*, Vol. i. p. 651.

(*b*) R. *v.* Charlesworth, 2 F. & F. 326. *Ex parte* Fernandez, 10 C. B. (N. S.) 3. In *re* Fernandez, 6 H. & N. 717. R. *v.* Leatham, 8 Cox, 408.

(*c*) *Ante*, p. 1458, and see R. *v.* Pike, [1902], 1 K. B. 552.

(*d*) *Ante*, p. 1414.

END OF VOL. II.

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CANADIAN NOTES.

OF WITNESSES.

Sec. 1.—*Who May be Witnesses.*—See R.S.C. ch. 145, secs. 3, 4, etc.

Sec. 2.—*Attendance.*

(*a*) *At Trial—May be Procured by Subpœna.*—See Code sec. 971.

Warrant May be Issued After Disobedience to Subpœna.—See Code sec. 972.

Where a witness is financially unable to pay his expenses of attending it is usual for the department of the provincial government charged with the administration of justice to pay the same; and in the more serious offences, the Crown will subpœna the witnesses for the accused, if the latter is financially unable to pay the expenses of service of process.

The erroneous decision of a magistrate as to whether or not a defaulting witness was bound to attend his Court in respect of a trial for an offence against a provincial statute without pre-payment of witness fees, and as to the liability of such witness to arrest has been held not to be reviewable upon habeas corpus although the accused was deprived of such witness's testimony through the refusal of the magistrate to issue a warrant for his arrest. R. v. Clements (1901), 4 Can. Cr. Cas. 553 (N.S.). Such refusal will not deprive the magistrate of jurisdiction to convict, and the defendant's remedy is by way of appeal only. *Ibid.* Per Meagher, J.

But where the witness was summoned before a Court sitting in another judicial district from that in which he lived, the privilege was held not to apply to a charge of a criminal offence committed by him during the time he was in the former district for the purpose of giving evidence. Ex p. Robert Ewan (1897), 2 Can. Cr. Cas. 279 (Que.).

Warrant Against Witness in First Instance.—See Code sec. 973.

Code sec. 675 is the corresponding provision for the arrest of a material witness on a preliminary enquiry in respect of an indictable offence, on proof that the witness will not attend without being "compelled" to do so. The word "compelled" as used in both sections seems to imply something more than such legal compulsion as is

involved in the service of a subpœna. A witness should not be placed under arrest without proof that he intends to disregard a mere subpœna or "summons to witness." Proof merely of the witness' statement that he would not go unless he was compelled to go, would ordinarily mean that the witness would not go unless subpœnaed or placed under a legal obligation to go.

Sec. 973 was introduced by way of amendment to the Criminal Code of 1892 in the year 1900, and was intended to meet the case of witnesses about to abscond.

Subpœna May be Issued to Witness in Canada, but Beyond Jurisdiction of Court.—See Code sec. 974.

Proceedings When Such Subpœna Disobeyed.—See Code secs. 975, 976.

Procuring Attendance of Witness who is a Prisoner.—See Code sec. 977.

(*b*) *Preliminary Enquiry: Procuring Attendance of Witnesses.*

Summons to Witness.—See Code sec. 671.

The summons to a witness can be issued only by the justice who has taken the information or who is holding the preliminary enquiry. Byrne v. Arnold, 24 N.B.R. 161.

Service of Summons upon Witness.—See Code sec. 672.

Warrant for Witness after Summons.—See Code sec. 673.

Procedure Against Defaulting Witness.—See Code sec. 674.

Warrant for Witness in First Instance.—See Code sec. 675.

Witness Beyond Jurisdiction of Court may be Subpœnaed.—See Code sec. 676.

Such particulars as to the nature of the evidence expected from the witness should be set forth in the affidavit or deposition upon which the application is made as will satisfy the Judge applied to that the evidence of the witness is material.

Under the provisions of this section and of sec. 711 it is competent for a Judge to make an order for the issue of a subpœna to witnesses in another province to compel their attendance upon an appeal from justices under Code secs. 749 and 752 respecting a charge brought under Dominion law. R. v. Gillespie, 16 P.R. (Ont.) 155.

Warrant for Defaulting Witness.—See Code sec. 677.

(*d*) *Summary Trials.*

Procuring Attendance of Witnesses, Service of Summons, etc.—See Code secs. 788, 789.

(*e*) *Trial of Juvenile Offenders.*

Summons to Witness.—See Code sec. 809.

Binding Over Witness.—See Code sec. 810.

Warrant when Witness Disobeys Summons.—See Code sec. 811.

Service of Summons.—See Code sec. 812.

Coroner's Court.—1. A coroner is a local officer, and a coroner's warrant cannot, therefore, be executed outside of the territorial jurisdiction for which he holds his appointment.

2. In Ontario a coroner is bound by statute to summon such witness as the Crown directs and a coroner's warrant to apprehend a witness who had defaulted in attendance upon a summons being a ministerial and not a judicial act, certiorari will not be granted in respect of such warrant.

3. A coroner may summon a witness to re-attend to give further evidence on new matter alleged to have been disclosed to the Crown since the witness' examination in the same inquest. Re Anderson & Kinrade, 14 Can. Cr. Cas. 448.

(*f*) *Speedy Trials.*

Witness to Attend Throughout Trial.—See Code sec. 841.

Warrant May be Issued for Witnesses Disobeying Summons.—See Code sec. 842.

Sec. 3.—What Witnesses are Competent.

Expert Testimony.—Expert witnesses may be examined, not more than five for either side without leave. See R.S.C. ch. 145, sec. 7.

Handwriting, comparison. See R.S.C. ch. 145, sec. 8.

A jury may properly make a comparison of disputed handwriting although no witness has been called to prove the handwriting to be the same in both, and may draw their own conclusions as to its authenticity, if an admittedly genuine handwriting and the disputed handwriting are both in evidence for same purpose in the case. R. v. Dixon (No. 2) (1897), 3 Can. Cr. Cas. 220 (N.S.).

An accused person does not, by offering himself as a witness on his own behalf become bound to write in the witness-box at the direction of the Judge a specimen of his handwriting for comparison with a document in evidence. Where the accused had furnished a specimen of his handwriting by direction of the Court at a previous trial, but under protest from his counsel, the specimen so obtained should be excluded on the subsequent trial. R. v. Grinder, 10 Can. Cr. Cas. 33.

Expert Evidence.—No evidence of matters of opinion is admissible except where the subject is one involving questions of a particular science in which persons of ordinary experience are unable to draw conclusions from the facts. The jury, as a general rule, draw all inferences themselves, and witnesses must speak only as to facts. R. v. Preeper (1888), 15 Can. S.C.R. 409, per Strong, J.

On some particular subjects, positive and direct testimony may often be unattainable; and, in such cases, a witness is allowed to testify, as to his belief or opinion, or even to draw inferences respecting the fact in question from other facts, providing these facts be within his personal knowledge.

The Canada Evidence Act, sec. 7, limits the number of expert witnesses called on either side to give opinion evidence to five, subject to increase by leave of the Court.

Where a witness states that a wound was inflicted with a certain kind of instrument it is permissible to test that witness's credibility by calling a medical man to testify whether a wound of the kind described can be inflicted by such an instrument. R. v. Jones (1868), 28 U.C.Q.B. 416.

By sec. 7 of the Canada Evidence Act, where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution for the defence, or by any party, to examine as witnesses, professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called upon either side without the leave of the Court or Judge or person presiding. Such leave shall be applied for before the examination of any of the experts who may be examined without such leave.

In the course of a trial for murder by shooting a witness was called at the trial to give evidence as a medical expert, and in answer to the Crown prosecutor he said "there are *indicia* in medical science from which it can be said at what distance small shot were fired at the body. I have studied this—not personal experience, but from books." He was not cross-examined as to the grounds of this statement, and no medical witnesses were called by the prisoner to confute it. The witness then stated the distance from the murdered man at which the shot must have been fired in the case before the Court, and on what he based his opinion as to it, giving the result of his examination of the body. It was held by the Supreme Court of Canada that by his preliminary statement the witness had established his capacity to speak as a medical expert, and it not having been shewn by cross-examination, or other testimony, that there were no such *indicia* as stated, his evidence as to the distance at which the shot was fired was properly received. R. v. Preeper (1888), 15 S.C.R. 401.

The prisoner's witness having stated that death was caused by two blows from a stick of certain dimensions, it was held that a medical witness previously examined by the Crown was properly recalled to state that in his opinion the injuries found on the body could not have been so occasioned. R. v. Jones, 28 U.C.Q.B. 416.

The theory of the defence in an indictment for murder was that the death was caused by the communication of smallpox virus by Dr. M. who attended the deceased, and one of the witness for the defence explained how the contagion could be guarded against. Dr. M. had not in his examination in chief or cross-examination been asked anything on this subject; it was held that he was properly allowed to be called in reply, to state that precautions had been taken by him

to guard against the infection. R. v. Sparham & Greaves, 25 U.C.C.P. 143.

No evidence of matters of opinion is admissible except where the subject is one involving questions of a particular science in which persons of ordinary experience are unable to draw conclusions from the facts. The jury as a general rule, draw all inferences themselves, and witnesses must speak only as to facts. R. v. Preeper (1888), 15 S.C.R. 409, per Strong, J.

On some particular subjects, positive and direct testimony may often be unattainable; and, in such cases, a witness is allowed to testify, as to his belief or opinion, or even to draw inferences respecting the fact in question from other facts, providing these facts be within his personal knowledge.

The Canada Evidence Act, sec. 7, limits the number of expert witnesses called on either side to give opinion to five, subject to increase by leave of the Court.

A skilled witness cannot in strictness be asked his opinion respecting the very point which the jury are to determine; but he may be asked a hypothetical question which in effect will determine the same question. In R. v. Jones the skilled medical witness was not asked respecting the very point which the jury were to determine, namely, whether the prisoner caused the death of the deceased, nor even the question whether in his opinion the girl had killed the deceased (as sworn to by her), but simply whether the blows as she described them could produce the fractures, etc., found on the head of the deceased. R. v. Jones (1869), 28 U.C.Q.B. 416.

Determination of Competency.

Competency of Witnesses.—Section 3 of the Canada Evidence Act, R.S.C. 1906, ch. 145, declares that a person shall not be incompetent to give evidence by reason of interest or crime. And by sec. 4 of the same statute every person charged with an offence and, with the exceptions stated therein, the wife or husband of the person so charged shall be a competent witness for the defence. In certain prosecutions specified in the Canada Evidence Act, sec. 4, the wife or husband, as the case may be, of the accused in not only a competent but a compellable witness without the consent of the person charged, but no husband shall be compelled to disclose any communication made to him by his wife during marriage nor a wife compelled to dislose any communication made to her by her husband.

One co-defendant cannot be called as a witness by another co-defendant on a joint indictment and compelled to give evidence, but a co-defendant may testify if he chooses to do so. R. v. Connors (1893), 5 Can. Cr. Cas. 70 (Que.).

Where an English-speaking prisoner in the Province of Quebec is represented at his trial by counsel speaking the French language, and no request is made for a translation of the testimony of French-speaking witnesses into English, for the benefit of the prisoner, the failure to so translate as to enable the prisoner to personally understand the evidence is not a limitation of his right to make "full answer and defence" to the charge, and will not invalidate a conviction. R. v. William Long, 5 Can. Cr. Cas. 493 (Que.); and see Reg. v. Jones, 49 J.P. 728.

When it is sought to examine a witness through an interpreter in a foreign tongue, the opposing counsel may be given leave first to question the witness in English for the purpose of testing the witness's competency to speak English. And where a foreign witness examined in chief through an interpreter has some knowledge of English, the counsel entitled to cross-examine may do so in English without the intervention of the interpreter, and may also, if he chooses, put questions through the interpreter. R. v. Wong On (No. 2), 8 Can. Cr. Cas. 343.

Grounds of Incompetency.

A person shall not be incompetent to give evidence by reason of interest or crime. See R.S.C. ch. 145, sec. 3.

(*a*) *Persons of Unsound Mind.*—The general rule is that a lunatic or a person affected with insanity is admissible as a witness, if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of matters which he has seen or heard, in reference to the questions at issue, and whether he have that understanding is a question to be determined by the Court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity. Columbia v. Armes, 107 U.S. 419.

Deaf and Dumb Witness.—See R.S.C. ch. 145, sec. 6.

Children.—See R.S.C. ch. 145, sec. 16.

Other Material Evidence.—Upon the trial of a charge of attempted carnal knowledge of a girl under fourteen who is too young to understand the nature of an oath, a conviction for that offence is not warranted unless her evidence not under oath is corroborated by some other material evidence implicating the accused (Cr. Code sec. 1003), but the accused may be convicted of common assault upon the charge so laid if there be corroboration merely by some other material evidence (Can. Evidence Act sec. 16). R. v. De Wolfe (1904), 9 Can. Cr. Cas. 38 (N.S.).

The term "other material evidence" as regards corroboration of testimony has been much discussed under the Ontario Statute, 36 Viet.

ch. 10, sec. 6, and the Ontario Evidence Act in which it is now embodied.

In Parker v. Parker, 32 U.C.C.P. 113, Armour, C.J., stated his view in the following language: "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."

That decision was approved by the Ontario Court of Appeal in Radford v. Macdonald (1891), 18 Ont. App. R. 167. Osler, J.A., in the last named case (page 170) said:—

"Some independent material evidence must be given which corroborates, in plain Anglo-Saxon strengthens, the evidence of the opposite or interested party. If the evidence offered is admissible, if it supports the evidence of the party, it is corroborative evidence, and it is then for the Judge or jury to say what weight is to be attached to it. . . . Nor is the corroboration required to be directed to any particular fact or part of the evidence. It is the 'evidence' of the party which is to be corroborated by some 'other material evidence.'"

In a later case, Green v. McLeod (1896), 23 Ont. App. R. 676, the Court of Appeal confirmed its ruling in Radford v. Macdonald, and held further that the "material evidence," in corroboration required by the Ontario Evidence Act in an action by or against the personal representatives of the 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."

Osler, J.A. (page 679), pointed out that in Cole v. Manning, 2 Q.B.D. 611, a case in England under the Bastardy Act, which required corroboration "in some material particulars by other testimony," the evidence which was held to be sufficient for that purpose was in the strictest sense evidence shewing merely a probability that the statement of the plaintiff was true.

And in the recent case of Thompson v. Coulter (1903), 34 Can. S.C.R. 261, under the Ontario statute, Killam, J., delivering the judgment of the Court said:—

"In my opinion this enactment demands corroborative evidence of a material character supporting the case to be proved by such 'opposite or interested party' in order to enable him to obtain a 'verdict, judgment, or decision.' Unless it supports that case, it cannot properly be said to 'corroborate.' A mere scintilla is not sufficient. At the same time the corroborating evidence need not be sufficient in itself to establish the case. The direct testimony of a second witness is unnecessary; the corroboration may be afforded by circumstances. McDonald v. McDonald, 33 S.C.R. 145. The expressions used by the

learned Judges of the Court of Appeal in In re Finch, 23 Ch.D. 267, appear to me applicable under this statute.

Jessel, M.R., there said, "As I understand, corroboration is some testimony proving a material point in the testimony which is to be corroborated. It must not be testimony corroborating something else. Something not material." And Lindley, L.J., said, "Evidence which is consistent with two views does not seem to me to be corroborative of either."

Evidence of Child not Under Oath Received in Certain Cases.—See Code sec. 1003.

Upon the charge of attempted carnal knowledge of a girl under fourteen who is too young to understand the nature of an oath, a conviction for that offence is not warranted unless her evidence not under oath is corroborated by some other material evidence implicating the accused (Cr. Code sec. 1003), but the accused may be convicted of common assault upon the charge so laid if there be corroboration merely by some other material evidence (Can. Evidence Act, sec. 16). R. v. De Wolfe (1904), 9 Can. Cr. Cas. 38.

The fact that a girl of eleven years was instructed as to the nature of an oath only a few days before the trial is not sufficient ground for rejecting her testimony under oath if the Court is satisfied that she is competent to be sworn. R. v. Armstrong (1907), 12 Can. Cr. Cas. 544, 15 O.L.R. 47.

In a case prior to the Canada Evidence Act it was held that where the conviction on a charge of indecent assault was for common assault only, but the evidence was corroborated as here required, the conviction would be valid although the child's evidence would not at that time have been admissible on a charge of common assault. R. v. Grantyers (1893), 2 Que. (K.B.) 376.

On a charge for indecent assault upon a child under the age of fourteen, the child was examined on the *voir dire* and not sworn. On refusing to answer the Crown prosecutor had the trial adjourned. On the re-opening of the trial on the second day the child still absolutely refused to speak. Counsel for the Crown on being asked if he had any other evidence offered two witnesses in corroboration of the child's evidence as told to them by the child, and also evidence of similar acts with others by the prisoner:—Held, following R. v. Cole, 1 Phil. Ev. 508, that evidence not in support of the charges laid in the indictment, but referred to charges not laid, could not be received as corroborative evidence; and following Rex v. Kingham, 66 L.J.P. 393, evidence as to what the child told others could not be received. There being no other evidence for the prosecution, the prisoner was acquitted. R. v. South, 39 Can. Law Journal 639, Bole, Co. J.

Competency of Accused Prisoners.—A person shall not be incompetent to give evidence by reason of interest or crime. R.S.C. ch. 145, sec. 3.

Accused and Wife or Husband Competent Witnesses for Defence.—See R.S.C. ch. 145, sec. 4.

Failure of Accused to Testify not to be Commented on.—See R.S.C. ch. 145, sec. 4.

The result of this section is to empower (but not to compel) one of two persons jointly indicted to give evidence incriminating the other without the necessity of resorting to the old procedure of either taking a plea of guilty or pardoning the prisoner to be called.

When a person claims the right to be allowed to give evidence on his own behalf he comes under the ordinary rule as to cross-examination. He may be asked all questions pertinent to the issue, and cannot refuse to answer those which may implicate him. R. v. Connors (1893), 3 Que. Q.B. 100, 5 Can. Cr. Cas. 70.

A prisoner at the trial has the option of making a statement not under oath, or of giving evidence under oath. R. v. Aho (1904), 8 Can. Cr. Cas. 453, 11 B.C.R. 114.

In R. v. D'Aoust (1902), 5 Can. Cr. Cas. 407, 3 O.L.R. 653, the accused was charged with robbery, and being called as a witness on his own behalf, was asked by the counsel for the Crown, on cross-examination, whether he had not been convicted several times of indictable offences. This question was objected to by counsel for the accused, but was allowed by the learned trial Judge, and was answered by the accused in the affirmative. Counsel for the Crown thereupon questioned the accused as to five previous convictions, all of which the accused admitted. It was held by the Ontario Court of Appeal that the evidence of the previous convictions of the accused so obtained was admissible. R. v. D'Aoust (1902), 5 Can. Cr. Cas. 407.

Comment on Failure to Testify.—Comment by the prosecuting counsel before the jury in respect of the failure of prisoner's wife to testify is error entitling the prisoner to a new trial. R. v. Corby (1898), 1 Can. Cr. Cas. 457 (N.S.). The rule is to be applied, notwithstanding a subsequent withdrawal of the comment and notwithstanding the Judge's direction to the jury to disregard it. The objection is not waived, because not taken at the time, and it is sufficient if drawn to the attention of the trial Judge after the jury have retired to deliberate. *Ibid.*

An accused person has the right to have his case submitted to the jury, intimating that the prisoner could have given evidence as to an trial Judge, and although such comment is afterwards withdrawn, the making of same is a substantial wrong to the accused, and if he is convicted he is entitled to a new trial by reason thereof. R. v. Coleman (1898), 2 Can. Cr. Cas. 523, 30 Ont. R. 108.

Where, during the address to the jury by the prisoner's counsel, the counsel for the Crown interjects a remark, in the hearing of the jury, intimating that the prisoner could have given evidence as to an alleged occurrence then being referred to, and it appears that the ascertainment of whether or not such occurrence took place is not in fact material to the issue, such comment is not a ground for ordering a new trial. R. v. Weir (No. 3) (1899), 3 Can. Cr. Cas. 262 (Que.).

A direction to the jury upon a criminal trial that the accused has failed to account for a particular occurrence when the onus is upon him to do so, is not a comment on the failure of the accused to testify. R. v. Aho (1904), 8 Can. Cr. Cas. 453, 11 B.C.R. 114.

Where the trial Judge, in his charge to the jury, called attention to the fact that the prisoner charged with theft was not called to testify on his own behalf, and warned the jury that they were not to take that fact to his prejudice, but stated that if the accused were innocent he could have proved that he was not in the locality at the time, this is a prohibited "comment" entitling the accused to a new trial. R. v. McGuire (1904), 9 Can. Cr. Cas. 554, 36 N.B.R. 609.

A statement by the Crown counsel in his address to the jury that the prisoner's counsel "took the very best and wisest course in not having the prisoner go on the witness stand" and that he, the Crown counsel, thinks it was wise for the prisoner himself, is a comment unfavourable to the accused on his failure to testify on his own behalf and is within the prohibition of sec. 4. Where comment has been made in contravention of the Canada Evidence Act, upon the failure of the accused to testify, the same is a substantial wrong to the prisoner (Cr. Code sec. 1019), and entitles him to a new trial. R. v. Charles King (1905), 9 Can. Cr. Cas. 426.

Where two prisoners are jointly indicted but an order is made for their separate trial, the one is an admissible witness for the other and is bound to testify although he may prevent his evidence being used against himself at his subsequent trial. Only the person then on trial is a "person charged" within the meaning of the Canada Evidence Act, sec. 4, and comment is not prohibited as to the failure of the accused to call as a witness the person jointly indicted with him but whose trial has been ordered to be separate. R. v. Blais (1906), 10 Can. Cr. Cas. 354, 11 O.L.R. 345.

On a charge of theft, where the circumstances were such as to warrant the jury in drawing an inference of guilt from the prisoner's possession of one of the stolen articles, the Judge's comment in his charge that, if the defendant's witness is disbelieved, the prisoner has not given a "satisfactory account" of how he came into possession of the article is not comment on the failure of the accused to give evidence prohibited by the Canada Evidence Act. R. v. Burdell (1906), 10 Can. Cr. Cas. 365, 11 O.L.R. 440.

Notwithstanding sec. 4 of the Canada Evidence Act prohibiting comment upon the prisoner's failure to testify, the Court may instruct the jury that the prisoner is entitled under the law to remain silent at the trial. R. v. MacLean (1906), 11 Can. Cr. Cas. 283 (N.S.).

Where defendant's counsel during the trial states that he intends to call a witness to prove certain facts but does not call any witness on that point, the Crown counsel may properly comment on such failure in his address to the jury. R. v. Brindamour (1906), 11 Can. Cr. Cas. 315 (Y.T.).

A statement made by a Judge, in charging the jury in a criminal case, that the evidence of a witness for the Crown is wholly uncontradicted, is not a comment on the failure of a person charged to testify, within the prohibition of the Canada Evidence Act, sec. 4(5). R. v. Guerin, 14 Can. Cr. Cas. 424.

Procuring Attendance of Prisoner who is also a Witness.—See Code sec. 977.

Husband and Wife.—Wife or husband competent and compellable witnesses for prosecution. See R.S.C. ch. 145, sec. 4.

Disclosure of communications during marriage not compellable. See R.S.C. ch. 145, sec. 4.

When Wife or Husband a Competent and Compellable Witness.—The principal offences included in the sections of the Code specified in the second sub-section and as to which the wife or husband is made a compellable as well as a competent witness are as follows:—202-203 (buggery and attempts), 204 (incest), 205-206 (indecent acts), 211-214 (criminal seduction), 215-216 (procuring), 217 (householder permitting defilement), 218 (conspiracy to defile), 219 (carnally knowing imbecile), 238-239 (vagrancy), 244 (criminal neglect to provide necessaries), 245 (abandoning infants), 298-302 (rape and unlawful carnal knowledge), 307-308 (bigamy), 309 (feigned marriage), 310 (unlawful conjugal union), 311 (procuring unlawful marriage), 313-315 (abduction), 316 (child-stealing).

Communication Between Husband and Wife.—Neither husband nor wife is bound to disclose a communication received from the other.

A letter written by the accused to his wife and intrusted to but opened by a constable was held inadmissible. R. v. Pamenter (1872), 12 Cox C.C. 177. Conversations between husband and wife at which a third party was present or which he overheard may be proved by such third person. R. v. Smithie, 5 C. & P. 332; R. v. Simons (1834), 6 C. & P. 540; R. v. Bartlett, 7 C. & P. 832.

Under the original Code of 1892 the word "competent" was used in sub-sec. (3) where the word "compellable" now appears, and no distinction was made as to the wife being both competent and compel-

lable as a witness regarding certain offences as is now done in sub-sec. (2). It was in consequence held in Gosselin v. R. (1903), 7 Can. Cr. Cas. 139, 31 Can. S.C.R. 255, under the former Code, that the wife was not only a competent but a compellable witness. That decision no longer applies under the altered phraseology of sec. 4.

Accomplices.—A person shall not be incompetent to give evidence by reason of interest or crime. R.S.C. ch. 145, sec. 3.

One co-defendant cannot be called as a witness by another co-defendant on a joint indictment and compelled to give evidence, but a co-defendant may testify if he chooses to do so. R. v. Connors (1893), 5 Can. Cr. Cas. 70 (Que.).

It is not a rule of law that an accomplice must be corroborated, but one of practice merely. It is usual for Judges to tell the jury that they may act as they please upon the uncorroborated evidence of an accomplice, but that it is safer to require corroboration. "Judges in their discretion will advise a jury not to believe an accomplice unless he is confirmed, or only in so far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts to which he deposes. It is allowed that he is a competent witness and the consequence is inevitable that if credit is given to his evidence it requires no confirmation from another witness." R. v. Fellowes, 19 U.C.Q.B. 48; R. v. Andrews, 12 Ont. R. 184. An accomplice stands in a situation different from one whose character is bad. He is immediately connected with the crime, the subject of inquiry, and has an obvious interest in obtaining the conviction of those whom he represents to have acted with him in committing it; but it cannot be treated as a point of law that the evidence of an accomplice must be corroborated. Per Draper, C.J., R. v. Beckwith (1859), 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. R. v. Andrews, 12 O.R. 184.

The testimony of an accomplice ought not to be relied upon unless corroborated both as to the circumstances of the crime and the identity of the accused. R. v. Andrews, 12 O.R. 184. There should be some fact deposed to independently altogether if the evidence of the accomplice which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it. R. v. Smith (1876), 38 U.C.Q.B. 218; R. v. Seddons (1866), 16 U.C.C.P. 389.

A summary conviction based upon the uncorroborated evidence of an accomplice who is shewn to have received money to testify against the accused is properly set aside on appeal. R. v. Ah Jim (1905), 10 Can. Cr. Cas. 126.

Where two persons are being jointly tried for an offence, a voluntary admission made by one of them is evidence against himself only, and if it implicates a fellow prisoner the trial Judge should warn the jury that the statement is evidence only against the person making it and should not be considered in weighing the evidence against the fellow prisoner. R. v. Martin (1905), 9 Can. Cr. Cas. 371.

Semble, the prisoner jointly charged and likely to be implicated by the statement of the other accused person, would have good ground for applying to be separately tried in order to prevent the statement being put in even with such warning, as evidence before the jury by which he is to be tried. *Ibid.*

Such statement of one prisoner, if proved, must be proved *in toto*, and the Court would not be justified in directing that the name of others thereby implicated be suppressed by the witness proving the statement of the accused. *Ibid.*

Sec. 3B.—How Many Witnesses are Necessary.

Corroboration Required in the Proof of Certain Offences.—See Code sec. 1002.

Section 1002 is taken from sec. 684 of the Criminal Code of 1892. That section originated with 32 & 33 Vict. ch. 19, sec. 54(*d*),which abolished the incapacity of interested witnesses, but with a proviso that the evidence of an "interested person" should be insufficient unless corroborated by "other legal evidence in support of the prosecution." The corroboration required by that statute was held not to be the corroboration of the evidence of the person interested in every material particular tending to support the prosecution. R. v. Bannerman (1878), 43 U.C.Q.B. 547; R. v. Farrell (1888), 1 Terr. L.R. 166. This section abolished the distinction between interested and disinterested witnesses in this respect and declared that a conviction should not be made upon the evidence of one witness only unless corroborated in some material particular by evidence implicating the accused.

Forgery.—Where a prisoner is charged with forgery by writing three false signatures, as indorsements, on the back of a promissory note, and each of the parties whose signature is thus made to appear, swears that it is not his and is a forgery, there is the corroborative evidence required to make good a conviction. R. v. Houle (1905), 12 Can. Cr. Cas. 56.

On an indictment for forgery of prosecutor's name as endorser of a promissory note, prosecutor swore that he had not endorsed the note; that it was not his writing; that he had never authorized the prisoner to sign his name to the note, and that he himself was unable to write his name, being in fact a marksman. A son of his also swore that his

father was unable to write his name. Another witness also proved that he had known the prosecutor three or four years, and knew that he could not write. It was held that the evidence of the son and of the other witness to the effect that the prosecutor was unable to write his name was "other legal evidence in support of the prosecution" within the meaning of the section, and that it sufficiently corroborated the evidence of the prosecutor to sustain the conviction, and that the burden was then on the prisoner to shew as a defence that he was authorized to use or write the prisoner's name. R. v. Bannerman (1878), 43 U.C.Q.B. 547. The corroboration must be that of another witness, and not merely the evidence of the same witness on another point. R. v. McBride (1895), 2 Can. Cr. Cas. 544, 26 Ont. R. 639.

In R. v. Giles (1856), 6 U.C.C.P. 84, the prisoner, Elizabeth Giles, was charged with forging an order for the delivery of goods. The only persons who gave evidence at the trial were the person, whose name was alleged to have been forged, and the person to whom the order was addressed. The person whose name was alleged to have been forged denied the signature and also swore that he could not write; but the person to whom the order was presented by the prisoner, and who had supplied her with goods on the faith of the same, was not aware of that, and accepted the order in good faith. The order purported to be a request to let "the bearer" have goods, and the prisoner, on presenting it gave a fictitious name. In delivering the judgment of the Court of Common Pleas (Draper, C.J., Richards and Hagarty, JJ.), the Chief Justice said:—"The false representation made by the prisoner as to her own name would be a very material fact to establish a guilty knowledge on her part, if the fact that the note was forged was established; but, until that is done, this false statement wants significance, and I think it would be going too far to treat (it) as a corroboration of the statement of Aikenhead the party whose name was alleged to have been forged) that the order was a forgery. There is no corroboration of his testimony, *i.e.*, there is no material fact proved by him which is proved either by other direct testimony or by the proof of other facts which go to establish the truth of any material part of his statements."

Prostitution.—On a charge of allowing a girl under eighteen to be upon premises for immoral purposes, the evidence of the girl, proving that she shared with the proprietor the money she obtained by prostitution there carried on, is sufficiently corroborated by the evidence of another witness tending to shew that the place was a bawdy house. R. v. Brindley (1903), 6 Can. Cr. Cas. 196.

Seduction.—Evidence that the accused charged with the seduction of a girl between 14 and 16 (Revised Code, sec. 211) had previously told a witness other than the girl of his desire to have sexual inter-

course with her, and of subsequent admissions of the accused from which it might be inferred that he had afterwards taken advantage of an opportunity when he was left in charge of the house where the girl lived, is corroborative evidence to go to the jury although no medical evidence is adduced in support of the girl's story. Upon an appeal by the Crown, by leave of the Court of Appeal, from the judgment acquitting the accused and withdrawing the case from the jury on the ground that there was no corroborative evidence, the Court of Appeal, on reversing such ruling, should direct a new trial. R. v. Burr (1906), 12 Can. Cr. Cas. 104, 13 O.L.R. 485.

Where the defendant has been convicted and no question has been reserved or appeal taken except as to the sufficiency of the corroboration under this section, the Appellate Court cannot review the whole evidence but must proceed on the assumption that the charge as laid was fully proved by the complainant's testimony if the corroborative evidence satisfies the statutory requirements. R. v. Daun (1906), 11 Can. Cr. Cas. 244.

On a charge of seducing a girl under sixteen the evidence may consist of the prisoner's admission made after she attained sixteen that he had had connection with her. R. v. Wyse (1895), 1 Can. Cr. Cas. 6 (N.W.T.). And a statement made by the accused, before he was charged with the offence, that he had been advised that if he could get the girl to marry him he would escape punishment is corroborative evidence implicating the accused. *Ibid.*

Evidence of the girl's pregnancy, and of her having been employed in domestic service at the defendant's residence and of facts shewing merely a strong probability of there having been no opportunity at which any other man could have been responsible for her condition, does not constitute corroborative evidence "implicating the accused" required by this section in order to sustain a conviction. R. v. Vahey (1899), 2 Can. Cr. Cas. 258 (Ont.).

Attempt to Carnally Know.—Upon the trial of a charge of attempted carnal knowledge of a girl under fourteen who is too young to understand the nature of an oath, a conviction for that offence is not warranted unless her evidence not under oath is corroborated by some other material evidence implicating the accused (Cr. Code sec. 1003), but the accused may be convicted of common assault upon the charge so laid if there be corroboration merely by some other material evidence. (Can. Evidence Act, sec. 16). R. v. De Wolfe (1904), 9 Can. Cr. Cas. 38.

In a case prior to the Canada Evidence Act it was held that where the conviction on a charge of indecent assault was for common assault only, but the evidence was corroborated as here required, the conviction would be valid although the child's evidence would

not at that time have been admissible on a charge of common assault. R. v. Grantyers (1893), 2 Que. K.B. 376.

The fact that a girl of eleven years was instructed as to the nature of an oath only a few days before the trial is not sufficient ground for rejecting her testimony under oath, if the Court is satisfied that she is competent to be sworn. R. v. Armstrong (1907), 12 Can. Cr. Cas. 544, 15 O.L.R. 47.

On a trial for indecent assault upon a child under the age of fourteen, the child was examined on the *voir dire* and not sworn. On refusing to answer the Crown prosecutor had the trial adjourned. On the re-opening of the trial on the second day the child still absolutely refused to speak. Counsel for the Crown on being asked if he had any other evidence, offered two witnesses in corroboration of the child's evidence as told to them by the child, and also of similar acts with others by the prisoner:—Held, following R. v. Cole, 1 Phil. Ev. 508, that evidence not in support of the charges laid in the indictment, but referring to charges not laid, could not be received as corroborative evidence; and following R. v. Kingham, 66 L.J.P. 393, evidence as to what the child told others could not be received. There being no other evidence for the prosecution, the prisoner was acquitted. R. v. South, 39 Can. Law Jour. 639, Bole, Co. J.

Indecent Assault.—In an Ontario case it has been held that in a civil action for damages under circumstances constituting the criminal offence of indecent assault evidence is admissible of complaint made by the woman shortly after the assault was committed, in like manner as upon a criminal trial; and that complaint made by the woman to her husband on her first meeting him some hours after the assault, but on the same day, was admissible in evidence under the circumstances of the case. The proof of such complaint by the evidence of both the woman and her husband is corroborative of the woman's evidence that she did not consent to the acts complained of. Hopkinson v. Perdue, 8 Can. Cr. Cas. 286. Where evidence of complaint is admissible on a charge of indecent assault, not only the fact of complaint may be shewn, but the particulars of the complaint. *Ibid.*

It is essential in all cases of indecent assault that complaint should have been made at the earliest opportunity after the offence; and evidence of such complaint may, under special circumstances, be received after the lapse of several days' delay. The fact of the girl being only seven years of age, that the act was committed without violence and that the girl did not realize the serious nature of the act, are circumstances which make a complaint made ten days afterwards admissible in evidence. R. v. Barron (1905), 6 Can. Cr. Cas. 196 (N.S.).

Under exceptional circumstances evidence of a complaint made by an adult female of an indecent assault may be admitted although

five days had intervened between the assault and the complaint. R. v. Smith (1905), 9 Can. Cr. Cas. 21 (N.S.). See also R. v. Graham (1899), 3 Can. Cr. Cas. 22 (Ont.).

Rape.—Upon the trial of a charge of rape the whole statement made by the woman by way of complaint shortly after the alleged offence, including the name of the party complained against and the other details of the complaint, is admissible in evidence as proof of the consistency of her conduct and as corroborative of her testimony regarding the offence, but not as independent or substantive evidence to prove the truth of the charge. Whether or not the complaint was made within a time sufficiently short after the commission of the offence as to admit evidence of the particulars of the complaint, is a question to be decided by the Court under the circumstances of the particular case; but it is nevertheless the province of the jury to take into consideration the time which intervened, in weighing the probability of its truth. R. v. Riendeau (1901), 4 Can. Cr. Cas. 421, 10 Que. K.B. 584.

In the Riendeau Case the lapse of seven days between the date of the offence and the time of making complaint thereof was held insufficient under the circumstances to exclude testimony of the particulars of the complaint. But see R. v. Ingey (1900), 64 J.P. 106, noted in 3 Can. Cr. Cas. 305.

Upon a charge of rape, statements made by the complainant to a police officer on the day after the offence was alleged to have been committed and in response to his inquiries, the complainant having on the day of the offence complained to others of an assault but not of rape, are not admissible in evidence as part of the *res gestæ* or as in corroboration. But if the jury acquit the accused of that offence but find him guilty of indecent assault, the verdict should stand notwithstanding the improper admissions in evidence of statements so made by the complainant after the alleged offence, if the other evidence in the case is ample to warrant the verdict of indecent assault. R. v. Graham (1899), 3 Can. Cr. Cas. 22 (Ont.).

Evidence of Child of Tender Years Must be Corroborated.—See R.S.C. ch. 145, sec. 16.

The term "other material evidence" as regards corroboration of testimony has been much discussed under the Ontario statute, 36 Vict. ch. 10, sec. 6, and the Ontario Evidence Act in which it is now embodied.

In Parker v. Parker, 32 U.C.C.P. 113, Armour, C.J., stated his view in the following language: "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."

That decision was approved by the Ontario Court of Appeal in Radford v. Macdonald (1891), 18 Ont. App. R. 167. Osler, J.A., in the last named case (p. 170) said:—

"Some independent material evidence must be given which corroborates, in plain Anglo-Saxon strengthens, the evidence of the opposite or interested party. If the evidence offered is admissible, if it supports the evidence of the party, it is corroborative evidence, and it is then for the Judge or jury to say what weight is to be attached to it. Nor is the corroboration required to be directed to any particular fact or part of the evidence. It is the 'evidence of the party which is to be corroborated by some' other material evidence."

In a later case, Green v. McLeod (1896), 23 O.A.R. 676, the Court of Appeal confirmed its ruling in Radford v. McDonald and held further that the "material evidence" in corroboration required by the Ontario Evidence Act in an action by or against the personal representatives 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."

Osler, J.A. (p. 679), pointed out that in Cole v. Manning, 2 Q.B.D. 611, a case in England under the Bastardy Act which required corroboration "in some material particulars by other testimony," the evidence which was held to be sufficient for that purpose was in the strictest sense evidence shewing merely a probability that the statement of the plaintiff was true.

And in the recent case of Thompson v. Coulter (1903), 34 S.C.R. 261, under the Ontario statute, Killam, J., delivering the judgment of the Court said:—"In my opinion this enactment demands corroborative evidence of a material character supporting the case to be proved by such 'opposite or interested party' in order to enable him to obtain a 'verdict, judgment or decision.' Unless it supports that case, it cannot be said to 'corroborate.' A mere scintilla is not sufficient. At the same time the corroborating evidence need not be sufficient in itself to establish the case. The direct testimony of a second witness is unnecessary; the corroboration may be afforded by circumstances. McDonald v. McDonald, 33 S.C.R. 145. The expressions used by the learned Judges of the Court of Appeal in In re Finch, 23 Ch.D. 267, appear to me applicable under the statute. Jessel, M.R., there said: "As I understand, corroboration is some testimony proving a material point in the testimony which is to be corroborated. It must not be testimony corroborating something else—something not material." And Lindley, L.J., said: "Evidence which is consistent with two views does not seem to me to be corroborative of either."

Sec. 4.—Swearing the Witnesses.

Who May Administer Oaths.—See R.S.C. ch. 145, sec. 13.

Jurors and witnesses (except witnesses before a grand jury) must be sworn or affirm in open Court.

Christians are sworn on the New Testament with their hats off: Jews on the Old Testament with their hats on; Mohammedans on the Koran, and persons of other religions according to the form prescribed by the religion they profess.

Before the oath is administered is the proper time to ascertain what form of oath or affirmation the juror or witness considers binding on his conscience.

For taking the evidence of a Canton Chinaman not a believer in Christianity, the oath known as the "chicken oath" should be administered if the trial is for a capital offence instead of the less solemn "proper oath." R. v. Ah Wooey (1902), 8 Can. Cr. Cas. 25 (B.C.).

When a witness without objection takes an oath in the form ordinarily administered to persons of his race or belief, he is then under a legal obligation to speak the truth and cannot be heard to say that he was not sworn. Perjury may be assigned in respect of statements given in evidence by a Chinaman who was not a Christian where the oath was administered to him by the burning of paper and an admonition to him "that he was to tell the truth, the whole truth and nothing but the truth or his soul would burn up as the paper had been burned." R. v. Lai Ping, 11 B.C.R. 102, 8 Can. Cr. Cas. 467.

A witness at the trial who professes the Jewish religion but is sworn on the Evangelists, and without placing his hat on his head will be sworn anew by order of the Court when his religious belief is ascertained by counsel, notwithstanding that the witness declares himself bound by the oath already taken. Sessenweir v. Palmer, 3 Que. P.R. 110.

Affirmation by Witness Instead of Oath.—See R.S.C. ch. 145, sec. 14.

Affirmation by Deponent upon Affidavit, etc.—See R.S.C. ch. 145, sec. 15.

Witnesses Ordered Out of Court.—See Code sec. 645.

Excluding Public from Certain Trials.—The following are the subjects during the hearing of which the public may be excluded:—Sec. 202, Unnatural offence; 203, Attempt to commit sodomy; 204, Incest; 205, Indecent acts; 206, Acts of gross indecency; 211, Seduction of girls under 16; 212, Seduction under promise of marriage; 213, Seduction of ward, servant, etc.; 214, Seduction of passengers on vessels; 215 and 216, Procuring; 217, Permitting defilement on premises; 218, Conspiracy to defile; 219, Carnally knowing idiots, etc.; 220, Prostitution of Indian women; 228, As to keeping bawdy house; 238, (*i*), (*j*) and (*k*), Being common prostitute; keeping house of ill-fame; frequenting such house; 292, Indecent assault on females; 293, Indecent assault on males; 299, Rape; 300, Attempt to commit rape; 301,

Defiling children under 14; 302, Attempting to defile child; 303, Procuring abortion; 304, Woman procuring her own miscarriage; 305, Supplying noxious drugs, etc.; 306, Killing unborn child; 313, Abduction of woman; 314, Abduction of heiress.

Excluding Public from Preliminary Investigation.—By Code sec. 679(*d*) a justice holding a preliminary enquiry may order that no person other than the prosecutor and accused, their counsel and solicitors, shall have access to or remain in the room or building in which the enquiry is held, if it appears to him that the ends of justice will be best answered by so doing.

Sec. 5.—Examination of Witnesses.

Manner of Taking Evidence for Prosecution.—Code sec. 682.

Hostile Witness.—See R.S.C. ch. 145, sec. 9.

The party on whose behalf a witness is called is not debarred by this section from proving by other witnesses any relevant facts inconsistent with or contradictory of such witness's testimony without a ruling that the witness is hostile to the party calling him. R. v. Laurin (No. 5), 6 Can. Cr. Cas. 135 (Que.).

The witness's deposition at a preliminary enquiry may be shewn to him on his examination in chief at the trial for the purpose of refreshing his memory, but neither the examining counsel nor the witness may read the deposition aloud. On the witness silently reading his previous deposition, a question, which had been put to the witness before he saw the deposition, and to which he had given an unexpected answer, may be reput; and only in case the witness, after his memory has been so refreshed, persists in the same unexpected answer, can the question be repeated to him in a leading form from the depositions. R. v. Laurin (No. 5), 6 Can. Cr. Cas. 135.

The opposite party is entitled to cross-examine not only upon the examination in chief but upon the previous depositions which had been so shewn to the witness for the purpose of refreshing his memory. *Ibid.*

No witness may refuse to answer incriminating questions, but the answer is not receivable against him. See R.S.C. ch. 145, sec. 5.

If when called upon to testify, the witness does not object to do so on the ground that his answers may tend to criminate him, his answers are receivable against him in any criminal trial or other criminal proceeding against him thereafter. If, on the other hand, he does object, he is protected, except on a prosecution for perjury in respect thereof. R. v. Clark (1901), 5 Can. Cr. Cas. 235 (Ont.); R. v. McLinchy, 2 Can. Cr. Cas. 416 (Que.).

Relevant statements made by the accused without objection on his examination for discovery in a civil action prior to the criminal proceedings are admissible in evidence on the criminal tral. R. v. Brindamour (1906), 11 Can. Cr. Cas. 215 (U.T.).

If the accused voluntarily gives evidence on his own behalf (Can. Ev. Act, sec. 4) the proceeding in which the statement was made is not a proceeding "thereafter instituted against him," but is a then pending proceeding, consequently section 5 of the Evidence Act does not apply. R. v. Skelton (1898), 4 Can. Cr. Cas. 467, 484, per Richardson, J. (N.W.T.).

The deposition of a judgment debtor upon his examination as to means may be proved in evidence against him on a criminal charge of disposal of property in fraud of creditors, unless at the time of the examination he objected to answer on the ground that his answer might tend to criminate him. R. v. Van Meter (1906), 11 Can. Cr. Cas. 208 (Alta.).

If the examination were before a duly authorized authority, the admissions then made in answer to questions not objected to, may be afterwards used against the accused although such questions were not properly within the scope of the examination. *Ibid.*

A communication from a solicitor to his client is not privileged if calculated to further or conceal a criminal act. Gosselin v. R., 7 Can. Cr. Cas. 139.

Evidence given by the accused in a former civil proceeding is to be considered as a voluntary statement and therefore admissible in evidence against him on a subsequent criminal proceeding relating to the same matter, unless the accused has objected to answer in the civil case upon the ground that the answer may tend to criminate him or upon the ground that the answer may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person. R. v. Douglas (1896), 1 Can. Cr. Cas. 221 (Man.). The objection may be taken although the witness or party is compelled to answer under the provincial laws of evidence governing the civil proceeding. If he is compelled to answer notwithstanding his objection a question which he would have been excused from answering but for a provincial statute which makes the answer compulsory, then section 5 of the Canada Evidence Act makes such answer inadmissible in any subsequent criminal proceeding other than a prosecution for perjury in respect of the very answer so given.

Cross-examination as to Previous Statements in Writing—As to Deposition in Investigation.—See R.S.C. ch. 145, sec. 10.

This section of the Act is a re-enactment of sec. 325, Rev. Stat. Canada, 1886, ch. 174, originally taken from sec. 5, Imperial Statute 28 and 29 Viet. ch. 18.

As to a statement made orally by a witness and reduced to writing, 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. R. v. Troop (1898), 2 Can. Cr. Cas. 29 (N.S.).

This view is, of course, not applicable to the case of a statement made in writing by the witness himself, which, obviously could be proved only by the production of the writing itself, or failing that, by proof of its contents. *Ibid.*

The statement of the accused made upon the preliminary enquiry and certified by the justice, may be given in evidence against him upon the trial without further proof thereof, unless it is proved that the justice purporting to have signed the same did not in fact do so. Code sec. 1001.

And depositions taken in the preliminary or other investigation of any charge against any person may be read as evidence in the prosecution of such person for any other offence upon the like proof and in the same manner in all respects, as they may, according to law, be read in the prosecution of the offence with which such person was charged when such depositions were taken. Code sec. 1000; and see Code secs. 998 and 999 as to conditions under which depositions are admissible on a subsequent trial.

Evidence given by the official stenographer to the effect that the prisoner resembled the party of same name as prisoner, whose depositions he had taken, and that he believed him to be the same man, but could not sufficiently remember to swear positively to his identity, is properly submitted to a jury. R. v. Douglas (1896), 1 Can. Cr. Cas. 221 (Man.).

Relevant statements made by the accused without objection on his examination for discovery in a civil action prior to the criminal proceedings are admissible in the criminal trial. R. v. Brindamour, 11 Can. Cr. Cas. 215.

Cross-examination as to Previous Oral Statements.—See R.S.C. ch. 145, sec. 11.

Questions respecting the relevancy of testimony to the matter in issue often arise when a counsel in cross-examination of a witness uses a license, which the practice allows him, of asking a variety of questions having no apparent connection with the matter to be tried, in the hope of involving the witness in some contradiction. He is not in such cases obliged to explain the object of his questions, because that might defeat his object, but he must be content to take the answer which the witness gives to any question that is irrelevant, and is not allowed to call witnesses to disprove the statements he makes in reply, because that would lead to the trial of innumerable issues irrelevant to

the case, and would distract the attention of the jury; and besides, which is a better reason, it would be unsafe, and would be unjust towards the witness, to infer from any contradiction that might be given by another witness that the one who has been cross-examined has sworn falsely, and is unworthy of belief, since he could not have contemplated that he would be questioned upon points unconnected with facts to be tried, and could not therefore be expected to be able, on the sudden, to support his testimony by the evidence of other persons, though it might be perfectly true in itself, notwithstanding the contradiction. R. v. Brown (1861), 21 U.C.Q.B. 330.

But whether the witness admit or deny the alleged contrary statement he may if he state certain facts connected with such former statements relevant to the cause, be contradicted with regard to such facts. R. v. Jerrett (1863), 22 U.C.Q.B. 499, 511 (A. Wilson, J.).

A witness for the Crown gave evidence quite different from a previous written statement made by him to the prosecutor's counsel; he admitted such statement when shewn to him, but said it was all untrue and made to save himself. Hagarty, J., inclined to the opinion that the witness having fully admitted his previous inconsistent statement, no further evidence relating to it should have been received. Adam Wilson, J., held that the prosecutor's counsel was properly admitted to disprove the witness's assertion as to how this statement came to be made, for the fact of its being obtained as he stated would tend very much to prejudice the prosecution, and was therefore not a collateral matter, but relevant. R. v. Jerrett and others (1863), 22 U.C.Q.B. 499.

Section 11 applies only where the witness is being cross-examined. On a charge of forcible entry, evidence relating to the title of the occupant is not admissible; and a statement in the cross-examination of the accused denying that he had previously stated that he had sold the land to complainant is not one "relative to the subject-matter of the case," but as to a collateral matter, and evidence to contradict his denial was improperly received in reply. R. v. Walker (1906), 12 Can. Cr. Cas. 197 (Alta.).

Whether or not the conditions required by section 11 of the Evidence Act, to justify the admission of rebuttal testimony contradicting a witness who has denied making an alleged statement to a third party at variance with her testimony, have been fulfilled, is a question for the presiding Judge, and, if reasonably exercised, is not a ground for a new trial on a case reserved. R. v. Clarke (1907), 12 Can. Cr. Cas. 299 (N.B.).

Examination as to Previous Conviction.—See R.S.C. ch. 145, sec. 12.

An accused person examined as a witness on his own behalf, may be cross-examined as to whether he has been previously convicted of an

indictable offence, whether or not the charge upon which he is being tried sets out the fact of a previous conviction, and although no evidence of a good character had been adduced for the defence. R. v. D'Aoust (1902), 5 Can. Cr. Cas. 407 (Ont.).

For further cases, see notes to Book 12, Chapter 2, sec. 4, under "Indictment for Offences Committed after Previous Conviction."

Re-examination.—Where, on the cross-examination of a witness inadmissible matters are introduced whether volunteered by the witness or given in answer to questions put by the cross-examining counsel, the opposite party will be entitled to re-examine thereon unless the cross-examining party applies to have the inadmissible evidence struck out. R. v. Noel (1903), 7 Can. Cr. Cas. 309 (Ont.).

The position of prosecuting counsel is not that of an ordinary counsel in a civil case, but he is acting in a quasi-judicial capacity and ought to regard himself as part of the Court; that while he is there to conduct the case, he is to do it at his discretion, but with a feeling of responsibility, not as if trying to obtain a verdict, but to assist the Judge in fairly putting the case before the jury and nothing else. He is to regard himself as a minister of justice and not to "struggle for a conviction." R. v. Patterson (1875), 36 U.C.Q.B. 129, 146.

Right of Reply.—On a joint indictment for one offence, when the evidence for the one would enure to the benefit of the other, the right to a general reply is with the prosecution, though only one defendant called witnesses in defence. R. v. Connolly (1894), 1 Can. Cr. Cas. 468 (Ont.).

Reply of Counsel Acting for Attorney-General.—"Attorney-General" means the Attorney-General or Solicitor-General of any Province in Canada in which any proceedings are taken under this Act, and, with respect to the North-West Territories and the Yukon Territory, the Attorney-General of Canada. Code sec. 2, sub-sec. 2.

A Crown prosecutor instructed by a provincial Attorney-General is a counsel "acting on behalf of the Attorney-General" under sec. 944(3), and has the right of reply, although no witnesses are called for the defence. R. v. Martin, 9 Can. Cr. Cas. 371.

Crown prosecutors in the North-West Territories acting under instructions from the Department of Justice at Ottawa are within the provision of Code sec. 661 respecting counsel acting on behalf of the Attorney-General or Solicitor-General and have the right of reply, although no witnesses are examined for the defence. R. v. Charles King, 9 Can. Cr. Cas. 426.

It had previously been held in R. v. Le Blanc, 6 Can. Cr. Cas 348 (Man.), that where the defence offered no evidence, this right of reply under this section was merely the right to again address the jury at the close of the evidence and before the address of defendant's counsel. That decision has not been followed in the later decisions.

The proviso seems to be an extension of the statute 32-33 Vict. (Can.) ch. 29, sec. 45, and of the rule referred to in 5 St. Tr. N.S. 3 (*n*), as a "resolution of the Judges" and which was intended to remove doubts which formerly existed as to the right of reply in such cases by counsel other than the Attorney-General or Solicitor-General. 2 St. Tr. N.S. 1019. The resolution was as follows: "In those Crown cases in which the Attorney or Solicitor-General is personally engaged, a reply where no witnesses are called for the defence is to be allowed as of right to the counsel for the Crown, and in no others."

So in R. v. Marsden, M. & M. 439, it was held that the Attorney-General has the right of reply even though the defendant call no witnesses; and in R. v. Toakley, 10 Cox C.C. 406, the same right was accorded to the Solicitor-General appearing on behalf of the Attorney-General in the post office prosecution. The statute 32-33 Vict. (Can.) ch. 29, sec. 45, gave the right of reply to the Attorney or Solicitor-General or to any Queen's Counsel acting on behalf of the Crown. It had previously been held in Ontario that the Crown counsel not being the Attorney-General or Solicitor-General had no right of reply where no witnesses were called for the defence. R. v. McLellan, 9 U.C.L.J. 75.

In Quebec the rule was to allow the reply in cases of public prosecutions for felony whether the Attorney-General appeared personally or by a representative. R. v. Quatre Pattes, 1 L.C.R. 317.

The admission of evidence in reply which was admissible in chief is as a general rule in the discretion of the Judge, subject to being reviewed by the Court. R. v. Jones (1869), 28 U.C.Q.B. 416, per Richards, C.J.

Impeaching Character of Witness.

Adverse Witness may be Contradicted, but his Character may not be Impeached.—See R.S.C. ch. 145, sec. 9.

The party on whose behalf a witness is called is not debarred by this section from proving by other witnesses any relevant facts inconsistent with or contradictory of such witness's testimony without a ruling that the witness is hostile to the party calling him. R v. Laurin (No. 5), 6 Can. Cr. Cas. 135 (Que.).

Question as to Previous Conviction.—See R.S.C. ch. 145, sec. 12.

An accused person examined as a witness on his own behalf, may be cross-examined as to whether he has been previously convicted of an indictable offence, whether or not the charge upon which he is being tried sets out the fact of a previous conviction, and although no evidence of good character had been adduced for the defence. R. v. D'Aoust, 5 Can. Cr. Cas. 407 (Ont.).

Evidence of character can only be as to general reputation. R. v.

D'Aoust (1902), 5 Can. Cr. Cas. 407; R. v. Triganzie (1888), 15 O.R. 294.

Sec. 6.—Privilege of Witness from Answering Certain Questions.

Husband and Wife—See R.S.C. ch. 145, sec. 4.

Neither husband nor wife is bound to disclose a communication received from the other.

Under the original Code of 1892 the word "competent" was used in sub-sec. (3) where the word "compellable" now appears, and no distinction was made as to the wife being both competent and compellable as a witness regarding certain offences as is now done under sub-sec. (2). It was in consequence held in Gosselin v. R. (1903), 7 Can. Cr. Cas. 139, 31 S.C.R. 255, under the former Code, that the wife was not only a competent, but a compellable, witness. That decision is no longer applies under the altered phraseology of sec. 4.

Public Officers.—In public prosecutions public officers called as witnesses will not be compelled or permitted to disclose the source of information obtained by the executive for the detection of crime, unless the Judge orders that such disclosure is necessary to shew the innocence of the accused. Humphrey v. Archbold, 21 O.R. 553; R. v. Sproule, 14 O.R. 375. But on a private prosecution it seems that the source of information, if relevant to the issue, must be stated by a witness, unless the trial Judge considers that the disclosure would be injurious to the administration of justice.

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——— R. *v.*.... 11 Can. Cr. Cas. 188, 11 O.L.R. 525.. ....2038*cc*, 2096*a*, 2254*h*
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——— R. *v.*....(1861) 21 U.C.Q.B. 330, 338.. ....370*a*, 2096*c*, 2120*a*, 2352*w*
——— R. *v.*....(1909) 17 O.L.R. 698....1020*e*
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——— R. *v.*.... 16 Ont. R. 41....1996*i*, 2154*d*
——— R. *v.*.... 14 Can. Cr. Cas. 247....1598*a*
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——— R. *v.*.... 8 Can. Cr. Cas. 143....2038*ll*
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——— R. *v.*....(1901) 4 Can. Cr. Cas. 385.. ....204*b*, 958*f*, 1996*l*, 1996*m*, 1996*x*
——— R. *v.*....(1898) 2 Can. Cr. Cas. 173....1064*b*, 1996*c*
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——— R. *v.*....(1902) 7 Can. Cr. Cas. 167 (N.S.)....554*b*
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——— R. *v.*.....14 Can Cr. Cas. 15.....828*g*, 828*h*
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——— R. *v.*....(1892) 2 B.C.R. 491.....204*d*, 1598*e*, 1598*j*
——— R. *v.*.....15 O.R. 49.....1996*j*, 2154*d*
——— R. *v.*.....9 Can. Cr. Cas. 125.....1996*p*, 1996*t*
——— R. *v.*....(1901) 5 Can. Cr. Cas. 235 (Ont.).....1320*c*, 1416*c*, 2038*y*, 2038*jj*, 2038*nn*, 2352*t*
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——— R. *v.* (No. 1).....14 Can. Cr. Cas. 46.....204*g*
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——— R. *v.*.....12 Can. Cr. Cas. 402 (N.B.).....2038*cc*
——— R. *v.*....(1895) 1 Can. Cr. Cas. 48 (N.B.).....1176*b*, 2038*z*
——— Re (No. 2).....10 Can. Cr. Cas. 73.....536*e*
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——— R. *v.*...(1896) 27 Ont. R. 59...2038*l*, 2038*m*
——— Ex parte...(1895) 1 Can. Cr. Cas. 31 (N.B.)...2038*l*
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——— R. *v.*...(1900) 6 Can. Cr. Cas. 117...2038*k*, 2038*t*
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——— R. *v.*...(1890) 20 O.R. 209...2254*d*
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——— R. *v.* ..... (1894) 2 Can. Cr. Cas. 335 (N.S.) .. 1996*c*, 1996*p*
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——— R. *v.* ..... (1899) 3 Can. Cr. Cas. 421 ..... 1598*m*
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——— R. *v.* ..... (1907) 17 Man. R. 288 ..... 1320*f*, 1996*i*, 2038*gg*
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——— R. *v.* ..... (1899) 3 Can. Cr. Cas. 95, 31 O.R. 14 ..... 2254*a*
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——— R. *v.* ..... (1907) 12 Can. Cr. Cas. 524, 15 O.L.R. 100 ..... 1996*j*, 2154*d*
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——— R. *v*.....(1853) 3 U.C.C.P. 209, 218.....18*b*, 1064*e*, 2038*e*
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——— R. *v*..... 45 U.C.R. 231.....2038*f*
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——— R. *v*..... 7 Revue Legale 573.....536*b*
——— R. *v*.....(1896) 3 Can. Cr. Cas. 451.....2254*p*
——— R. *v*.....(1898) 2 Can. Cr. Cas. 302.....958*h*, 2038*ii*
——— R. *v*.....(1886) 16 O.R. 704.....2038*jj*
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Giles, R. *v*..... 26 O.R. 586.....1908*h*
——— R. *v*.....(1894) 31 C.L.J. 33.....2038*gg*, 2038*mm*
——— R. *v*.....(1856) 6 U.C.C.P. 84.....2352*n*
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——— R. *v*.....(1898) 1 Can. Cr. Cas. 551.....1098*a*, 2154*a*
——— R. *v.* (No. 2)..... 2 Can. Cr. Cas. 309.....57*d*, 1598*a*, 1934*n*
Gilmore, R. *v*..... 7 Can. Cr. Cas. 219, 6 O.L.R. 286.....2254*n*
Girard, R. *v*.....(1898) 2 Can. Cr. Cas. 216 (Que.).....1996*s*
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Goff, R. *v*.....(1860) 9 U.C.C.P. 438.....1598*h*
Golden, R. *v*..... 10 Can. Cr. Cas. 278.....2254*i*
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——— R. *v.*.....(1899) 3 Can. Cr. Cas. 22 (Ont.).....
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——— R. *v.*..... 16 U.C.C.P. 340, 353.....
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——— R. *v.*.....(1898) 2 Can. Cr. Cas. 390.....
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——— R. *v.*.....(1899) 3 Can. Cr. Cas. 1 (Man.).....2038*ll*
——— R. *v.*..... 4 Can. Cr. Cas. 251.....204*b*
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——— R. *v.*.....(1898) 2 Can. Cr. Cas. 75.....2038*d*, 2038*y*
——— R. *v.*..... 1 B.C.R., Pt. I., 255.....2054*e*
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——— R. *v.*.....(1900) 4 Can. Cr. Cas. 529 (N.S.).....2038*ll*
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——— R. *v.*..... 6 Can. Cr. Cas. 357, 5 O.L.R. 198.....2038*o*
——— R. *v.* (No. 2).....(1903) 9 Can. Cr. Cas. 101.....1996*q*, 1996*s*
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——— R. *v.* (No. 2).....(1899) 3 Can. Cr. Cas. 15 (Man.).....2038*h*
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——— R. *v.*..... 10 Can. Cr. Cas. 68, 38 N.S.R. 328..1104*b*
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——— R. *v.*..... 9 B.C.R. 294, 6 Can. Cr. Cas. 402.....834*a*
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——— R. *v.*.....(1873) 33 U.C.Q.B. 537, 549.....2038*l*
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——— R. *v.*.....(1898) 2 Can. Cr. Cas. 5.....2038*g*
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——— R. *v.*..... Draper's Rep. Upper Can. 53.....408*b*
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——— R. *v.*..... 14 Can. Cr. Cas. 221.....2038*ee*, 2096*c*
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——— R. *v.*..... 4 Can. Cr. Cas. 178 (Que.).....254*g*
——— R. *v.*..... 14 U.C.Q.B. 569.....1176*c*
——— R. *v.*..... 8 Can. Cr. Cas. 123, 7 O.L.R. 525..1820*a*, 1832*b*, 2038*u*
——— R. *v.*.....(1892) 2 B.C.R. 87.....2254*s*
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——— Gertie, Re..... 8 Can. Cr. Cas. 243.....958*h*

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——— R. *v.* ..... 6 Can. Cr. Cas. 232 ..... 204*e*, 1598*j*
——— R. *v.* ..... (1902) 7 Can. Cr. Cas. 525 ..... 1908*l*
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——— R. *v.* ..... (1857) 6 U.C.C.P. 372 ..... 438*a*
——— R. *v.* ..... (1902) 8 Can. Cr. Cas. 130 (Que.) 1996*q*
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——— R. *v.* ..... 20 U.C.C.P. 247 ..... 139*c*
——— R. *v.* ..... (1897) 1 Q.B. 214, 2 Can. Cr. Cas. 497 ..... 254*q*
——— R. *v.* ..... 9 Can. Cr. Cas. 426 (N.W.T.) . 2038*bb*, 2352*j*
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——— R. *v.* ..... (1894) 3 Rev. de Jur. (Que.) 389 ..... 1908*e*
——— R. *v.* ..... (1903) 7 Can. Cr. Cas. 318 (Ont.) 1908*e*
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——— Re ..... (1877) 42 U.C.Q.B. 206 ..... 2038*j*
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——— R. *v.* (No. 2) ..... (1902) 5 Can. Cr. Cas. 545 ..... 2254*r*
——— R. *v.* (No. 3) ..... 5 Can. Cr. Cas. 548 ..... 2254*k*, 2254*r*
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——— R. *v.*..... 6 Can. Cr. Cas. 499.....2038*n*
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