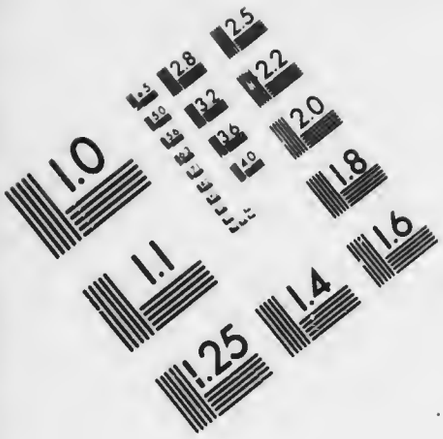

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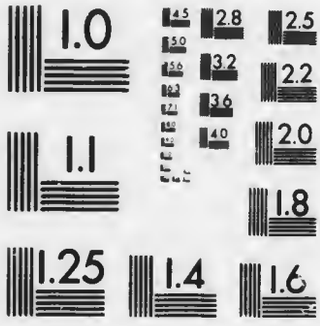

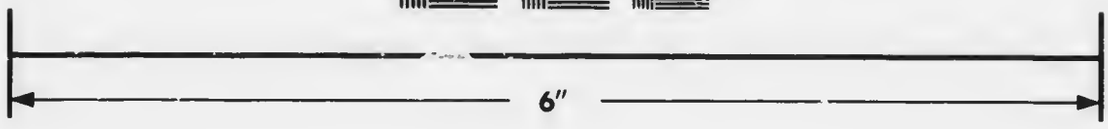

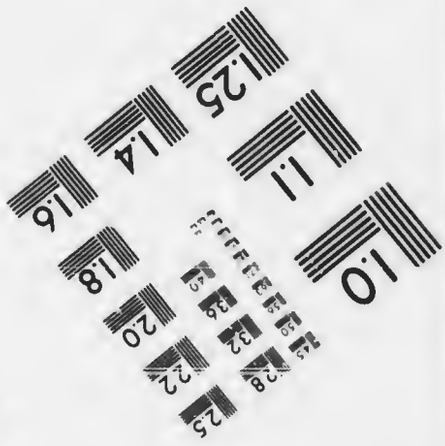

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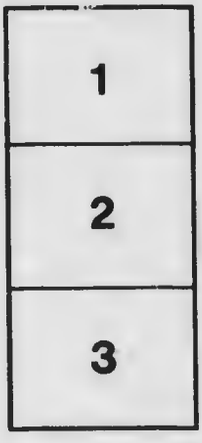


EVIDENCE.

Title of

EVIDENCE:

FORMING A part OF THE

CODE

OF

LEGAL PROCEEDINGS,

ACCORDING TO THE PLAN PROPOSED BY

CROFTON UNIACKE, Esq.

"If Law *be a science*, and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of *reason*; but if it be *merely* an unconnected series of decrees and ordinances, its use may remain, though its dignity be lessened, and he will become the greatest lawyer who has the strongest habitual or artificial *memory*."

SIR W. JONES, *on Bailments*.

By SAMUEL BEALEY HARRISON,

OF THE MIDDLE TEMPLE, ESQ.

LONDON:

HENRY BUTTERWORTH,

Law Bookseller and Publisher,

7, FLEET STREET.

1825.

Newbatt and Grimmer, Printers,
19, Frith Street, Soho.

PROPOSAL

TO UNDERTAKE THIS WORK.

Sir,

3, *New Square, Lincoln's Inn,*
10*th December*, 1824.

HAVING prepared a letter for the press, addressed to the Lord Chancellor on the necessity and practicability of forming a Code of the Laws of England, I am desirous that a work on Evidence should be published, in which the principles, and general rules of that branch of the law, shall be concisely stated, and which may serve as a specimen of the plan proposed in that letter.

You have been mentioned to me, as an individual whose talents and industry would do justice to the subject; and I am willing to leave the execution of this little work entirely in your hands, after giving you the best instructions in my power, as to the views I have long indulged on this interesting topic. The letter itself will disclose my

ideas as to the outline of the plan, and I shall always be happy to afford you any additional information you may desire.

The main feature of my plan is simple—it is to digest the whole body of the common law on this subject, so as exhibit, in a striking manner, all the rules and exceptions which are established or recognized as law. In doing this, the greatest care must be given, not to admit mere circumstances and details of facts, which belong only to particular cases, and which have no general application; but, at the same time, not to exclude any thing which may be necessary to a clear view of the subject, or which may be useful in so important a part of the practical jurisprudence of the country.

The form I propose, is that of a celebrated work —Domat's Civil Law, upon which I intend to offer a specimen in a digest of the New Bankrupt Law. I have chosen this form, after great consideration, but shall be happy to bestow my approbation upon any other which may be found hereafter to be better adapted to this great object.

I wish the authorities to which you refer, in support of your propositions and cases, to be neatly stated in tables at the end of the work, and referred to by words in italics. This I recommend, because the mind, particularly of the student, will

not be disturbed by the perpetual display of names and figures intermingled with the text; the work will have the appearance of other books of science; and the profession will become accustomed to see, and to acknowledge plain and incontrovertible principles and rules, without an eternal reference to books, which have no other value, than that they *first recorded* that which, after all, must be referred to the reason and sense of man. These tables, when the work shall have received the sanction of Parliament, will of course be laid aside.

My earnest desire is, to render whatever you do, as *practically* useful as possible; your labours, therefore, must be constantly governed by this consideration, without which, you can never hope to merit the attention of a sensible and reflecting people. You may, with this view, introduce a clear and concise statement of the points of cases, which will recommend your little work to many, whose minds are unaccustomed to contemplate the law as a science.

Sir William Jones, in speaking of the beautiful outline of Blackstone, says, "If, indeed, all the titles which he professed only to sketch in elementary discourses, were filled up with exactness and perspicuity, Englishmen might hope at length, to possess *a digest of their laws*, which would leave but little room for controversy, except in cases

depending on their particular circumstances; a work which every lover of humanity and peace must anxiously wish to see accomplished."

To fulfil the wish of that great man, has been an object which has never ceased to employ my leisure hours, from the earliest days of my professional pursuits; and I sincerely hope, for the honor of the English Bar, to find a sufficient number of able and aspiring men, who will display a noble zeal, in effecting a purpose, as honorable to the mind which conceived it, as it will be beneficial to their country when executed.

When the whole code is completed, and has been some time before the public, various improvments will no dombt be suggested by a learned and liberal profession. Great additions may be made to the general rules, by a careful examination of all the particular cases; many of which may be found to contain positions of more general application than may at first appear. And when the rule is not well defined, or universal in its application, these cases may be retained, as clear and scientific records of the varieties of essential circumstances, upon which our courts of law have decided: but which do not come with strictness under the denomination of exceptions. The incongruities and contradictions which have unavoidably occured in the succession of ages, will be thus brought more

immediately to view; and the ablest pens in the profession, may find an ample field in showing the most easy method of restoring principles to their legitimate station, controling, as they ever must, in science, the vague and dangerous innovations of loose and slovenly practice. That time will be necessary to accomplish this great and beneficial design, I am fully convinced, but I am also well assured, that this subject only requires to be commenced with judgment, moderation, and sound learning, to command the general support both of the profession and the public, to doubt which would be but a poor compliment indeed to the present age.

It would be too much to expect that these works should receive the immediate sanction of the legislature. They must be under the public scrutiny for some time, and their usefulness must be acknowledged, before this can be accomplished; and should even this sanction be withheld, there is still left a hope, that works which have received the approbation of the profession, will at least become as good authority, as the reports of individuals, on which the country now depends for a knowledge of what is called its Common Law.

I indulge no other wish, than to see method given to the laws of my country, which are now in deplorable confusion; and legislative sanction

afforded to some system, worthy of a great and enlightened nation. If to cherish this wish be a crime, I plead guilty, and I am willing to endure the *ignominy* which attaches to the ~~united~~ names of Blackstone and Jones, and to the memory of every *intellectual* lawyer this empire has ever produced.

With these observations, I leave the execution of the work to your own skill and judgment,—others will soon follow you in the noble enterprise.

I am, Sir,

With best wishes for your success,

Your obedient Servant,

CROFTON UNIACKE.

PREFACE.

In taking up the plan proposed by Mr. UNIACKE, it will be necessary, as the present is an effort in some degree of a novel character, to make a few remarks upon the execution of the work: and I entreat the liberal consideration of the profession to the difficulty of the undertaking, which required to an eminent degree, the talent of accurate definition, and scientific arrangement.

I have in every respect, endeavoured strictly to pursue the plan proposed to me. *In the first place*, by adopting with the greatest exactness the arrangement of Domat; for although English lawyers have never, since the days of Fortesque, felt any peculiar veneration for the codes of the Civil Law, but have entertained an honest, and perhaps laudable, prejudice to their disadvantage; yet certainly there can be no reason, why this prejudice should prevent us from adopting their clear and perspicuous style of arrangement. And should it be necessary, as I think it hardly is, in this enlightened age, to bring forward authorities, in

proof of the advantages arising from a clear system of arrangement, I might mention Mr. Cruise, and several other most distinguished writers. *Secondly*, Although far short of the perfection, which we may hope to see accomplished in the art of generalizing ideas upon legal subjects, I have endeavoured to avoid the statement of mere circumstantial details, and to give as general and comprehensive extent to the propositions, as the nature of the subject would admit. *And thirdly*, I have given the points of cases, which, as they form a distinct, and subordinate part of the plan, I have put into a smaller type, in a method in some degree corresponding with that adopted by Mr. Justice Bayley, in his most excellent treatise on the law of bills of exchange. It will be observed, that, in some instances, I have given a full collection of the cases on a subject; in others, only a few, in the nature of illustrations; and in others again, none whatever. I considered it necessary to give the leading cases under a rule, when I found it so indefinite in its terms, that a reference to former decisions, must be made, in order to show its application; but when it was tolerably defined, I thought it sufficiently explained, by one or two cases by way of illustration; and wherever it was so comprehensive as to include all possible cases, or where its terms were so clearly defined, that there could be no difficulty in applying it to practical purposes.

I have of course dispensed with all reference to cases and decisions. It is possible, that by endeavouring to render what I have written, as concise as I could, I may have fallen into the opposite extreme, and omitted subjects, which at another time it may be thought expedient to insert. Although, from the general arrangement of the work, I anticipated no difficulty in finding any subject required; yet as the profession have been so long accustomed to the use of an alphabetical index; I have with a wish to give every possible facility to reference, added an index, as full as the concise style of the work would admit. With these observations, I commit my performance to the attention of a liberal profession, and an enlightened public.

S. B. H.

3, Essex Court, Temple,
1st June, 1825.

TABLE OF CONTENTS.

EVIDENCE.

INTRODUCTION.

BEFORE the subject of Evidence is entered upon, it will be shown, of what matters the courts are bound to take judicial notice, and which therefore require no proof: after that has been disposed of, Evidence will be considered, as divided into PAROL and WRITTEN.

Parol Evidence is treated under the heads of—Admissions—Confessions—Presumptions—Persons incompetent to be witnesses, from deficiency of reason—Persons inadmissible as witnesses, from want of religion—Persons inadmissible by reason of infamy—By reason of interest—Inadmissibility of parties to the suit to be witnesses—Of husband or wife of the parties—Of the counsel or attornies of the parties—Attendance of witnesses—Examination of witnesses—and number of witnesses required to prove a fact.

Written Evidence is considered under the heads of—Acts of parliament—Judgments—Proceedings in Chancery—Proceedings in courts of peculiar jurisdiction—Decisions of magistrates—Depositions—Other judicial written documents—Public written documents not judicial—Mixed written documents, partly public and partly private—Deeds—Wills—Mercantile contracts—and other private written documents.

The General Rules appointed to regulate the production of evidence, are next adverted to; these are—That the best evidence the nature of the case admits must be produced—That the evidence is to be confined to the points in issue between the parties—That the substance of the issue need only be proved—That the affirmative of the issue must be proved—and lastly, That hearsay is not in general evidence of a fact. And in conclusion, demurrers to evidence, and bills of exceptions so far as they relate to the subject of evidence, are shortly mentioned.

SECTION I.

JUDICIAL NOTICE.

Matters judicially noticed.

THE Courts will take judicial notice, 1st, Of the existence of facts, which must have happened, according to the constant and invariable course of *nature*. 2ndly, Of all general laws, as public *statutes*; the right of a *corporation* at large, to remove one of its members, unless that power is delegated by a bye law, or charter, to a select part of the corporation; the privileges of the King's *palaces*; the prerogative of the *Crown*; the rights and privileges of the *Queen*; and the *ecclesiastical*, *civil*, and *marine* laws. 3dly, Of the time of the *King's* accession; of the commencement of a session of parliament; the *place* of holding parliament on any particular day; the *prorogation* of parliament; and the *course* of proceedings in parliament, either before one of the houses, or before a committee. 4thly, Of their *own* proceedings, and those of all courts of general jurisdiction, as the Court of *Chancery*, the other courts at *Westminster*, the courts of the counties *Palatine*, the courts of great

sessions in *Wales*, and the prerogative court of the archbishop of *Canterbury*. 5thly, Of all general customs of the realm, as the custom of *merchants*, of *gavelkind*, and *borough English*. 6thly, Of the ordinary computation of *time*; the *fasts* and festivals, whether *moveable* or fixed, which are appointed by the calendar; the number of days in any particular *month*, or in leap year; the *coincidence* of the day of the week with that of the year; and the beginning and end of *term*. 7thly, Of the known divisions of the kingdom into *counties*, and *dioceses*; and of the extent of a *port*. And, lastly, Of all public matters recited in acts of *parliament*, royal *proclamations*, or other public documents published by competent authority.

SECTION II.

ADMISSIONS.

CONTENTS.

I.

Of record.

No evidence need be given, to prove any facts, which are admitted by the pleadings on the record;

nor can any be received, to *dispute* such admission; for the jury are only sworn to try the matters in issue between the parties, so that nothing else is properly before them: But an *averment* in one count of a declaration, or in one distinct *plea*, cannot be insisted on, as an admission of any fact in another count or plea.

II.

Judgment by default, &c.

A judgment by default, is an admission of the cause of action, and of all the material allegations respecting the *contract* in the declaration; and in the same manner, a judgment on *demurrer* admits every thing but the amount of the sum in demand: the following cases are illustrations of the rule, with regard to judgments by default.

1.—In an action on a bill of *exchange* against the acceptor, by suffering judgment to go by default, the defendant admits the acceptance, and that the bill is as stated in the declaration.

2.—In an action for *goods* sold and delivered, and money had and received, the defendant by suffering judgment to go by default, admits that something is due, and he cannot afterwards dispute the contract of sale, or show fraud on the part of the plaintiff in making the contract.

III.

Money into court.

Payment of money into court is an admission by the defendant, that the plaintiff has a legal *demand* to the amount of the *sum* paid into court; and when paid in *generally* upon the whole declaration, it admits the *contract* upon which the action is *brought*, and all the formal requisites to be proved, as *hand-writing*, and sufficiency of the *stamp* on a bill of exchange, the *execution* of a deed, and the *title* on which the plaintiff sues; although it appears in evidence that if the admission had not been made, the plaintiff must have been *nonsuited*. But if a plaintiff by *misrepresenta-*

tion, induce a defendant to believe, that the only point to be tried, is a question of fraud, and suffers him to prepare his evidence accordingly, he will not be allowed, to object to that evidence at the trial, on the ground that the contract has been admitted, by the defendant's having paid a sum of money into court generally on the whole declaration: and in an action against a *justice* of the peace, for an act done in his official capacity, the bringing money into court, by virtue of a statute, does not, it is said, admit the right of action.

Payment of money into court, is proved by the production of the *rule* of court, or an office copy, as it is not sufficient to call the *attorney* who has taken the money out of court.

IV.

Particulars of demand are of two sorts, 1st, Such as are delivered by one party to another, in the course of business; which though they are strong presumptive evidence, that there are no items, but what are mentioned in the bill of *particulars*, within the period which it purports to include, yet the party will not be precluded from showing, that other items have been omitted by mistake; 2dly, They are such, as are delivered under a judge's order for that purpose, which are more conclusive, as they effectually preclude the party delivering them from giving evidence of any demand, differing either in *nature*, or in the *title* on which the plaintiff sues, from that mentioned in the particulars delivered; as when a declaration contains counts on a promissory note, together with the money counts; and the particulars of demand includes only the note, the plaintiff will not be allowed to prove the *consideration*, for which the note was given; and if he cannot recover upon the note, on account of its not having a proper

Particulars of demand.

stamp, or by reason of any other defect, he will be nonsuited: and even if a plaintiff deliver a particular under a judge's order, and afterwards a *second*, without an order, he cannot give evidence of any claim contained in the second particular, which was not included in the first. But although a plaintiff is restricted in his own evidence, by the particulars he has delivered, yet to increase his demand, he may avail himself of any evidence *adduced* by the defendant. Particulars of demand delivered under a judge's order are sufficient, though in some respects *inaccurate*, if they give proper *information* to the opposite party, so as to guard him against surprise, and it does not appear that any *wilful* misrepresentation was intended: They are *proved* by the production of the judge's order, and proof of the delivery of the particulars.

V.

Parties.

Admissions by the parties are either, 1st, Such as are made by a party to a suit on the *record*, which are strong evidence against that party, or any other party on the record who has a joint interest with him: 2dly, Such as are made by a person who is really *interested* in the event of the suit, though not named on the record, which will be evidence against the party on the record; as in *appeal* cases, when declarations by rated inhabitants are evidence, though the appeal is entered in the names of the *parish officers*; or the declarations of persons interested in a *policy*, will be evidence against the plaintiff; or in actions against the sheriff when he is indemnified, declarations made by the party indemnifying, are evidence against the *sheriff*: 3dly, Such as are made by a nominal party, who sues merely as a *trustee* for the benefit of another; which are in general, evidence against him; but the declarations of a *guardian*, are not admissible

in evidence against a minor who sues by his guardian.

VI.

Admissions by one partner, will be evidence against another, in matters concerning *joint contracts*, and their *joint interest*, as well after, as during the *continuance* of the partnership, and whether the party making them be, or be not a *party* on the record; but in actions of *trespass*, and in criminal proceedings, the admissions of one party as to the fact of the trespass or offence, are not evidence against any of the others; except declarations of *co-conspirators*, when made in furtherance of the plot, which have been received in evidence against their companions. Partners.

VII.

Admissions and declarations made by an *agent*, either at the time of his making an agreement for his principal, or whilst acting within the scope of his *authority*, after the fact of agency is established, are evidence against the principal, to prove the *contract*, but not to show the agent's *account* of what passed at the time. Agents.

VIII.

The admission of the *attorney* on the record of either of the parties, when formally made with intent to obviate the necessity of proving any particular fact, is evidence against the client; but a statement made in the course of *conversation*, or an offer of *compromise* to get rid of an action, or an admission of a fact connected with the merits of the suit, when made upon the faith of a *negociation*, are not evidence; although an admission of an indifferent fact, which might easily be otherwise proved, will be received as evidence. Attornies.

IX.

Deputies. Admissions of authorised deputies, for whose actions the principals are answerable, are evidence against their principals; as the declarations and statements of the *under-sheriff* in all cases, and those of a *sheriff's officer*, so far as they form a part of the transaction in which he represents the sheriff, and if the *warrant* to him be established by independent proof, are evidence against the sheriff.

X.

Conduct. A party, although he may have made no direct admission, may frequently preclude himself from disputing a fact, by the tenor of his conduct and demeanour; under this rule, the following cases have been decided:—

1.—After acquiescing, and acting for several years under a commission of *bankruptcy*, a party cannot dispute the commission.

2.—By not objecting at a meeting before the commissioners, to a petitioning creditor's debt, a bankrupt makes a primâ facie admission, that the *balance* struck by the commissioners is correct.

3.—If a bankrupt voluntarily submit to a *commission*, and obtain his discharge under a judge's order, he is precluded from contesting the validity of the commission.

4.—After advertising *goods*, as the property of a bankrupt, an auctioneer cannot dispute the bankruptcy.

5.—After cohabiting with a *woman*, and holding her out to the world as his wife, a man cannot object to a creditor, who supplied her with goods, that she is not his wife.

6.—When a man has written prescriptions, and held himself out to the world as a *physician*, he cannot afterwards maintain an action to recover fees.

7.—After allowing a recognizance of *bail* to be entered for him, in the name by which he is sued, a defendant cannot plead a misnomer, even if he were no party to the recognizance.

8.—By making no objection upon reading a *notice to quit*, a party admits, that the tenancy expires at the time mentioned in the notice.

9.—By allowing a *tenant* to alter premises at his own expense, a landlord furnishes primâ facie evidence of his consent to the alteration.

10.—After having permitted a tenant to exercise acts of *ownership* without objection, it is evidence to go to a jury, that the landlord meant to be bound by those acts of the tenant.

11.—An *inn-keeper*, by writing over his door, that he is licensed to let post-horses, affords presumptive evidence that he is so licensed, in an action against him for an offence against the post-horse act.

12.—By giving security for the payment of the duty on advertisements, and applying to the stamp-office concerning the duties on a *newspaper*, a man admits that he is the publisher of such newspaper.

13.—By omitting a debt due to himself in his schedule, an *insolvent* debtor furnishes strong evidence against himself, in an action afterwards brought by him for the debt.

14.—By offering money to bribe a *voter*, a man admits that the party solicited has a vote.

15.—An acknowledgment by a defendant, that his trade is a *nuisance*, is admissible, although not conclusive, evidence against him, upon an indictment, for setting up his trade in another place.

16.—By accounting with a person as farmer of the *tolls* of a turnpike, a party is estopped from disputing the validity of his title, when sued by account stated for those tolls.

17.—By paying *tithes* to the plaintiff on former occasions, a defendant admits the right of the plaintiff, to an action for not setting out tithes.

18.—By receiving tithes, a *clergyman* precludes himself from disputing the fact of his being the parson, in an action against him for non-residence.

19.—Where a party rented glebe lands of a *rector*, and had paid him rent, he was not permitted, in an action for use and occupation, to dispute his lessor's title, by proving that his presentation was simoniacal.

20.—In actions of use and occupation, when the tenant has occupied by the permission of the plaintiff, he cannot dispute the plaintiff's *title*, although he may show that it is at an end.

21.—By submitting to a *distress* for rent, stated in the notice of distress to be due from the defendant as tenant to the distrainer, a defendant in an action

of use and occupation, admits the tenancy, and is precluded from disputing the title of the plaintiff.

22.—In actions of *ejectment*, by a landlord against his tenant, the tenant cannot question the title of his landlord, although he is at liberty to show that it has *expired*.

23.—By delivering an *inventory* into the spiritual court, an administrator admits, that there are assets to the amount stated in the inventory.

24.—If a party take his seat in parliament, it is evidence to go to a jury, that he has acceded to the character of a *candidate*, and adopts the acts of his committee.

25.—By promising to pay, or paying part of the money, or asking time for payment, an *acceptor* of a bill of exchange admits his own liability, and the necessity of proving the acceptance is dispensed with.

26.—By accepting a bill of exchange, the acceptor admits the ability of the *drawer* to make the bill, and if made after *sight* of the bill, his signature.

27.—By *indorsing* a bill or note, a party admits the ability and signature, of every antecedent party.

28.—By accepting a bill payable to the drawer's own order, the acceptor admits the drawer's ability to indorse; for if he cannot indorse, he was not able to draw; and precludes himself from relying upon infancy in such drawer and indorser.

29.—If a bill is drawn in the name of a *firm*, purporting to consist of several persons, the acceptance admits that there is such a firm.

SECTION III.

CONFESSIONS.

CONTENTS.

1.—*By pleading guilty, or submitting to the King's mercy.*
2.—*Before magistrates.*
3.—*Before other persons.*
4.—*Their effect, and how proved.*

I.

Pleading guilty, &c.

If the defendant on being brought up to plead, confesses in open *court*, that he is guilty of the offence charged against him, a trial is unnecessary, and the court have only to award judgment: And when a defendant upon an indictment for a misdemeanour, yields himself to the King's *mercy*, and desires to submit to a small fine, the court may accept of such submission, if they think fit, without putting the defendant to a direct confession.

II.

Before magistrates.

Confessions before magistrates are *strong* evidence against the prisoner, but they must be voluntary, and made without *threat*, or *promise*, or they cannot be *received* in evidence; although it "is no *objection*, that they were made after an admonition by a stranger, that the prisoner ought to tell the truth; nor under a mistaken supposition, that some of the prisoner's accomplices were in custody; nor that the prosecutor who was present, first desired the prisoner to speak the truth, and suggested that he had better speak out, if the magistrate or his clerk checked the prosecutor, and desired the pri-

soner not to regard him, but to say what he thought proper," nor in any case, if the promise or threat held out, may be considered as not having been made, with sufficient authority to influence the prisoner.

Writing. They should also be reduced into writing, and signed by the magistrate, as *paro'* evidence of their effect cannot be received, unless it is clearly proved, that they were not reduced into writing; nor are *minutes* of a prisoner's examination, not signed by him, but made by a witness who was present, of themselves admissible, though the witness may use them to refresh his memory, when giving parol evidence of the confession; nor can the examination of a prisoner be received as evidence against him, if it be *actually* taken, or even *purport* to have been taken, on oath.

Treason. In cases of *treason*, a confession of the overt acts must be proved to have been made by two witnesses present at the time, except when the overt act charged upon the prisoner is a direct *attempt* against the life, or person of the King; or when the confession is only offered as *confirmatory* evidence, or in proof of some *collateral* fact; in which cases, if it be proved by one witness only, it is sufficient.

III.

Before other persons. Confessions made by a prisoner of his guilt, or of any fact that may tend to the proof of it, to any *other person*, even if before a committee of the house of *commons*, are admissible as evidence, if it be proved that they likewise were voluntary and made without threat or promise, or such other inducement as may be supposed to have influenced the prisoner's mind, in hopes of a pardon, or favour shown to him.

IV.

Confessions are only evidence against the *party* who makes them, and not against others, even if it be proved that they are accomplices; but although a confession itself, from its having been improperly obtained, cannot be received in evidence, yet any facts that are brought to light in *consequence* of its having been made, may be properly received as evidence against the party confessing, or any of his accomplices: and a prisoner may be *convicted* upon his own confession, without other evidence. Effect.

Confessions before a magistrate if taken down in writing at the time, must be produced, and proved to contain the true *effect* of what the prisoner confessed, which is best done by the magistrate or his clerk; but if they were not written down at the time, and this fact is clearly proved, *parol* evidence of their contents will be admitted: When confessions made before other persons are used in evidence, if written, they are proved like other written documents, and if unwritten, by the evidence of some person who was present, at the time they were made. How proved.

SECTION IV.

PRESUMPTIONS.

CONTENTS.

1.—*Of law.*
2.—*Of fact.*

I.

Law. When facts cannot be directly proved by positive testimony, it may frequently be inferred that they have happened, from circumstances which either necessarily, or usually attend such facts:—this is called presumption, and is admitted in both civil and criminal cases, and is either, a presumption of law or of fact; the following examples are instances of the first description of presumptions.

1.—The *innocence* of a person is presumed, until guilt is proved.

2.—Where a criminal act has been proved, *malice* will be presumed.

3.—When a person has been once shown to be *alive*, his existence shall be presumed, at any time within *seven years*, from the time of showing that he was alive; but after that time, the presumption of life ceases.

4.—It shall be presumed, that a child born during *wedlock*, is legitimate, until illegitimacy is shown, by proof of circumstances rendering it physically impossible that the husband can be the father of the child.

5.—Where a *receipt* has been given for rent due on a certain day, it is strong presumptive evidence, that the former rents have been regularly paid down to that time, although the other party may prove the contrary.

6.—If a *bond* has been outstanding twenty years, without payment of interest, or other acknowledgment of its existence, it shall be presumed that it is satisfied; but, the fact of no demand having been made of a quit rent for forty years, is not a presumption of an *extinguishment*.

7.—Where a man has possession, the presumption is, that he has the right of property; and possession is, in most cases, sufficient to maintain *trespass*, or *trover* against a wrong-doer.

8.—*Grants*, *endowments*, and agreements are to be presumed, from great length of possession or usage.

9.—An *easement* or *faculty* may be presumed, from an uninterrupted enjoyment for twenty years, or upwards.

10.—If a *ship* be missing, and no intelligence received of her, within a reasonable time after she sailed, it shall be presumed that she is lost.

11.—When the neglect or *omission* by a party of any particular act would be criminal, it shall be presumed that he has performed the act.

12.—When a *title* to property has been proved, all the collateral circumstances attending the title shall be presumed.

13.—It is always presumed that the *records* of a court of justice have been correctly made.

14.—When a *partnership* has been once established, its continuance is presumed, until a dissolution is proved.

15.—Lands in Kent are *prima facie* to be presumed, held by *gavelkind* tenure.

16.—If a man has a separate *fishery*, the presumption is, that he is the owner of the soil.

II.

Fact.

Presumptions of fact, are such as are not absolutely and necessarily raised by the law itself, upon proof of certain facts; but such as nevertheless, are raised in the minds of a jury, upon the proof of those facts; as for example; 1st, On an indictment for theft, if it be proved that the *stolen* goods were found on the person, or in the possession of the prisoner, that fact would raise a strong presumption that he had committed the theft; or, 2ndly. On an indictment for *murder*, proof that, directly after the deed was committed,

the prisoner was seen near the body, with a bloody weapon, or with marks of blood upon his clothes, would afford a strong presumption that he had committed the murder; and, 3rdly, It has been decided, that where a *tenant* for life, has not been seen, or heard of for fourteen years, by a person resident near the estate on which he resided, although not a member of his family, it is primâ facie evidence of the death of such tenant.

SECTION V.

DEFICIENCY OF REASON.

Reason. The following persons are incompetent to be witnesses from a deficiency of reason; viz. *idiots*, *lunatics*, except in their lucid *intervals*, persons of *non-sane* memory, and *children*, so young as not to comprehend the nature of an *oath*.

SECTION VI.

WANT OF RELIGION.

Religion. All *atheists*, and persons who profess no *religion*, and have no belief that they are answerable to God, are inadmissible as witnesses, from a defect of religious principle; but *those* who have no belief in the Christian dispensation, as *Jews*, *Mahometans*, *Gentoos*, and other *Pagans*, yet if they believe in a God, the avenger of falsehood, and the obligation of an oath, they may be admitted to give evidence in our courts, in both civil and *criminal* cases; and may be sworn in the manner they consider most binding upon their *consciences*: and, by *statute*, persons excommunicated are admissible as witnesses.

SECTION VII.

INFAMY.

CONTENTS.

1.—*What crimes render a man infamous.*
2.—*How infamy is proved.*
3.—*How infamous persons are rendered admissible as witnesses.*

I.

Crimes.

Persons convicted of the following infamous crimes, viz. *treason*, *felony*, *piracy*, *forgery*, *swindling*, *cheating*, perjury, and subornation of perjury at *common law*, or on the *statute*; *attaint* of false verdict, *præmunire*, *barretry*, *bribery* of a person to withhold his evidence, *conspiracy* at the suit of the King, *winning* above ten pounds by fraud or ill practice at gambling; and persons *outlawed* for treason and felony, are inadmissible as witnesses for others, although they may make affidavits to *exculpate* themselves: but convictions for *petit larceny* by express provision of the legislature, or *outlawries* in personal actions, are not sufficient to render the testimony of witnesses inadmissible.

II.

How proved

The infamy of a witness must be proved by the *record* of conviction, or outlawry, and *judgment* thereupon, whether it be that of an *English*, or *foreign* court; as neither the *conviction* without the judgment, nor the *admission* of the witness himself, will be sufficient to render him inadmissible, however it may affect his credit, unless the judgment, which is the best evidence of infamy, be produced.

III.

How restored.

An infamous person is rendered admissible as a witness, in three several ways, 1st, By the *reversal* of the judgment or outlawry, proved by the record; 2ndly, By proof, that the party has been admitted to his *clergy*, and been burnt in the *hand*, or suffered such other *punishment* as may have been substituted by statute, for burning in the hand at common law; which must be proved in all cases, except when the witness is a peer or clergyman, who are entitled to clergy *without* burning in the hand, or other substituted punishment; and 3rdly, By proof that the party has received a *pardon*, which is granted either under the great seal, or by act of parliament; the former is proved by *inspection*, and will render an infamous person an admissible witness, in all cases, when the infamy is only a consequence of the judgment, as in perjury at common law; but not when infamy is a *part* of the punishment, as in perjury on the statute of Elizabeth: and in both kinds of pardon, if they are conditional, it must be shown that the *condition* has been performed.

SECTION VIII.

INTEREST.

CONTENTS.

I.

The general rule, with regard to the exclusion of interested persons as witnesses, is, 1st, That all persons, for, or against whom a *verdict*, in any suit, can be used as evidence, in any subsequent legal proceedings; and, 2ndly, All persons, who have a direct, and immediate *interest*, however small it may be, in the *event* of a suit one way, are not admissible as witnesses in that suit. General rule.

The exceptions to this rule, are, 1st, That the parties injured, and, 2ndly, Accomplices are ad- Exceptions.

missible as witnesses in criminal prosecutions; 3rdly, That certain persons, although interested, are made admissible by act of parliament; 4thly, That persons entitled to rewards on the conviction of offenders, are admissible; 5thly, That agents, carriers, factors, brokers, and servants are admissible in most cases, from a principle of public convenience; and lastly, That persons are admissible as witnesses, when they are equally interested on both sides.

II.

Cases. 1st branch. The following cases have been decided, under the first branch of the general rule, viz. that whenever the verdict can be used, either for, or against a party, proposed as a witness, he cannot be examined.

1.—A *servant* cannot, without a release, disprove his own negligence, in an action against his master.

2.—In an action by a *master*, for an injury done to his horses, his servant, the driver of the horses, cannot prove negligence on the part of the defendant.

3.—An agent of a *water* company, after information of the dangerous state of a water-pipe had been given to the turncock, was not considered admissible, to disprove negligence on the part of the company, in an action for an injury done to a horse, by the bursting of the pipe.

4.—A *pilot*, on board a ship is not allowed to disprove negligence, in her having run down a barge.

5.—A *broker* cannot, without a release, disprove his own negligence, in an action against his principal.

6.—In an action on a policy of insurance, against the underwriter, the plaintiffs, who were the insurers, were not allowed to call the *owner* of the ship, to prove that she was sea-worthy.

7.—In an action against an *underwriter*, he cannot call the captain of a ship, to disprove the charge of barretry.

8.—In an action by the master of a vessel, against the custom-house officers, for not clearing the ship and re-delivering the cockets; the plaintiff was not allowed to call the *freighters*, to prove the fact of his being the master.

—The *dawer* of an accommodation bill, cannot prove that the bill was given for an usurious consideration, in an action by indorsee against the acceptor.

—In an action, by indorsee, against maker of a promissory note, a *payee* who has become bankrupt, and obtained his certificate, subsequently to the date of the note, is not an admissible witness for the defendant, to prove that the note is an accommodation note.

—In an action against the sheriff, for a false return to a fi.-fa, in which he stated, that he had paid a sum of money to the *landlord* for rent in arrear; the landlord was not allowed to prove, that the rent was due.

—A *sheriff's officer*, who has given security, cannot be called to prove, that he endeavoured to make an arrest, in an action against the sheriff, for a false return of non est inventus.

—In an action against the sheriff, for taking goods in *execution*, the person against whom the execution is issued, is not an admissible witness on the part of the defendant, to prove that the goods were his property.

—A defendant's *bail*, cannot give evidence for their principal.

—Commoners under the same *custom*, are not allowed to prove for each other, a right of common by custom.

—Persons claiming a right of *pasture* on a common, cannot prove, that a defendant ought to repair his fences contiguous to the common.

—A tenant of lands, within a parish, is not an admissible witness to prove, a custom, relating to away-going *crops* within such parish.

—An owner of property within a *chapelry*, is not admissible to disprove an immemorial usage, that the land owners, within such chapelry, ought to repair the chapel; and although he has leased his property, for a rent certain, without any deductions, it will make no difference.

—Where a member of a *corporation* can derive a personal advantage from a verdict, he cannot be a witness in a cause for the corporation.

—In an action by the parson, for tithes, any person who would be liable, if the parson's claim should be allowed, cannot prove a *modus decimandi*.

—A person who has exercised a *trade*, in a particular place, cannot be called to disprove the fact that

none, but the members of a particular corporate body, have a right to exercise such trade in that place.

22.—A tenant in possession, in *ejectment*, cannot support the title of the defendant, under whom he holds.

Cases. 2nd branch.

The following cases have been decided, under the second branch of the general rule concerning Interest; viz. That such as have a certain, direct and immediate interest, however small it may be, in the event of a suit one way, are inadmissible as witnesses.

1.—If a plaintiff agree to grant a *lease* of lands to a person, if he shall succeed in a suit for the recovery of them, that person is not an admissible witness for the plaintiff in such suit.

2.—If a witness is to *repay* to the plaintiff, a sum of money if he fail in his action, but not otherwise, he cannot give evidence for the plaintiff.

3.—If an *underwriter*, who has paid his proportion, is to be repaid, in the event of the plaintiff's success, he cannot be a witness for the plaintiff, in an action against another underwriter, on the same policy.

4.—In an action on a bill of exchange, against the acceptor, upon an acceptance for the accommodation of the *drawer*, himself or his wife, are not admissible witnesses for the defendant.

5.—Creditors of *bankrupts*, or *deceased* persons, are not admissible witnesses, to increase the fund out of which they may receive a dividend.

6.—A petitioning creditor is not admissible to prove a *commission* regularly sued out, although he may prove a fact, which will *defeat* a commission or *lessen* his own debt.

7.—A *bankrupt* is not a good witness, to prove property in himself, or a debt due to himself, or in any other manner to increase the *fund*, in an action by his assignees, although he may be a witness to decrease his estate.

8.—A creditor of a bankrupt is not admissible to prove him a *gambler*.

9.—A *creditor*, to whom a bankrupt before he obtains his certificate, promised payment in full, is not a good witness to support a second commission.

10.—A person who has undertaken to *indemnify* the plain

tiff's attorney, cannot be examined for the plaintiff, without a release from the attorney.

11.—Persons liable to the costs of a suit, or any part of them, as *prochein-amy, guardian* of an infant on the record, or *governors* of the poor, made liable to costs by statute, are not admissible witnesses.

12.—A person who has bought *goods* in his own name, is not an admissible witness, to prove that he purchased them as agent for the defendant.

13.—A freeman of a corporation, which had approved part of a *common*, and leased it, is not an admissible witness, to prove that a sufficiency of common was left for the commoners.

14.—A *devisee*, is not allowed to prove the sanity of a devisor.

15.—A *remainder* man, cannot prove any facts concerning the title of land.

16.—A *residuary* legatee, although he has released all claim to the debt sued for, is not a good witness in an action by an executor, without a release of the whole residue.

17.—A *legatee* without a release, is not a good witness, to support a will, nor to *increase* the estate.

18.—A *lessor*, cannot be called to prove a right of possession in his lessee.

19.—In *ejectment*, against a bailiff, the tenant in possession, is not admissible to prove that himself, and not the defendant, is the possessor of the land.

III.

1st exception, parties injured.

The first exception to the general rule, that all persons who are interested in the event of a suit are inadmissible as witnesses, is that the injured parties are allowed to give evidence in support of criminal prosecutions, although they may be entitled to a reward, or to the restitution of their property, on the conviction of the offenders; and this exception, extends to *all cases*, but prosecutions on statutes which give a specific remedy to the party injured, as the statute of *perjury*, which gives £10.; and prosecutions for *forgery*, when the party whose name is forged, or upon whose genuine name a forgery is committed, is not *allowed* to prove any facts tending to the proof of the forgery,

Forgery.

if he has an interest in the destruction of the document supposed to be forged: But if he will not incur any loss, or be liable to any suit, whatever may be the result of the prosecution, he may prove the forgery, and in all cases, it seems he is admissible to prove any *collateral* facts, which do not directly tend to the proof of the forgery, as appears from the following cases:—

1.—The *cashier* of the bank of England, may prove the forgery of a bank note.

2.—Where the party whose name is forged on a bill of exchange, has not been debited with the amount of it by his *banker*, who paid the money, he may prove the forgery,

3.—A party. whose name is forged on a *receipt*, may prove the forgery, if he has before the time of trial, recovered the money from the prisoner.

4.—A maker of a note, purporting to be payable either at his own *residence*, or at a banker's, may prove that he did not make it payable at the banker's.

5.—A party, whose name is forged on a power of *attorney* for selling stock, may prove the forgery, if the stock has not been sold.

6.—Where a forgery consists in *altering* an instrument, and giving it better credit, but not altering the responsibility of the party whose name is forged, he may prove the forgery.

7.—Where the party whose name has been forged, has been *released* by the party benefitted by the document, he may prove the forgery.

8.—A supposed testator may prove the forgery of his *will*.

9.—On an indictment for personating a stock holder, and forging his signature, he was permitted to prove the *amount* of the stock he had in the bank, and the dividend due to him.

IV.

2nd. exception, accomplices

The admission of *accomplices* as witnesses, in all cases, is a second exception to the general rule of Interest, though in some cases, as *robbery, coining, burglary, house-breaking, horse-stealing, privately* stealing to the value of five shillings, from shops, warehouses, stables, and coach-houses, or

uttering *counterfeit* money; if they, being out of prison, do voluntarily discover two or more persons, who have committed the like offences, they are entitled by act of parliament, to a pardon on the conviction of such persons; and in other cases, by proclamation, or an implied promise, they are offered a pardon, if they make a full and fair disclosure.

A prisoner may be *convicted* upon the testimony of an accomplice, even though it is wholly uncorroborated.

This exception, that a person who is particeps criminis, is admissible as a witness, in both criminal and civil cases, if he has not been convicted of an incapacitating crime, has been decided to extend further to the following cases:—

1.—A person who has received a *bribe* himself, if he is the discoverer of other bribery, may be a witness on an information under the *statute*, for bribery at an election.

2.—The principal felons may be witnesses against accessories, in prosecutions on the *statutes* for *receiving*, or taking a *reward*, to help to stolen goods.

3.—A *clerk* having embezzled his master's property, laid it out in illegal insurances, he was held to be an admissible witness for the master, against the insurer.

4.—A man who had pretended to convey an *estate*, was allowed to prove that he had no title.

5.—A *co-trespasser* who is not on the record, is a good witness for the plaintiff, although a recovery against the defendant, would discharge the action against himself.

V.

3rd exception by statute.

The admission of certain persons, either expressly by enactment of the legislature, or in cases where statutes can receive no *execution*, without the admission of such persons, forms a third exception to the general rule; the following cases have been decided under this exception:—

1.—*Informers* are good witnesses, in actions for penalties, for *bribery* at elections.

2.—Informers are admissible on *prosecutions* for exporting *machinery*.

3.—Losers of money at *gaming*, are allowed to prove their loss, in prosecutions for penalties, on the *statute*.

4.—*Prosecutors* are held admissible, on prosecutions for seducing *artificers*.

5.—Informers are good witnesses, in prosecutions on the act for preventing counterfeited *certificates* of character to servants.

6.—Informers are admissible, in prosecutions on the *hackney-coach* act.

7.—Informers are admissible witnesses, on indictments for *embezzling*, and concealing *naval* stores.

8.—Inhabitants of the county, town, &c. where a *bridge* is situated, are admissible witnesses on prosecutions against private persons, or corporate bodies, for not repairing the bridge or highway.

9.—Inhabitants of *parishes*, who do not receive alms, or any parochial gift, are good witnesses in actions against the parish officers, for malfeazance in their office.

10.—Inhabitants of a *hundred*, are admissible witnesses for the hundred, in actions by a party robbed, on the statute of Winton.

11.—*Surveyors* under the highway act, are good witnesses in all cases relating to that act, although their salaries may depend on forfeitures.

12.—Inhabitants of parishes, are admissible witnesses against *offenders*, where *penalties* are given to the parish, if the penalties do not exceed £20.

13.—*Inhabitants* of parishes, are good witnesses in all cases relating to the *rates*, cesses, and boundaries of such parishes; and in all cases of settlement within, or removal from, such parishes; and in all cases of bastardy, or election, or appointment of parish officers; and in all cases of the allowance of the accounts of such parish officers.

VI.

4th exception, rewards.

A fourth exception, is the admission of persons who are entitled to rewards, offered by act of *parliament*, by *proclamation*, or by *private persons*, on conviction of any offenders.

VII.

5th exception, agents, &c.

The admission of agents, carriers, factors, brokers, or servants, from a principle of public *convenience*, to prove for their principals, or masters, the making of contracts, the receipt, or payment of money, and the receipt, or delivery of goods, forms a fifth exception to the general rule; in what cases they are admitted, appears from the following decisions:—

1.—A *factor* may prove a contract of sale, although he is to receive a poundage on its amount, or is to take for himself all he can get above a *certain sum*.

2.—A *servant*, may prove for his master the delivery of goods.

3.—A *clerk*, who has received money, is a good witness to prove the payment, for the person who paid, although he is himself liable on the receipt of it.

4.—A carrier's *book-keeper*, is a good witness for his master, without a release.

5.—A *carrier* is admissible, to prove that he paid a sum of money by mistake, in an action to recover it back; or to prove that he delivered *goods*, although he is responsible to the consignor.

6.—A *porter* is a good witness, to prove that he delivered goods for his employer.

7.—In an action of *trover* for a bill of exchange, by the payee, against the drawee, the agent of the payee is an admissible witness, to prove that he received the bill indorsed in blank from the payee, and left it for acceptance with the drawee.

8.—A *banker's clerk* having paid more than was due on a bill of exchange, was held to be a good witness, in an action brought by the banker to recover back the surplus.

9.—A servant of a *coal* merchant, was held a good witness for his master, in an action by an informer against his master, for selling coals without measuring by the bushel, notwithstanding the statute inflicts a penalty upon the servant for not doing it.

10.—A servant for beating whom, his master has brought an action, may prove the *assault*; and the plaintiff's daughter being seduced, is a good witness to prove the *seduction*.

11.—A book-keeper generally, is a good witness for his *master*, without a release.

VIII.

6th exception, equal interest.

The last exception to the general rule, is where a witness is equally interested on both sides, so that it is immaterial to him which is successful, for he is then admissible for either party; the cases on this head are:—

1.—A person is admissible, to prove the *receipt* of money from the plaintiff, for the defendant's use.

2.—A *captain* of a ship, may prove that money was advanced to him on account of the ship, in an action against the owner for money lent.

3.—A *pauper* is a good witness for either parish, in a settlement case.

4.—The *acceptor* of a bill of exchange, is an admissible witness, to prove that he had no effects of the drawer's in his hands, in an action by indorsee against drawer.

5.—The *payee* is admissible to prove, that he indorsed a bill before it became due, in payment of good, in an action by indorsee against drawee.

6.—One *joint maker* of a promissory note, may prove the signature of the other.

7.—In an action by indorsee against indorsor of a promissory note, the *maker* is a good witness for the plaintiff.

8.—In an action against the acceptor of a bill, the drawer is a good witness, either for the *plaintiff* or *defendant*, even if he is in custody, upon a charge of having *forged* the bill.

9.—One *partner* is admissible, to prove that another had no authority to draw in the name of the firm, in an action on a bill of exchange drawn in the partnership name, by a separate creditor of the drawer.

10.—Upon a plea in abatement, that promises were made *jointly* by the defendant and others, one of those other persons may be a witness for the plaintiff.

IX.

Remote interest, &c.

But a remote or contingent interest, or wishes and a strong bias, or a belief without any foundation, by the witness himself, that he is interested, are not sufficient to render the evidence of a witness inadmissible, however they may affect

his credit; the following cases have been decided on the several parts of this rule.

1.—An *heir* is an admissible witness, to support the claim of his ancestor.

2.—An *executor* is a good witness, to support a will, though in case it is set aside, he will become liable as an executor de son tort.

3.—A person who has been *in office* under a custom, may be called to prove what the custom is, and what he did whilst in office, although his acts if illegal, would subject him to a proceeding by quo warranto.

4.—A *steward* of a manor, has been held to be an admissible witness, to prove that a fine was due on the death of the lord, although if that were established, a re-admission might be necessary, and he would be entitled to a fee.

5.—A dormant *partner*, having had nothing to do with making a contract, may prove the contract for his partners.

6.—A *sub-lessee* of the defendant, is admissible to prove proper culture, in an action of covenant, for mis-management of a farm.

7.—A tenant in possession, may prove an injury done to a reversionary estate, in an action by the *reversioner*.

8.—A bond *surety* for an administrator, is admissible to prove a tender, in an action against the administrator.

9.—One of three joint *obligors* in a bond, is an admissible witness to prove the execution.

10.—Where members of a *corporation*, cannot derive any individual advantage from a verdict in a suit, in which the corporation is a party, they may be witnesses for the corporation.

11.—In an action against a sheriff, for a false return of *nulla bona*, after having taken the goods of debtor in execution, at the suit of the plaintiff; a person who claims property in the goods, and who has under that claim, taken the goods out of the possession of the sheriff, is a good witness for the sheriff, to prove such property in the goods.

12.—In an action by the indorsee against the maker of a promissory note, the *indorser* is a good witness for the defendant, to prove the note paid.

13.—In an action against a man, who pleads his *discharge* under the insolvent debtor's act, a creditor of his, who is no party in the cause, may prove, that the defendant is not within the description of the act.

14.—*Trustees* and executors not taking any beneficial interest under a will, are good witnesses to establish such will.

15.—Where several actions are brought against two defendants, for the same *assault*, they may be witnesses for each other.

16.—Where several persons are indicted for *perjury*, in swearing to the same fact, at any time before conviction, they may be witnesses the one for the other.

17.—One *underwriter*, is an admissible witness for another on the same policy, unless he has entered into the consolidation rule.

18.—One *mariner*, may prove wages due to another for a voyage, in respect of which, he himself has a claim.

19.—A joint purchaser of an *annuity*, as tenant in common with the plaintiff, is a good witness in an action against a conveyancer, for negligence and fraud in the negociation of the annuity.

20.—When the only question at issue, relates to the original destination of a ship, the *captain*, although he is part-owner, is a good witness to give evidence on that point.

21.—In an action on the *warranty* of a horse, a prior vendor, who warranted to the defendant, is admissible to prove the soundness.

22.—The creditor of an intestate person, is a good witness for the administrator, to prove due *administration*, by payment of a debt to himself.

23.—A *woman* whose husband has been convicted, may give evidence against a prisoner although she expects, that on his conviction, her husband will be pardoned.

24.—In an issue, on a right of common claimed by *prescription*, as belonging to the estate of one person; another party, who claims a prescriptive right to the same common, as appurtenant to his own estate, may be a witness, to establish the right of common.

25.—When the question was, whether the eldest son of a *freeman*, was entitled to the freedom of a corporation, the father was held to be a good witness, to prove the custom for sons of freemen to become free.

26.—The *vendor* of an estate, who has sold without any covenant for good title, or warranty, is admissible to prove the vendee's title.

27.—A *trespasser* not sued, is a good witness for a plaintiff, against his co-trespasser, without being released by the plaintiff.

28.—In an action for representing a man as solvent, that person, or if he has since become a bankrupt, a *creditor* of his, is an admissible witness, to prove that he was *insolvent*, at the time the representation was made.

29.—A person who has borrowed money on *usury*, is a good witness, in an action for penalties against the lender.

30.—A man who has been arrested, and suffered by the sheriff to *escape*, is a good witness, to prove the escape, in an action against the sheriff.

31.—A person who had been rescued, may be a witness for the defendant, in an action against him for *rescue*.

32.—A person who was *bail* to the sheriff, may be a witness in a cause.

33.—It is no objection to a witness, that he has laid a *wager* on the subject of the suit.

34.—In an action of *trover*, a third person is an admissible witness to prove property in himself.

35.—A mariner on board a ship which has taken a *prize*, may be a witness for the captain, in an action for part of the goods taken, although it appears, that by the admiralty law he is entitled to a share of the prize.

36.—The bare possibility of a witness being liable to an *action* in a certain event, does not render him inadmissible.

37.—Although a person considers himself bound in *honor*, to indemnify the bail in a suit, yet he is an admissible witness in that action.

X.

Examination.

It is a general rule, that when a party has any objection to a witness on the ground of interest, he ought to make it on the voire dire, and before the witness is sworn in chief, if he is aware of it at the time; but, if the interest of the witness is discovered afterwards, at *any time* during the trial, and the objection is made, the witness becomes inadmissible, and such evidence as he may have given must be *struck out;* but if it should not be discovered at the trial, the court will not grant a new trial, on the mere ground, that it has *subsequently* turned out, that some of the witnesses were interested.

A witness himself, may be examined as to his interest, or the party objecting to his testimony, may call other witnesses, or produce other evidence, to prove that he is interested; but the contents of written *documents*, which are not produced, can only be inquired into for the purpose of showing interest, on the voire dire, and not in cross-examination; and any objection, arising from an answer of the witness himself, may be *obviated* by another answer.

XV

How interest is removed.

Whatever interest a witness may have had, he is rendered admissible, if, at the time of his being sworn, he is divested of it: 1st. By a general *release*, given after the *transaction* on which the cause of action arose, by any one having *authority* to release, although a *residuary* legatee will only be rendered admissible, by releasing all claim to the residue; a release, when used, must be produced, and have its execution *proved*, or if it cannot be produced, its absence must be accounted for, in the usual manner; but in many cases, a release is unnecessary, as when the witness has *offered* to release, or surrender all his interest, and the party has refused to accept it; or if the party, has *tendered* a release to the witness, and he has refused to accept it; or if a witness has acquired his interest fraudulently, for the purpose of *depriving* a party of the benefit of his testimony; or when a witness is *equally* interested on both sides: 2ndly. A member of a corporation, may render himself an admissible witness for the corporation, by *resigning* his franchise, even by parol, if it is accepted, and another person elected, or by disfranchisement *regularly* effected: and, 3rdly. If it be necessary, that one of the *bail* should be examined as a witness, the court, on an affidavit of merits, will allow his name to be struck out of the bail piece, on adding and justifying another in his place.

SECTION IX.

PARTIES TO THE SUIT.

Parties.

No persons who are on the record, as *parties* to the suit, though merely *trustees*, as *procheinamy*, *guardian* of an infant, or *governors* of the poor, who are made liable to costs in appeal cases by statute, are allowed to give evidence for themselves, or for any joint suitors against the opposite party, except in the following cases; 1st. When trustees of incorporated public charities, are sued in their *corporate* capacity, they are good witnesses for themselves; 2ndly. In proceedings by, or against a *corporation*, if the members will not derive any individual advantage from the decision either way, they may be witnesses; 3rdly. When persons have been *arbitrarily* joined as defendants, to prevent their testimony from being given, and no evidence whatever has been offered against them, they may be admitted as witnesses; 4thly. When a party, has been made a defendant by *mistake*, the court, on motion, will allow his name to be struck out, even after issue joined, and he will be an admissible witness; 5thly In actions against the hundred, on the statute of Winton, the parties *robbed*, are allowed to prove the robbery, and the amount of their loss, but not any other facts, which may be easily proved by other witnesses; 6thly. In actions for malicious *prosecutions* on criminal charges, the defendant may prove the evidence, he gave on the trial of an indictment; or 7thly. When the suit may be considered as at an end, with regard to a co-defendant, as by a *nolle prosequi* having been entered as to him, or his having *submitted*, and been fined on an indictment for an assault, or by judgment on default having been entered up against him in *trover* or *ejectment*, such co-defendant may

be called as a witness; but a judgment by default, will not render a co-defendant, an admissible witness on the trial of a *misdemeanor*, nor in actions of *trespass*, and on joint *contracts*.

Nor can parties to a suit, whether they are on the record, or are the parties really interested, although *not* named on the record, be *compelled* to give evidence against themselves; but it has been held, that a *co-plaintiff*, with the consent of the defendant, may be admitted to disprove the defendant's liability. In courts of *equity*, although any of the defendants in a suit, may be examined as witnesses, yet the plaintiffs cannot examine each other.

SECTION X.

HUSBAND OR WIFE.

Husband and wife.

Husband and *wife*, are not allowed to give evidence at law or in equity, either *for*, or *against* each other; not even after the marriage is *dissolved*, or when the opposite party *consents* to the examination of the wife of the other; and it is at least doubtful, whether a *woman* living with a man as his wife, and having had children by him, would be admissible, to prove the fact of her not having been actually married to him. The following cases, where a wife may be a witness against her husband, are exceptions to the general rule.

1.—In cases of *abduction* and forcible marriage, the woman not being a wife de jure, may be a witness against the husband.

2.—On indictments for *bigamy*, the second wife may be a witness, after the proof of the first marriage.

3.—Where a man was indicted for the *murder* of his wife, her dying declarations, were allowed to be given in evidence.

4.—In cases of personal *violence*, offered by one party to the other, they may be witnesses against *each other*.

5.—On an appeal of *bastardy*, in the case of a married woman, she may prove the fact of the criminal connection, but that only.

6.—On an appeal against the *removal* of a woman as a widow, she may disprove a primâ facie case of marriage.

7.—In cases of *bankruptcy*, the bankrupt's wife may be examined before the commissioners.

8.—When a wife has acted for, and under the authority of her husband, he is *bound* by her *admissions*, and *acknowledgments*.

9.—In actions between *third* persons, a wife may be a witness, if the action do not immediately affect her husband's *interest*, even if her evidence, may by possibility expose him to a legal demand.

10.—In cases of high *treason*, it is said, that a wife may be a witness against her husband.

SECTION XI.

COUNSEL OR ATTORNIES.

Counsel or attorney.

Persons who stand in the *situation* of *counsel*, or attorney, or *agent* to an attorney, or *interpreter* between an attorney and his client, are not allowed to give evidence, either in criminal or civil proceedings, of communications made to them, at *any time*, in their professional *character*; nor can they be compelled to produce *documents*, entrusted to their care, in the same capacity. And as it is the privilege of the *client*, and not of the witness, the courts will interfere, to prevent a witness from *divulging* such communications, if he is willing to betray his trust; but the client may, if he chooses, waive his privilege, and consent to the production of such evidence, which will make it admissible: and if a counsel or attorney, is examined as a witness for his client, he may be cross-examined by the other party, as to the *same* matter,

although it may involve matter of confidential communication, but such cross-examination, cannot extend to other points in the cause.

Cases narrowing the rule.

As the rule operates to the exclusion of evidence, the courts, as appears from the following cases, have always felt inclined to construe it strictly, and narrow its effect.

1.—A witness who has been consulted, under a mistaken *supposition* that he was an attorney, when the fact was otherwise, may be examined as to those communications.

2.—An attorney may be examined, as to *matters* communicated to him, not as the attorney, but as the agent of the party.

3.—An attorney may be examined, as to a communication made to him, before the commencement of a *suit*, and whilst he did not act in the capacity of attorney, or clerk in court, and was not retained.

4.—Or as to any gratuitous communications, made by the client to the witness, after the *compromise* of a suit, on an interlocutory judgment, and execution of a writ of enquiry.

5.—An attorney is compellable to *identify* the person of his client, or prove his *hand-writing*.

6.—On a prosecution for *perjury* on an answer in chancery, an attorney is bound to prove that his client swore to, and signed the answer.

7.—An attorney may be compelled, to prove the *execution* of a document by his client, to which he is an attesting witness.

8.—In an action on a bond, the attorney of the plaintiff was called by the defendant, to prove that the consideration for the bond was *usurious*, and the court received his testimony.

9.—An attorney may prove any facts, as to the state of an *instrument*, which he knows independently of a professional communication from his client.

10.—An attorney is bound to disclose the contents of a written *notice* to produce papers, which he has received.

11.—A witness may prove any communication however confidential it may be, which he *overheard* between an attorney and his client, for this is owing to the *negligence* of the client himself.

SECTION XII.

ATTENDANCE OF WITNESSES.

CONTENTS.

I.

When a person is at liberty, his attendance as a witness, is procured by *personal* service upon him, of a copy, or *ticket* of a writ of *subpœna* ad testificandum, within a *reasonable* time before the trial; and, if he is to produce deeds, or other documents, a *clause* of duces tecum is added, commanding him to bring them with him. But he cannot be compelled to attend, or give evidence, without having had the reasonable *expenses* of going to, staying at, and returning from the trial, tendered to him, at the time of the service of the subpœna; although no compensation is allowed for loss of *time*, to any, but *medical* men and *attornies;* even although the witness has been expressly promised such *compensation;* but he may maintain an action for his expenses, although he has *refused* to give evidence at the trial, because they have not been paid, or when he could not give evidence, because the cause has not been *called* on. Civil cases.

A witness is also protected from *arrest*, during the *necessary* space of time, taken up in going to the place of trial, staying there, and returning home again, whether he *attend* of his own free will, or be Arrest.

compelled by process of the court; but this protection, does not extend to one, who has *absconded* from his bail, for it is not an arrest, but a mere re-taking of a prisoner who has escaped; nor to a witness, taken by his *bail* to be surrendered: but it has been decided, that witnesses attending an *arbitrator* under a rule of nisi prius, and *bankrupts* attending meetings of the commissioners, are within the rule of protection.

Punishment.

But if a witness, after having been duly served with a subpœna, and had his expenses tendered him, does not attend, he makes himself liable to an *attachment*, for *contempt* of the process of the court; or a special *action* on the case for damages at common law; or an action of *debt* on the statute, for the penalty, and further recompence given by the statute.

When in custody.

When a person who is a *prisoner*, or one under the command of a superior officer, who refuses his permission to attend, is required as a witness; the courts upon motion, grounded on an *affidavit*, stating that the evidence of the witness is material, will direct a writ of habeas corpus ad testificandum to be sued out, directed to the party who has the custody of the witness, and on receiving such writ the sheriff or other officer, in whose custody the witness is, must bring up the body, on being paid his reasonable charges. But this writ will not be granted, to bring up a prisoner of *war*, who cannot be brought up without an order from the secretary of state; nor where it appears, that the writ is a mere *contrivance* to remove a prisoner in execution.

II.

Criminal cases.

In criminal cases, the attendance of witnesses is enforced, either by process of *subpœna*, which now extends to the prisoner's *witnesses*, as well as those for the King, or by a *recognizance* taken before the

justice, or coroner, who commits the prisoner; and in cases of *felony*, the reasonable expenses of witnesses are allowed by the court.

III.

Bankrupts. Commissioners of *bankrupts*, are empowered by their *warrant*, to compel witnesses to appear before them; and are to allow such *costs* and charges as they shall think fit. The general *inclosure act*, gives power to the commissioners to summon in writing, persons within a certain distance, to appear and be examined before them, and if the person summoned refuse to appear, he is liable to a penalty.

Inclosure act.

IV.

Courts martial. If a witness, who has been duly summoned, neglect to attend on a court *martial*, he may be attached in the court of King's Bench, in the same way, as if he had neglected to attend a trial in some criminal proceeding in that court.

V.

Magistrates *Magistrates* have no power to compel the attendance of witnesses, for the purpose of a summary trial, except such as is given them, by the special provisions of the legislature.

SECTION XIII.

EXAMINATION OF WITNESSES.

CONTENTS.

I.

Swearing.

When a witness is in court, and before he is sworn, it is the proper time to ask him as to his religious belief; and the proper *question* to be asked, is not, whether he believes in Jesus Christ or the holy Gospels, but whether he believes in God, the obligation of the *oath* he is about to take, and a future state of rewards and punishments. If these questions are answered in the affirmative, he must be sworn, whatever may be his *rank*, station, or religious belief; although the oath, need not of necessity be sworn on the *evangelists*, as the form of it may be such, as the witness considers, most binding upon his *conscience:* thus, Christians of the church of England, are sworn by kissing the New Testament: *Quakers* are allowed to give evidence in civil cases, upon their solemn affirmation; and *Moravians*, upon their declaration; but neither of these can give evidence for other persons, in cases substantially of a *criminal* nature without being sworn, although in criminal proceedings,

where a defendant in ordinary cases, would be allowed to make oath to exculpate himself, they may affirm, or declare in their *defence:* Scotch *covenanters* are sworn, by holding up their hands, whilst the book lies open before them: Jews are sworn upon the *Pentateuch:* Mahometans on the *Alcoran;* Gentoos by touching with their hands the foot of a *Bramin*; and indeed, it may be said generally, that all persons ought to be sworn, according to the *ceremonies* of the peculiar religion they profess at the time; for it has been decided, that a person who was a *Jew*, and who has never formally renounced the religion of his ancestors, but yet considers himself to be a member of the established church, may be sworn on the gospels.

II.

Examination.

After a witness is sworn, if there is no objection made to him on any of the grounds before mentioned, he is examined by the party who produces him: this is called the examination in chief, in which the courts do not allow irrelevant, or leading questions to be asked; although in some particular cases, as when it is necessary for a witness to *identify* a person, he may be pointed out to the witness, who may be asked in direct terms, whether that is the man; or where one witness swears to a *fact*, and another witness is called to contradict him, the latter may be directly asked whether that fact ever took place; or if the witness appears evidently *hostile* to the party for whom he is called, the court in their discretion, will allow the examination to assume the form of a cross-examination, when leading questions may be put.

Cross-examination.

After the examination in chief, the opposite party is at liberty to cross-examine the witness; when, as the object is to try the credibility of the witness, the counsel is allowed to enquire concerning his situation, with respect

to the parties, and the subject of litigation, his motives, inclinations, and prejudices, and his means of obtaining a correct and sufficient knowledge of the facts to which he has deposed, and in doing this, he is allowed to ask *leading* questions *relevant* to the issue. Cross-examination may be resorted to in all cases, where a witness is *sworn*, whether he has been examined or not, by the *party* calling him.

Re-examination.

A witness may be re-examined, as to any new fact, which may arise out of the cross-examination, or if his statements, or his character, have been impeached, to show the consistency of his statements, and to vindicate his character.

Ordered out of court.

In cases where the courts think proper, they will order all the witnesses out of the court, but the one who is under examination; and it is an inflexible rule, that a witness who is present in the court during a trial, after he has been *ordered out*, cannot be examined.

III.

Questions.

Witnesses cannot be compelled to answer any questions whatever, which may tend to subject them to *penalties*, or any kind of *punishment*, or to a *criminal* charge, or a forfeiture of estate; nor are they bound to answer any *irrelevant* questions which may tend to degrade their character, although it seems that such questions are legal, and if they are answered, the party asking them, is conclusively *bound* by the answer; but a witness must answer questions, which are relevant to the matter in issue, although the answer to such questions, may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit.

Political informers, are not bound to answer questions, as to who employed them, the name of the person from whom they procured their information, or as to any other matters, which may explain

the *channel* of intelligence. And upon the same principle, official communications made between the go ernor, and the law officer of a *colony*, respecting the state of the colony; *orders* by a governor of a colony to a military officer; correspondence between an agent of *government*, and a secretary of state; reports of a *military* court of enquiry, respecting the conduct of an officer, are privileged communications, which the courts will not a low to be disclosed.

A witness is not allowed to reveal advice given to the King, at the *council*-board, or speeches made in *parliament*.

IV.

Knowledge of witness.

A witness must speak from his own knowledge and recollection, although to refresh his memory, he is allowed to refer to any written *entry*, or memorandum made, or at least *examined* by himself, either at the time a fact occurred, or very recently afterwards; but he is not allowed to give evidence of his opinions, except in some particular cases, as those of science, skill, trade, or others of the same kind, when persons of skill, are allowed not only to speak as to the facts, but also to give their opinions in evidence; as is shown by the following cases decided on this point.

1.—A ship-builder, may state his opinion of the sea-worthiness of a *ship*, from examining a *survey*, which had been taken by others, and at which he was not present.

2.—A person conversant in the business of *insurance*, may be examined, as to whether the communication of particular facts, would have varied the terms of insurance; but he cannot be asked, what his conduct would have been in the particular case.

3.—A clerk of the *post-office*, accustomed to inspect franks for the detection of forgeries, has been examined, to prove that the hand-writing of an instrument, is an imitated, and not a natural hand, although he never saw the supposed person write; and also to

prove that two writings, suspected to be in imitat hands, were written by the same person.

4.—Commercial men may be called as witnesses, to prov the meaning of any particular expression, used in letter, on a *commercial* subject.

5.—A seal engraver may be called, to show a differenc between a genuine impression of a *seal*, and on supposed to be forged.

6.—An *engineer* may be examined, as to his judgment o the effect of an embankment, in a harbour, as co lected from experiment.

7.—The opinions of *medical* men, are evidence as to state of a patient, either in body or mind, even i cases, where they have not themselves seen the p tient, but have heard the symptoms, and particular of his state, detailed by other witnesses at the trial and in cases of homicide, they are always allowe to state their opinion, whether the wounds describe by witnesses, were likely to cause death.

V.

How a witness's credit is impeached.

The credit of a witness may be impeached by the opposite party, in three several ways: 1st. By examining other witnesses as to his general bad *character*, but *not* as to any *particular* offences: 2dly. By proof, that he has made *statements* out of court upon the same subject, *contrary* to what he swears upon the trial; although it will be necessary before this can be done, that the witnesses be *cross-examined* as to the former statements: or, 3dly. It seems, by calling other witnesses to swear, that from what they have observed from his conversation, and manners, they would not believe him on his *oath*. A party cannot *discredit* his own witnesses, by either of these modes, but if a witness unexpectedly state facts, against the *interest* of the party calling him, other witness may be called, by the same party to disprove those facts.

SECTION XIV.

NUMBER OF WITNESSES.

Number of witnesses required.

One *credible* witness, is sufficient to prove a fact in all cases, except on indictments for *perjury*, when to obtain a conviction, "there must be strong and clear evidence, and more numerous than the evidence given for the defendant;" and on *prosecutions* for high *treason*, two witnesses must be produced, to prove the *overt* act, unless the treason charged, be a direct *attempt* at the King's life, or person, when a prisoner may be convicted upon the like evidence, as if he stood charged with murder; or if it be a treason concerning the *coin* of the realm, *one* witness is only requisite for the proof: But in *petit* treason or *misprision* of treason, there must be two witnesses. Also in the ecclesiastical courts, two witnesses must be produced in all cases, except to prove facts, coming before them collaterally, and which would only require proof by one witness in courts of law; for if they refuse to notice such facts, for want of proof by two witnesses, a *prohibition* may be granted.

SECTION XV.

ACTS OF PARLIAMENT.

CONTENTS.

I.

Public. Public statutes are either, such as affect all the King's subjects generally, or such as though private in their nature, are declared to be public by the legislature; they are not required to be proved, as the courts take judicial notice of their contents, by reference to the printed *statute books*.

Copies of the statutes of *Ireland*, prior to the Union, when printed and published by the King's printer, are received as conclusive evidence in any court of Great Britain.

II.

Private. Private statutes must be formally proved, either by copies, sworn to have been *examined* with the parliament roll, or by *exemplification* under the great seal: but a printed copy of a private act, has been held sufficient, in the case of an *appeal*, against an act done under such statute, or where the act though private in its nature, yet related to a whole country, as the act of *Bedford* levels, and the act for rebuilding *Tiverton*.

SECTION XVI.

JUDGMENTS.

CONTENTS.

I.

Of superior courts same parties.

Judgments and verdicts of the superior courts of common law, when they have directly *decided* a point, are conclusive evidence in any action for the *same cause*, between the same parties *really* and *substantially* interested, when they sue, or are sued, in the same *capacity* or character; and also between their privies in *blood*, in *estate*, and in *law:* a judgment is also evidence against one, who *might* have been a party to it if he would, for he cannot complain of the want of those advantages, which he has voluntarily given up; but a recovery in any suit, upon issue joined upon matter of title, is *only* conclusive upon the subject matter of such title, when pleaded by way of *estoppel*.

Strangers.

But a former recovery, cannot be given in evidence, *against* a stranger to the record in a former suit, nor *for* a stranger, against either of the former parties; except in the following cases:—

1.—In questions of *tolls*, and *manorial*, or other *customs*.
2.—In questions of public right of *way*, or of liability to repair a *highway*.
3.—In questions on customary rights of *common*.

4.—In questions of the public right of *election* to a parochial office; in these four cases, a verdict in a former action, between any other parties, is *admissible*, although clearly not *conclusive* evidence.

5.—Mr. Justice Buller adds a fifth exception, viz. questions of *pedigree*, although there is a contrary decision in the Duke of *Athol's* case.

6.—When a judgment in a former action, is only produced to prove some collateral fact, by way of *inducement* to the action, it is admissible in evidence, for or against parties, who were strangers to such former action.

7.—In cases of *quo warranto*, when a judgment of ouster against one *corporator*, is evidence in a similar proceeding against another, who derives his title under the former party, and is conclusive evidence, unless *fraud* be shown.

II.

Common law judgment how proved.

Records of the superior courts of common law, are preserved for *security*, in public repositories, and are *accessible* to all the King's *subjects*. When it is necessary to prove them, in the courts where they are deposited, they are produced and inspected; but when in any other courts, they are proved, 1st. By exemplifications under the *great seal*, which are only granted of records, returned into chancery by writ of certiorari: 2dly. By exemplifications under the seal of the *court*, in which the proceedings are recorded, which are admitted as conclusive, without any extrinsic evidence of their being *genuine:* 3dly. By copies, examined with the originals, *deposited* in their proper place; if these have been examined with the *officer*, who has the custody of the records, it is sufficient for the witness, to prove that the *copies* agree with what the officer read; but if they are examined by the witness and a *stranger*, it is thought, that they should exchange the documents, and read them alternately; or 4thly, By office copies, which when made in the court where the proceedings are filed, are considered as *equivalent* to records; but

when in any other court, they must be *proved* by a witness in the usual manner. A copy *authenticated* by a person trusted by the court for that purpose, is admissible, without proof of actual *examination*, but a copy, given out by an officer who is not trusted for that purpose, but has merely the *custody* of the records, must be regularly examined. The officer who has the custody of records, may be examined as to their *condition*, but not as to their matter.

When a record is relied on in evidence, the *whole* of it, or if it is exemplified or copied, a copy of the whole should be produced; for although the *nisi prius* record, with the postea indorsed, is good evidence to prove, that a *cause* came on to be tried, yet it is not sufficient evidence of a *verdict*, without production of the judgment, entered on the judgment-roll. A final judgment can only be proved, by an examined copy from the record, as the *book* at the judgment office, is not sufficient even to prove the *time* of signing the judgment, except it be a judgment of the House of *Lords*, which may be proved by an unstamped copy of their minute book. An *Irish* judgment will not be sufficiently proved, by showing that it was compared with a parchment roll, produced to the witness in the Four Courts; it must be proved, that the record was seen in the hands of the proper officer, or in the proper place for the custody of such records.

III.

In criminal cases.

A judgment in criminal cases, is conclusive evidence, upon the trial of a subsequent indictment, or other criminal proceeding for the same *offence*; but when offered as evidence in *civil cases*, it cannot be used to prove any thing more than the mere fact of the adjudication, except where the defendant has *confessed* his guilt, when the conviction will be

admissible evidence in an action for the same wrong.

All criminal records are open to the *inspection* of every person, except in the particular case of an *acquittal* on a prosecution for felony; when a copy of the indictment cannot regularly be *obtained* by the defendant, without an order of the court for that purpose; but it seems that if an officer do give a copy of a record, or produce the original, without such authority of the court, it will be received in evidence, although obtained in *contempt* of the court.

A criminal judgment is proved, by inspection, or exemplification, in the usual way, and in some particular cases, by *transcript* under express directions of the *legislature*.

As a general rule, a criminal judgment cannot be used in evidence either for, or against persons, who were strangers to the former proceedings; except in the following cases.

1.—When a *parish* is indicted, for not repairing a road, it may prove a non-liability to repair, by producing a record of conviction, establishing the fact, that another parish is bound to repair that road.

2.—On the trial of an *accessory*, the record of conviction of the principal felon, is admissible in evidence, to show that the felony was committed by the person convicted as principal.

3.—A record of conviction is conclusive to prove the *infamy* of a witness, and the record of *reversal*, to show his admissibility.

IV.

In rem. in the Exchequer.

Judgments of condemnation in the Exchequer, are conclusive evidence against all persons, not only of the King's right to the goods *seized*, but also, in justification of the officer who made the seizure; but a record of *conviction* for penalties, is not considered as evidence between strangers and third persons, of the offence having been com-

mitted. It does not appear clear, that a sentence of acquittal in rem. in the Exchequer, is in like manner conclusive; although Lord Kenyon seems to have held an *opinion*, in favour of the conclusive operation of such a judgment.

V.

By commissioners of excise.

Judgments of *condemnation* by commissioners of excise, are generally thought to have the same conclusive effect in evidence, as judgments of condemnation in the Exchequer, but this point has not been clearly *decided*.

VI.

Of Inferior courts.

Judgments of inferior courts not of record, are only evidence to prove, that such decisions have taken place, and are usually proved by the production of the *books*, containing the minutes of the proceedings of the courts; but evidence of the *proceedings* prior to the judgment, should be given, in order to show that they have been *regular*. And as the proceedings are in some measure public documents, they are open to the *inspection* of all persons interested, and may be proved by *copies*.

SECTION XVII.

PROCEEDINGS IN CHANCERY.

CONTENTS.

1.—*Bill.*
2.—*Answer.*
3.—*Depositions.*
4.—*Decree.*

I.

Bill. A bill in chancery, is not evidence in a court of law to prove any *facts*, either alledged, or denied therein; but only to show, that a certain suit existed, and that certain facts were in issue between the parties, in order to introduce the answer, or the depositions of witnesses; except in the instance of a bill filed by an ancestor, which will be evidence of a family *pedigree* therein set forth.

II.

Answer. An answer in chancery, is strong evidence against the party making it, or his *privy*; but the answer of a minor by his *guardian*, is not evidence against the *minor*, although it would be admissible *against* the guardian; nor is that of a *trustee*, in any case, evidence against the cestuy que trust; nor is that of one defendant, generally evidence against a *co-defendant*; although the answer of one *partner*, to a bill filed by a creditor, has been received as evidence, in an action by another creditor against the other partner.

When an answer is *produced* in evidence, it must be read *throughout*, and if there has been a *sec*

answer put in, the defendant may insist on having that read also, to explain what he has sworn in his first; this rule applies in all cases, except where the answer is only produced, to show the inadmissibility of a witness, who has therein admitted himself *interested* in the event of the cause, in which case, such facts only need be read, as state the ground of interest. And when used as an *admission*, it is proved by an examined copy, together with some proof of the *identity* of the party; and cannot regularly be given in evidence, without proof of the bill, unless after proper *search*, that cannot be found: but on a prosecution for *perjury*, in swearing to an answer, or in actions in the nature of criminal proceedings, as actions for *malicious* prosecution, the answer itself must be produced, and it will be necessary to prove, the administration of the oath, and to show that the signature on the answer, is in the hand-writing of the party, and that the jurat has been properly signed and attested by the master before whom it was sworn.

III.

Depositions.

The depositions may be given in evidence, in any action at common law on the same matter, between the same parties, or any who claim under them; if on the trial, it can be proved, either, 1st. that the deponent is *dead;* or 2dly. That he cannot be found, after strict *inquiry;* or 3dly. That he is kept away, by the *contrivance* of the other party; or 4thly. That he is out of the kingdom, and not amenable to the *process* of the court. But they are not admitted in evidence, for a party to the suit against *persons* who are neither parties, nor *claimed* under parties to the proceeding in equity; nor in like manner for a *stranger* against either of the parties, except where the question to be tried, is one of

custom, or toll, or where *hearsay* and reputation would be good evidence. Depositions are not admissible as evidence, without *proof* of the bill and answer; except they be so *ancient* that no bill or answer can be found, or the *defendant* be in contempt of the court; or has waved his right of cross-examination; or unless they be produced in a court of common law, under an *order* of the Court of Chancery. Nor are they admissible, after a bill has been dismissed for *irregularity*, in the mode of bringing a cause before the court; nor before an *answer* is put in, unless the witness has been examined *de bene esse*, and has died before answer put in, in which case, the depositions may be read as evidence, although there is no answer.

Depositions taken on *interrogatories* under a commission of modern date, are not evidence, without the production of the commission; but if the depositions are ancient, so that the commission may be presumed to be lost, they are evidence of themselves, in which case, there is no necessity to produce the bill and answer. And if a man in giving his depositions in chancery, refer to any written *papers*, these may be read in evidence, as part of the deposition; or the depositions of witnesses professing the *Gentoo* religion, who were sworn according to the ceremonies of their religion, and taken under a commission out of chancery, may be read in evidence in this country.

Depositions are proved, in courts of common law by examined copies, but in the Court of Chancery, *office copies* are considered sufficient.

IV.

Decree. The decree is governed by the same rules, as a judgment or verdict in a court of common law, and may be given in evidence, in the same manner, and under the same restrictions and limitations: It is proved either, 1st. By an *exemplification* under

the seal of the court; 2dly. By a *sworn copy*; or 3dly. By a *decretal* order in paper, with proof of the bill and answer, unless they be either *recited* in the decretal order, or the decree be so *ancient*, that the bill and answer cannot be found after proper search, in which last case, the decree will be admitted as evidence by itself, without further proof.

SECTION XVIII.

PROCEEDINGS OF COURTS OF PECULIAR JURISDICTION.

CONTENTS.

1.—*Ecclesiastical Court.*
2.—*Courts of Admiralty.*
3.—*Colleges in the Universities.*
4.—*Foreign courts generally.*
5.—*Foreign judgments of debt.*
6.—*Courts martial.*
7.—*Commissioners of bankruptcy.*

I.

Ecclesiastical Courts.

Sentences of Ecclesiastical Courts, directly determining the validity of *marriages*, and *wills* of personal property, or upon granting administration, are conclusive evidence of the facts directly determined; but not of any *collateral* matters, which may be collected, or inferred from the sentences; and although a *sentence* of jactitation, is admissible evidence against a marriage, it is not *conclusive*, like a sentence of nullity or affirmance. But they are not evidence in any *criminal* proceeding, and will not preclude inquiry upon a criminal prosecution, except in the case of a prosecution for *polygamy*; when by the express enactment of the statute, a sentence of divorce, or nullity of mar-

riage, but not a sentence of *jactitation*, will protect the party from any criminal inquiry. Sentences of Ecclesiastical Courts, on questions of marriage, are proved by examined copies, in the same manner as proceedings in chancery; and it is generally necessary to prove the *libel*, and other proceedings previous to the sentence; although a sentence of *divorce* a mensâ et thoro, has been received without such preliminary proof: Sentences of Ecclesiastical Courts, as to wills and administration, that is probates, and letters of administration, are considered in another place.

The *practice* of the Ecclesiastical Courts, must be proved like any other matter of fact, by the testimony of witnesses.

II.

Admiralty. Sentences of Courts of Admiralty both *domestic*, and those *abroad*, which are acknowledged by the law of *nations*, and possess competent *jurisdiction*, are conclusive in prize questions, against all the *world* upon the matters thereby *directly* decided, when the same point arises incidentally in other courts; and this is the case, whether the decisions involve questions as to right of property, as in actions of *trover*, or of compliance, or non-compliance with *warranties*, as in actions on policies of insurance: And whenever they state the *facts*, upon which the condemnation was grounded, they are conclusive of those facts, if it appear that they *warranted* a condemnation; but where the fact, which is the ground of condemnation, is *specifically* stated in the decretal part, the sentence is only conclusive of that fact, and not of any others previously recited: and if no *grounds* of condemnation appear on the face of the sentence, the court will presume, that it was on the ground of the property belonging to an enemy: and a sentence of *condemnation* of a neutral ship, by a British vice-

admiralty court, is sufficient evidence to raise a presumption, that the ship had been engaged in some illegal transaction, although the ground of condemnation do not appear in the sentence. A condemnation before a *consul* of one belligerent state, resident in another, in alliance offensive and defensive with it, has the same effect, as if decreed in the state appointing the judge who condemns; but a sentence of condemnation, pronounced by an enemy's prize court holden in a *neutral* country, is a nullity, and therefore cannot be given in evidence here.

Sentences of the Courts of Admiralty in this country, are proved by examined copies, with *proof* of the prior proceedings, if they can be found, if not, without such additional proof; those of Foreign Courts, are proved by an exemplification under the seal of the court.

III.

Colleges. Sentences of Colleges in the Universities, either by the *master* and fellows, when unappealed against, or by the *visitor*, on an appeal to his authority, are conclusive in courts of common law, upon all subjects within their jurisdiction, such as the deprivation, or expulsion of the members of a college; and are proved, by examined copies, in the usual manner.

IV.

Foreign Courts. Sentences of Foreign Courts, of competent authority, when they directly decide any question, which is properly cognizable by the law of the country to which they belong, seem to be conclusive upon the same question, incidentally arising in this country; this rule applies as well to criminal as civil proceedings, and under it, the following cases have been decided:

1.—A sentence of a foreign court, directly establishing a *marriage*, is conclusive of the validity of the marriage, in any court in this country.

2.—A sentence of a foreign court, in a country where a bill of exchange is negotiated, which vacates the *acceptance*, would be conclusive here, of that fact.

3.—An acquittal of *murder* in a foreign court, would be conclusive evidence, on an indictment here, for the same offence.

4.—A sentence of *divorce* by the Synagogue at Leghorn, is admissible to prove such divorce, if the law of the country be previously established.

5.—A sentence of a foreign court of *Admiralty*, is conclusive upon all the world, in civil suits, as to all matters within its jurisdiction, and decided by the sentence.

6.—A sentence of a foreign prize court, of competent jurisdiction, proceeding on the ground of infraction of *treaty*, however unwarranted that conclusion may be, is conclusive in this country.

V.

Foreign Judgments.

In an action on a foreign *judgment*, the sentence is only primâ facie evidence of the debt, when the proceedings on which it is grounded, appear upon the face of them, *consistent* with reason and *justice*; and for the purpose of ascertaining whether a judgment has been fairly obtained, and is pronounced by competent authority, and on a case within the jurisdiction of the foreign court, the courts here will *examine* into the proceedings, and receive evidence, of what the *law* of the foreign state is, and whether the judgment is warranted by that law. Foreign judgments are proved, by *exemplifications* signed by the judge, and having the seal of the court attached to them, when it is not only necessary, to prove the *handwriting* of the judge, but also the authenticity of the *seal*, by some one acquainted with its *impression*: And if a *Colonial* Court possess a seal, it must be used, although it be defaced; but if it has no seal, and this is clearly proved, so that there can be no exemplification under seal, then some other *requisite*,

to give credit to the judgment, as proof of the *signature* of the judge, must be resorted to. But a *document* professing to be a copy of a judgment, made by the chief officer of the court, is not admissible in any case.

VI.

Courts Martial.

Courts *martial*, are bound by the same rules of evidence as the courts of common law, and their general proceedings, when not otherwise regulated by act of parliament, must follow the same course; and their sentences, when within the scope of their authority are in general conclusive, although a sentence of *acquittal* by a court martial is not evidence of the illegality of an imprisonment.

VII.

Commissioners of Bankrupts.

The proceedings on commissions of bankruptcy, if they are not enrolled, are proved by production, but if they are enrolled as directed by the *statute*, they are proved by copies, duly signed and attested by the officer who has the custody of the originals. Depositions made before the commissioners, may be given in evidence against the person who made them, by producing and proving them in the ordinary way, even although the proceedings are not enrolled.

SECTION XIX.

DECISIONS OF MAGISTRATES.

CONTENTS.

I.

At quarter sessions.

Judgments of quarter sessions, when *confirming* orders of removal, are conclusive upon the appellant parishes, and may be given in evidence against them, by third parishes in any subsequent appeals; but when *discharging* orders of removal, upon the merits, they are only conclusive, upon the contending parishes, that the settlement of the pauper, was not in the appellant parish at the time of removal.

II.

Orders.

Orders of justices when confirmed at sessions, are conclusive as to all the facts stated in the *orders;* and an order of *removal*, when executed without appeal, is conclusive as to the settlement of the pauper, up to the time of the order, and as to all *derivative* settlements, even although the party removed was therein *misdescribed;* but in cases, where justices have acted without *jurisdiction*, their orders are void, and may be objected

against, even after a lapse of twenty years. If it be proved that an order of removal has been *lost*, parol evidence may be given of its contents.

III.

Convictions by magistrates, in cases where they have jurisdiction, if regularly made, are *conclusive* evidence for the magistrates, in *actions* brought against them; and whilst they remain unreversed, or quashed, they cannot be *controverted*, or disproved in evidence; although the magistrates must show the *regularity* of their own convictions, and produce, and prove in court, the informations on which they were founded. Convictions.

SECTION XX.

DEPOSITIONS.

CONTENTS.

I.

Depositions are only admissible, 1st. When they are the *best* evidence, the nature of the case admits, as when the witness himself cannot be examined vivâ voce, on account of death, insanity, not being found after strict enquiry, contrivance When admitted.

of the opposite party, or being out of the kingdom, and not amenable to the process of the court: 2ndly. When the party against whom they are offered, was a *party*, or *privy* to the proceedings, in which they were taken; but in cases of customs, and tolls, and generally in all cases where *hearsay* and reputation would be evidence, or where, they are offered to *contradict*, what the same witness swears at a trial, but not to support his testimony, they are admissible evidence against strangers: 3rdly. When the proceeding in which they were taken, was a *judicial* one, as otherwise they are mere voluntary affidavits: and 4thly. When the deponent was *cross-examined*, or *might* have been so, by the party against whom they are offered, or by the person under whom he claims.

But before depositions can be received as evidence, it will be necessary to prove all the preparatory facts, as the *death* of the witness, his insanity or the cause of his absence, and the identity of the *cause*, and the parties to the proceeding.

II.

On interrogatories.

When a material witness, is about to leave the country, or resides abroad, the courts will allow his depositions, taken on interrogatories by consent, to be used as evidence in both civil and *criminal* cases; if at the time of the trial, it is proved that the witness has quitted the *country*, or even, that he is on board *ship* for that purpose, and has been driven back by storms, or cannot proceed on account of contrary *winds:* but it will not be sufficient, merely to show, that the witness is a *seafaring* man, and that he lately belonged to a vessel, which is lying at a certain place, without proving that pains had been taken, to procure his attendance. Depositions taken on interrogatories at the chief justice's chambers, may be proved by a *copy* signed by the chief justice,

and received from his clerk, unless some suspicion of forgery is thrown upon the signature of the deponent, when the original depositions must be produced. And whenever papers are referred to in the depositions, such papers may be read as part of the evidence, as if the master of a private vessel, when examined on interrogatories, refer to his *log-book*, the entries referred to, may be read as part of his deposition.

It is no objection to depositions taken in an ancient suit to perpetuate testimony, and to which both the plaintiff and defendant were privies, that the interrogatories upon which the depositions were framed, were *leading* interrogatories, and such as would not have been allowed at the trial.

III.

In India.

Depositions duly taken in *India*, and returned in the form prescribed by *statute*, are to be admitted in any case, where there is a judicial enquiry in this country, about any offence, or cause of action arising in India; and are to be deemed, and taken to be as good and competent evidence, as if the witnesses had been themselves sworn at the trial, and examined.

IV.

Before magistrates.

Depositions made before magistrates, in cases of *manslaughter*, and *felony*, but in those cases ***only***, may be used in evidence, if it be proved, **1st.** That the informant is *dead*, or that he is insane, or that he is kept away by the *contrivance* of the prisoner; 2ndly. That they were taken upon *oath*, in the presence of the ***prisoner***, or at least, that they were ***read over***, to the deponent, and sworn to by him, in the prisoner's presence; 3dly. That the depositions offered in evidence, are the same as were sworn before the magistrate, without any *alteration* or addition; but it does not appear es-

sential, that they should be *signed* by the absent witness: and they will be evidence against a prisoner, in the *county* where he is tried, although they were taken, in a county where the crime was not committed, and where the magistrate had no original cognizance of the offence: and may be used by a prisoner, to show a *variance*, between the testimony of a witness at the trial, and his deposition before the magistrate. *Parol* evidence is not admissible, to add to, vary, or discharge depositions.

V.

By coroner. Depositions taken by a *coroner*, in cases of murder and manslaughter, when made in the same manner as depositions before magistrates, may be used in evidence, under the same restrictions, and in the like cases; and like them, they should be proved, to contain the true *substance*, of what was deposed upon oath, without any alteration or addition: but it does not appear essential, that it should be proved, that the prisoner was *present* at the time they were made.

VI.

In Ecclesiastical Courts. Depositions taken in the *Ecclesiastical* Courts, in causes within their jurisdiction, seem to be admissible in evidence, upon the same footing, and under the same limitations, as depositions in chancery, although it is said in a book of great *authority*, that they shall not be admissible in any case whatsoever.

SECTION XXI.

OTHER JUDICIAL DOCUMENTS.

CONTENTS.

I.

Rules of court. Rules of court, are evidence that the courts have ordered as therein stated, but not of any *allegations* in them, which are the mere suggestions of the party who obtained them; they are proved, either by production of the originals, or by *office copies*, which it is not essential to prove have been *examined*.

II.

Writs. Writs are good evidence, to prove the actual time of the commencement of a suit, whenever that is material, as to show, that an action had not been commenced, until after the expiration of one month from the delivery of an *attorney's* bill; or until after the first day of term, although there is only a general *memorandum* on the declaration,

and the cause of action had accrued after the commencement of term; or to bar the statute of *limitations;* or to negative a *tender*, stated in the pleadings to have been made before the action was brought.

They are also good evidence in justification of a bailiff, for taking the *goods* of the plaintiff, if he be the party against whom the writ issued; but if the action is brought by any other person, claiming the goods by virtue of any *colourable* title, the bailiff must not only prove the writ, but also the judgment, or *information*, upon which the writ is founded.

Return. The sheriff's *return* duly made, and filed, is primâ facie evidence of the facts there stated, as for instance, if he has returned a *rescue*, or that he has levied a certain sum of money; although in the first case, it would be open for a party indicted for the rescue, to show that the return was false; and in the latter case, the return would be no proof, that he had paid over the *money* to the judgment creditor, so as to charge him in an action for the receipt: yet generally the sheriff's return, is *strong* evidence against *himself*.

How proved Writs are either not returned, in which case, to prove them, the original itself should be produced; or they are returned, when they become a part of the record, and are proved in the same manner as any other records, by examined *copies* from the judgment roll; which is conclusive evidence, of all the proceedings which it sets forth; therefore in an action for use and occupation, by tenant by *elegit*, an examined copy of the judgment roll, is evidence of the issuing, and return of the elegit, without proving the writ and inquisition. Writs may also be divided into such as are mere matters of inducement, which are proved by production; or such as are the *gist* of the action, when a copy from the record is necessary to prove them. The best evidence to prove the issuing of a writ, is an office

copy; and before secondary evidence of the issuing can be given, it must be proved, that proper search has been made for the original at the *Treasury*, for it is not sufficient to produce the filacer's book, and to prove a notice to produce the writ.

III.

Inquisitions

Inquisitions are, 1st. by the *coroner*, either of felo de se, which are not conclusive of the fact found, but may be removed into the King's Bench, and traversed by the executors and administrators of the deceased person; or of fugam fecit, which it seems are conclusive, and not traversable; or inquistions *post mortem*, which are admissible in evidence, though not conclusive.

2dly. Of *lunacy*, which are admissible evidence in *criminal* as well as civil cases, though not conclusive so as to affect the rights of third persons.

3dly. Inquisitions by the sheriff, or coroner, by virtue of their office, or under special writs, and those found by *commissioners* specially appointed, which if regularly taken, and under a competent *authority*, are admitted as evidence of the facts there found, even against third persons: but when inquisitions have been taken without legal authority, they are inadmisible; therefore, an inquisition made by a *sheriff's* jury, to ascertain who was entitled to the property of goods taken in *execution*, is not admissible evidence, even against the sheriff in an action of trover, brought by the party in whose favour the inquisition was found, since it was merely a proceeding of the sheriff on his own authority.

How proved

When inquisitions are offered in evidence, the commission under which they are taken, ought regularly to be proved, or shown to be lost, except, where the commission is of such public notoriety, as the commission of *Hen. VIII.* that it requires no such proof.

IV.

Examinations.

Examinations of *paupers*, concerning their settlements, though taken on oath before a magistrate, are not admissible evidence, in any case against an *appellant* parish, upon questions of settlement; except in the case of a soldier, when by the *mutiny act*, not only the *original* examination is admissible, but also, the attested copy delivered to the soldier, under the direction of the act; but whilst such attested copy is in existence, no other *copies* can be received.

But the examination of a pregnant woman, in cases of *bastardy*, will be evidence, after her death, against the reputed father, on his appearance at the sessions, to abide the order of the court, according to his recognizance.

V.

Affidavits.

Voluntary affidavits are admissible evidence against the party making them, and if offered as affidavits, must be proved to have been *sworn*, but if only as notes or letters, it is only necessary to prove the *signature;* but a *copy* of a voluntary affidavit, is in no case admissible. To prove an affidavit which has been made in the course of a *cause*, it is sufficient in a civil suit, to prove, that such a cause was depending, and that such an affidavit was made use of by one of the parties. And to prove an affidavit of the *defendant* in the same court in which the action is tried, although in another cause, it is only necessary to produce an *office copy*, without proof of the hand-writing of the party, or that he was sworn. The affidavit of a man who is dead, may be read to prove his *marriage*, although it was made before a surrogate, when there was no cause in court.

VI.

Fines and recoveries.

Where it is necessary to prove a *fine*, that has been levied with proclamations, they should be examined with the roll; for although the copy made out by the chirographer, is sufficient evidence of a fine without proclamations, as he is the authorised officer for such purpose; yet as he is not appointed to copy the *proclamations*, they should be examined, for the mere production of the chirograph, having them indorsed as duly made, is not sufficient evidence of the fact. But a *copy* of a fine or recovery will be evidence, if the original be lost, or in the hands of the opposite party.

VII.

Certificates of conviction.

Certificates of conviction, are made evidence by the legislature, in the following cases, 1st. Where a man has taken the benefit of clergy, or a woman the benefit of the *statute;* 2dly. On indictments for returning from *transportation;* and 3dly. On a trial for a second offence, in uttering *counterfeit* money.

Of Justices.

Certificates of justices, certifying that a *highway* is in repair, are admitted as evidence of the state of repair, on a prosecution against a parish for not repairing the highway, after it has pleaded guilty to the indictment.

Of Officers.

Certificates of authorised officers, as protests of *notaries* public, on foreign bills of exchange; certificates of enrolment of *fines*, and deeds of *bargain* and sale; of the secretary at war, relating to the office of a *serjeant* in the army; of *commissioners* appointed by statute, to enquire into the state of the debts of the army; of the enrolment of a duchy lease, by the auditor of the Duchy of *Lancaster;* or a record of a magistrate of forcible *entry* and detainer, are evidence of the facts therein certified: but the certificate of the *King*, under his sign manual, cannot be received as evidence; nor will that

of a *vice-consul* abroad, be admissible even to ascertain the amount of a sale of damaged goods, although he is the legal officer in that country to superintend such sale; nor will a *notarial* certificate and seal, verified by a British consul, whose hand-writing is sworn to, be evidence in a court of law, of the execution of a power of attorney to receive money in this country for a party abroad, unless it is accompanied by the affidavit of the subscribing witness; nor will the certificate of an agent for *Lloyd's* at a foreign port, ascertaining an average loss upon a cargo damaged by sea-water, be evidence of itself, to show the amount of the loss, in an action by the insured, against the underwriter; nor will the mere production in court of a *diploma* of a doctor of physic, under the seal of one of the universities, be sufficient evidence in itself, that the party named in the diploma is entitled to that degree; nor is a *captain's* protest evidence in chief, for it is admissible only for the purpose of contradicting the captain's testimony.

Of Ordinaries. Certificates of *ordinaries*, in cases of bastardy and marriage, when entered of record, are in general conclusive evidence of the fact; but the certificate of a *minister* abroad, that he had solemnized a marriage, would not be admitted as evidence in this country.

Wales, &c. Certificates of the courts of *Wales*, are evidence of their practice; and the customs of the city of *London*, are certified by the mouth of the recorder.

Of Bankruptcy. Certificates of *bankruptcy*, are evidence to bar all demands due at the time of the act of bankruptcy, and which could have been proved under the commission; but where a *verdict* is obtained against a bankrupt, in an action for damages, before an act of bankruptcy, but judgment is not signed until after, the debt is not barred by the certificate; nor will a certificate be a bar, where the plaintiff's

claim is in unliquidated *damages*, as in actions of trespass or trover, although the conversion, or act of trespass was before the bankruptcy; in the same manner, those of the discharge of an *insolvent* debtor under the *insolvent act*, are primâ facie evidence to prove the fact of his discharge.

VIII.

Probates. Probates being copies of wills, authenticated under the seal of the Ecclesiastical Court, are the best evidence of wills of personal property; but they are not received as proof of wills of *real property*, even though the original is proved to be *lost*, and they are only produced to establish a *pedigree*; but in some particular cases, the *ledger-book* of the Ecclesiastical Court, or a copy of it, will be secondary evidence of a devise of a real estate. A probate whilst unrepealed, is in civil cases, the only proper evidence of the *validity* of the will, of the appointment of the executors, and of their interest in the personal property; as the original *will* itself, is not admissible in evidence, without being authenticated by the Ecclesiastical Court, whose *seal* on a probate need not be proved.

Lost. If a probate be lost, or not produced after notice for that purpose, an *exemplification* under the seal of the court, or an examined copy of the *Act Book*, or the *original* will, produced by an officer of the Ecclesiastical Court, and bearing the seal of that court, and being indorsed as the instrument on which the probate was granted, or the *act* of the court simply indorsed on the will, are good evidence of the contents of such will: And an examined *copy* of the probate, is evidence of the person there named being executor, although a copy of the will, would not be evidence of that fact.

Revocation. An entry of *revocation*, in the book in the prerogative court, is good evidence to prove, that a probate has been revoked; and a *party* may show,

that a probate is forged, or that an inferior Ecclesiastical Court, had no *jurisdiction*, by reason of there being bona notabilia; but he is not *allowed* to prove, that another person was appointed executor, or that the testator was insane.

IX.

Letters of Administration.

A party must prove his title as administrator, by the production of the *certificate*, granted by the Ecclesiastical Court, if it can be produced; if not, after having accounted for its absence, he may show such title, by giving in evidence, either the *book* of the Ecclesiastical Court, wherein is entered an order for granting administration; or the original book of *acts*, with the surrogate's fiat, directing the letters of administration to be granted, even although subsequent letters of administration have been granted to another person, if the first be not recalled; or lastly an examined *copy* of the act book, stating that administration had been granted, without any notice to produce, the letters themselves. But the letters of administration will be no proof of the *death* of the intestate.

Whenever a party sues as administrator, he must produce the letters of administration, unless the defendant has by his pleading, *admitted* the plaintiff's right to sue in that character; and if it appears, that an administrator sues for a greater sum, than is covered by the ad valorem *stamp* of his letters of administration, they cannot be received in evidence.

X.

Insolvent's discharges.

The discharge of an insolvent debtor, may be proved by the certificate of the officer, under the provisions of the *insolvent act*; and independently of such provision, a discharge by a court of *Quarter sessions*, may be proved by the order of the court

for that purpose; and to prove such order in the *insolvent* debtor's court, the original entry of the judgment by the court ought to be produced, for it is not sufficient to produce, and prove, the order of the court to the marshal for the discharge of the debtor, although it recites the judgment; but an *instrument* purporting to be a copy of the original discharge of an insolvent, and signed by the clerk of the proper officer of that court, with the seal of office affixed to it, is admissible in evidence to prove such discharge, without the production of the certificate itself, or proof that the paper is an examined or attested copy.

XI.

Awards. When awards are regularly made by an *arbitrator*, to whom the matters in difference are referred, they are conclusive on the parties to the reference, upon all matters enquired into, within the *submission;* but they are not evidence between *strangers*, nor as to any matters which were never contested at the arbitration; and the arbitrator may be *examined* to prove, that no evidence was given as to those particular subjects; or to prove that a particular claim was made, although the award is general, and contains no reference to such claim. But evidence of *partiality* in the arbitrators is not allowed, in an action of debt on an award.

How proved When actions are brought upon awards, they must be properly stamped, and the submission of all the *parties* must be proved, either by parol evidence, or by the production and proof of the written instrument of submission. The execution by the arbitrator must also be proved, by the attesting witness, if there be one, if there is none, or he is dead, by proof of his handwriting in the usual manner: But where a submission was made to *two persons* and such third person as they should appoint, the mere production of an award, executed by the three

persons, and reciting that the two, had appointed such third person, is not sufficient proof of the execution of the award. Where an original award had been *lost*, by the mail in which it was, having been robbed, the court allowed it to be proved by a copy.

Order of reference.

When an order of reference has been made by a judge at a trial, it may be proved by the original order; if the order has been made a rule of court, and it is necessary to prove it in the same court, it may be done by an office copy, but if in any other court, the original rule itself should be produced.

Award by Commissioners.

If an award of *commissioners* under an act of Parliament is given in evidence, the act must be produced, to show the authority of the commissioners; and if it be a private act, it must be regularly proved: but if the commissioners are required by the act, to give any notices or do any other particular act, previous to making their award; proof of the regularity of such notices, will not in general be necessary, unless the circumstances of the case, raise a presumption, that all has not been regularly performed, when it will be necessary for the party to prove a compliance with the provisions of the act. To explain an *ambiguous* award of a road, under an inclosure act, evidence of contemporaneous acts, by the occupiers of the land may be received.

SECTION XXII.

PUBLIC NONJUDICIAL DOCUMENTS.

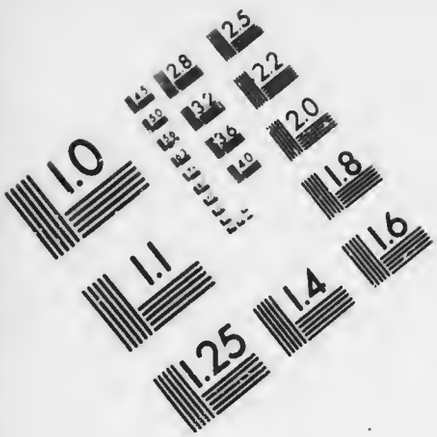
CONTENTS.

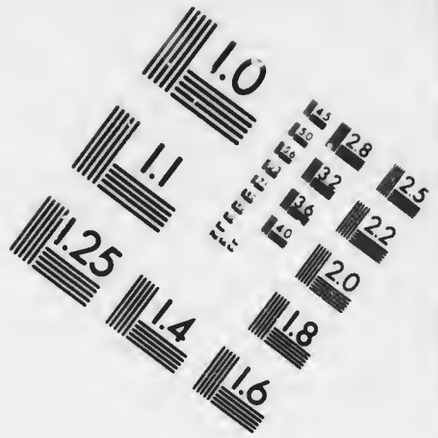
I.

Parliament.

The journals of both houses of parliament, are admissible *evidence* of their proceedings, in both civil and criminal cases; and those of the house of *Lords* have been admitted, to prove an address from that house to the King, and his Majesty's answer, in support of an averment in an information. But the *resolutions* of either house, are not evidence to prove any facts there affirmed.

Entries in the journals, may be proved, by *copies* examined with the originals, which need not be stamped; but they cannot be proved by the *printed* journals.





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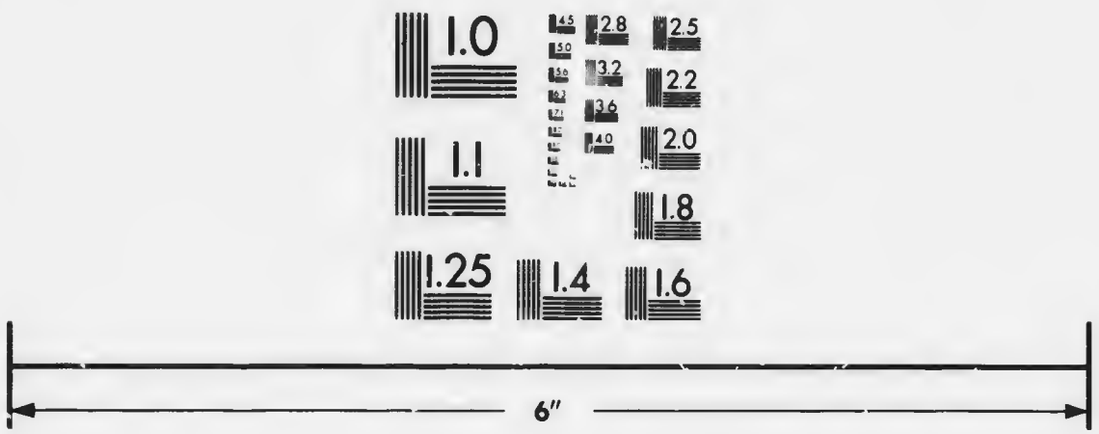

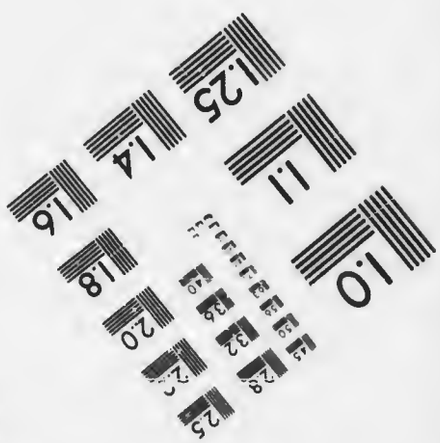

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II.

Gazettes.

Gazettes are evidence to prove all acts of *government*, or of the *King* in his political capacity, as *proclamations* for *peace*, for the performance of quarantine, and for reprisals; they are also good evidence, to support an *averment* of certain facts recited in a proclamation for discovery of offenders, or to prove that certain *addresses* had been presented to the King: but they are not admissible to prove facts relating to individuals, as an appointment to a commission in the *army*. Nor in general, will the insertion of a notice in the gazette, be sufficient evidence of such notice, except in cases respecting bankruptcy, when the insertion of notices in the gazette, is made sufficient by act of parliament; and notices of dissolution of *partnership*, when the gazette is considered good evidence of a *public* notice, although not sufficient to prove a notice to individuals who have dealt with the *firm*, unless it be proved, that the parties were in the habit of taking in, or *reading* the gazette.

Acts of State.

Articles of *war* may be proved by the production of the document itself printed by the King's printer; and the precise period of the commencement of a war, may be proved by a paper from the secretary of state's office, which was transmitted by the British *ambassador* at a foreign court, and purported to be a declaration of war, by the government of that country, against another foreign state. The King's proclamation, and the preamble of an act of parliament, which recite that certain *outrages* had been committed in different parts of certain counties, are admissible evidence to prove an introductory averment in an information for a libel, which states that divers acts of outrage had been committed in those parts.

III.

Surveys. Domesday book is the most authentic of the ancient surveys, and is received as evidence, in questions of ancient *demesne*, when the trial is by inspection of that document; but if it is only produced, to prove a fact by way of inducement, an examined copy of the relevant part is sufficient. There is also in the Exchequer, another ancient survey, ascertaining the extent of the King's *ports*, which is received as evidence.

Pope Nicholas's *taxation*, the new *survey* of the 26 Hen. 8, and other surveys of the possessions of *religious* houses, although the *commissions* under which they were taken are lost, are evidence on inspection, of the amount of the livings at the period at which they were taken, and to prove in what manner tithes were paid.

Copies of the parliamentary *surveys*, made during the *Commonwealth*, are admissible in the place of the original surveys, which were most of them destroyed by fire, when such copies are proved to have come from unsuspected repositories; these surveys are considered of such accuracy, that their silence as to an alleged *modus*, has been decided to be strong evidence against its existence.

On the same ground, inquisitions taken by the direction of the House of *Commons*, or under *public* commissions, are admissible evidence of the facts to which they relate.

IV.

Terriers. Terriers are another description of surveys, and are either temporal, or ecclesiastical; the former are good evidence, to prove old *tenures*, or *boundaries;* and the latter, are always admissible, in questions of *tithes*, when they are procured from proper places of *deposit*, which places are either the church *chest*, or the registry of the *Bishop*, or

Archdeacon of the diocese; though they may still be admitted, if the circumstance of their being found *elsewhere*, can be satisfactorily explained and accounted for.

Ecclesiastical terriers are always strong evidence against the *parson*, but not for him, unless they are signed by the church-wardens, as well as himself; and even then, if the church-wardens are of his nomination, they are of very little credit, unless they are also signed by some of the substantial inhabitants of the parish; but although a terrier may be *imperfect*, because not signed by the parson, yet it will still be admissible.

V.

Parish registers.

Parish registers being in the nature of records, are evidence of the facts to which they relate, and are proved, by examined *copies* from the *register book*, although they are first entered in a day book, and there is a variance between that and the register book.

A register of marriage, only proves the fact of a marriage having been solemnized between certain persons therein named; therefore, to establish a *marriage*, other proof of the identity of the parties must be given.

Neither the *Fleet books*, nor a copy of a registry of a marriage in a *foreign* chapel, are admissible in evidence to prove a marriage; nor in like manner, can a registry of *baptism* in Guernsey, be received in the courts here.

VI.

Ship's registers.

Ship's registers are conclusive evidence, to *negative* ownership, but are not in any case, a proof of *ownership*, for a party who claims an interest in a vessel; nor will they be evidence to charge a man as a part-owner of a ship, without it is shown, that they were made with his *privity*, as by his having made

the necessary *affidavit* to obtain the registry; or that he afterwards *assented* to such registry, and adopted it. They are not even sufficient of themselves, to prove a joint ownership, in support of a plea in *abatement;* nor to prove an averment, which states the *interest* in a ship, to be in certain persons, in an action on a policy of insurance; nor to prove that a ship is *British* built as stated in the register.

Ship's registers are proved by the certificate granted by the registering officer.

VII.

Old entries in vestry books, are admissible to prove an averment in an indictment for *libel*, or in cases where *reputation* would be sufficient; therefore an entry in a parish register, of different *moduses*, the sum total of which was in the handwriting of a deceased vicar was admitted. Rate books are made evidence by the legislature, in cases of *appeal*, at the general, or quarter sessions. Books for the entry of parish *indentures*, are in the same manner sufficient evidence of the existence of the indentures registered in them, and also of the several particulars specified in the register respecting such indentures, in case it shall be proved to the satisfaction of the court, that the indentures are lost or destroyed. Parish Books.

Parish books, are in general open to the inspection of all persons *interested*, but those, which are kept only for the private use of the parish, and relate to its private interests, are not allowed to be *inspected*, by persons claiming a right against such parish.

VIII.

Books kept in *public offices*, which are authorised by competent *authority*, are in general admissible, although in most cases as *secondary* evidence only; and the general rule with regard to such books, is, Public Books.

that such persons *only* who have an *interest* in their contents, have a right to inspect, and take copies of such parts as relate to their interest; and that when the books themselves are admissible in evidence, *examined* copies are equally admissible: but if an original document is not admissible in evidence, and a copy of it is made so, by act of parliament, the copy only will be evidence, for the original is not made so by *implication*. The following are cases, where public books have been received in evidence:

Books received.

1.—The register book in the *navy* office, or in the *sick* and hurt office, or the *muster* book, transmitted by an officer of a ship to the navy office, are evidence to prove the death of a sailor.

2.—The *log-book* of a man of war which convoyed a fleet, is evidence to prove the time of sailing.

3.—Such log-book, and the official letter of the commander to the admiralty, have been received as evidence, to prove that the fleet encountered a *storm*, and that a particular vessel parted company.

4.—An entry in the book at *Lloyd's*, is evidence of the fact of the capture of a ship.

5.—A *custom-house* copy of the searcher's report, produced by the officer in whose custody it is lodged, is evidence of the actual shipment of the goods therein specified.

6.—A book in the office of the secretary of *bankrupts*, containing entries of the allowance of certificates, is good secondary evidence of the allowance of a certificate, if the book has been kept by order of the Lord Chancellor.

7.—Books transcribed by officers of *excise* from specimen papers in malt-houses, are admissible evidence against the malster, although not signed by him, and though the excise officers are not called to substantiate the books by proof.

8.—The registry at the secretary of state's office, is good evidence to prove the contents of a *license* from the crown, which has been lost.

9.—An order entered in a book, and signed by the governors of Queen Anne's *bounty*, is sufficient evidence of the augmentation of a curacy, without going on to prove, that the money had afterwards been laid out in land, and allotted by deed, under the corporation seal of the governors, to be annexed to the curacy, and that such deed was enrolled within

six months after its execution, in pursuance of the *statutes*.

10.—Entries in the books of the clerk of the peace, of *deputations* granted to game-keepers, by the owners of manors, are evidence to show that manorial rights, were publicly exercised by such owners.

11.—The day-books in prisons, but not *copies* of them, are evidence to prove the *time* of committment, or discharge of any prisoner, but not the *cause* of such committment.

12.—The book in the master's office, in the court of King's Bench, is admissible to prove a particular person an *attorney* of that court.

13.—The *poll-books* taken at public elections, are admissible in evidence.

14.—The register of the bishop's institution to a living was admitted, and parol evidence of common report was received to prove who was the *patron*, where there was a blank left for his name in the register.

Books not received.

But in some particular cases, entries, although made in books of public officers, are not admissible in evidence, without showing that the party charged had assented to, or authorised such entries; the two following cases are instances of this part of the rule.

1.—An entry in a *tax-gatherer's* book, stating that a cart is the property of two persons, will not be evidence of that fact, without showing that both the parties authorised such entry.

2.—An unsigned entry in the office for licensing stage *coaches*, is not evidence that the persons named in the entry, are the owners of a coach, without giving similar proof.

IX.

Herald's books.

The ancient books in the *herald's* office, and the minute book of the herald's *visitation*, are evidence in questions of pedigree; and in one case, even when the minute book was found in a private library, it was allowed as evidence: But an *extract* from a pedigree, proved to have been taken out of the records, is not evidence, because a copy of

the record might have been had, and it is therefore not the best evidence: and a book found in the herald's office, purporting to be an account of the possessions of a *monastry*, is not evidence of that fact.

X.

Histories.

Histories and public chronicles, are evidence to prove a matter relating to the *kingdom* at large; therefore, in order to show that a *deed* was forged, which bore date 1 Ph. & M. and gave all the titles to Philip, which he used after the surrender of Charles the Fifth; chronicles were admitted to show that he did not take those titles, until six months after the date of the deed. But histories are not admissible to prove any *particular* local rights or customs, which do not affect the whole country; therefore where there was a question, whether by the custom of *Droitwich*, salt pits could be sunk in any part of the town, or only in a certain place; on a trial at bar, Camden's Britannia was refused as evidence of the fact. A book published by authority in a foreign country, as a regular copy of *treaties* concluded by the state, is not evidence, without proving that it has been examined with the original archives. The *year-books* are evidence to prove the course of the court.

XI.

Foreign laws.

Foreign laws, even those of *Scotland*, when necessary to be proved, must first have their *existence* clearly shown, which is proved like any other *fact* by appropriate evidence; after which, if they are *written*, they are proved by copies, properly authenticated; thus, a printed copy of the "*Cinq Codes*" of France, produced by the French vice-consul, resident in London, who purchased them at a bookseller's shop in Paris, was received as evidence of the law of France, upon which the

court would act: if they are *unwritten*, they may be proved by the parol evidence of witnesses, possessing competent professional skill.

XII.

Almanacks.

The courts are bound to take *notice* of the ordinary computation of time by the calendar, and of the fasts and festivals, whether moveable or fixed, which are thereby appointed; therefore, when it is necessary to prove any matter relating to time, it is only requisite to bring the subject properly before them; for this purpose, the almanacks and tables, framed by the *statute* made for altering the style, and prefixed to the *book* of Common Prayer, are sufficient in all cases, to prove the coincidence of any particular day of the week, with that of the year, or the time at which any given fast or festival happened.

SECTION XXIII.

MIXED DOCUMENTS.

CONTENTS.

I.

Court rolls.

Court rolls and customaries of *manors*, are evidence in cases between the lord and his tenants; entries in the court rolls, stating the *customs* within the manor, as found by the homage, and regulating the course of descents and *tenures*, although no

instances are shown of their having been acted upon, are admissible evidence to prove such customs. And ancient *documents*, not *signed* by the tenants, and not properly court rolls, but found amongst them, and delivered down from steward to steward, have been admitted to prove a course of descent, or a *reputation*, within a manor; but *presentments* by homage, restricting the lord's right, in respect of parcel of his demesne land, to turn so many cattle only on the waste, when not acted on, have no weight against an uniform contrary usage.

Court rolls are open to the inspection of the lord and *tenants*, and any one who has a primâ facie *copyhold*; but not *strangers*, who have no *concern* with the *manor court*, or court rolls; and when they are used, are proved by the production of the originals which need not be *stamped*, or by examined *copies*.

II.

Corporation books.

Corporation books are evidence in *suits* between any of the members, or by persons against the corporation, but not for the corporation, to support a claim against *strangers*, except in questions of public right, such as the swearing and admitting freemen: And when used, it is necessary to prove that they come from the proper place of deposit, and that they have been publicly *kept*, and that the entries have been made by the proper officer, except he was sick, or refused to attend, when entries made by a stranger would be sufficient.

Corporation books are open to all the members, either in disputes between *themselves*, or with third persons, but are not in any case, *accessible* to strangers; which rule extends to *corporations* sole as well as aggregate. They may be proved by *copies*, and the court will not order the originals to be produced, unless an inspection is necessary, on the ground

of an erasure, new entry, or other circumstance which renders the authenticity of the copy doubtful, and an inspection of the original necessary.

III.

Books of public companies, or copies from them, are evidence between those persons, who are interested in them, either as against each other, or against the company; thus the books of the East *India* Company, are evidence in a cause between parties possessing East India stock; the *Bank* books, are good evidence to prove a transfer of stock; and an entry in the *South Sea* Company's books, of the minutes of a license granted by them, is admissible in evidence, without calling as a witness the officer who made the entry. Books of public companies are *only* open to the *inspection* of persons who are interested in their contents.

Books of public companies.

SECTION XXIV.

DEEDS.

CONTENTS.

7.—*Sixth exception, proof of a customary right not expressed in the deed.*
8.—*Seventh exception, fraud or illegality in the creation of the deed.*
9.—*Of the execution of deeds.*
10.—*How proved, when in the possesion of the party, if attested, and the witnessess can be produced.*
11.—*How proved, when the witnesses cannot be produced.*
12.—*How proved, when not attested.*
13.—*In what cases the execution need not be proved.*
14.—*How proved, when in the possession of the adversary.*
15.—*Of notice to produce.*
16.—*How proved, when in the possession of third persons.*
17.—*How proved when lost, or not produced after notice or subpœnâ.*
18.—*Proof by admission.*
19.—*Proof by enrolment.*

General Rule.

Deeds being the highest description of private written evidence, are themselves the best proof of the facts they contain, and of their maker's intentions; and in their *construction*, which is for the *court*, and not the jury to determine, regard must be had to all their *parts*; and the words and phrases are to be understood, according to their common acceptation, at the time the instruments were made, and with reference to the nature of the subject. The general rule, with regard to the admission of parol evidence, to *explain* the meaning, or to *add to*, *vary*, or *alter* the express *terms* of a *deed*, is, that it shall not be *admitted*, except in the following particular cases, 1st. When, although the deed itself is clearly expressed, some ambiguity arises from extrinsic circumstances: 2ndly. When the language of a charter or deed has become obscure, and the construction doubtful from antiquity:

Exceptions.

3rdly. When a grant appears uncertain from not being acquainted with the grantor's estate at the time: 4thly. To show a different consideration consistent with, but not repugnant to that stated in the deed itself: 5thly. To shew a different time of delivery, from that, at which the deed purports to have been made: 6thly. To prove a customary right, not expressed in the deed, if not inconsistent with any of its stipulations: or, 7thly. To show fraud or illegality in the formation of the deed. But if a clause be so ambiguously, or defectively expressed, that the court cannot even by reference to the context, collect the meaning of the parties, it must be *void* on account of its uncertainty.

II.

1st Exception. Latent ambiguity.

The first exception to the general rule, is, that in all cases where although a deed appears upon the face of it, to be clearly expressed, some ambiguity arises from extrinsic circumstances, the courts will receive parol evidence, to explain such ambiguity; under this exception the followimg cases have been decided.

1.—Where a party granted a *manor* by a particular name, and he had two manors of that name, parol evidence was admitted to show which of them he meant.

2.—Where a man having two manors of the same name, levied a *fine* of one, without distinguishing which, parol evidence was admitted to show which was meant.

3.—Where premises in the occupation of a particular person, had been demised; parol evidence was admitted to show, that a *cellar* which was under the premises, had not been occupied by that person, and therefore did not pass under the demise.

4.—Evidence of usage was received, to show that a *room*, which had not been occupied with a certain messuage, did not pass under a demise of that messuage, together with all the rooms, chambers and appurtenances thereto belonging.

5.—Where a deed purported to grant all the *coal-mines*, in the lands in the occupation of certain persons, and the grantor had not at that time, any lands in the

occupation of those persons; letters written by his steward, and under his direction, about the time of making the deed, were admitted to explain what mines were meant.

6.—Where a particular *firm* had engaged in an adventure, with others, and insured in the name of the firm; parol evidence was admitted to explain, whether the name of the firm used in the policy of insurance, related to the whole of the adventurers in that transaction, or merely to the firm.

7.—If a grant be made to William, *Bishop* of Norwich, and the bishop's name at the time is Richard, the grant will be good, the intention being sufficiently clear and apparent.

8.—Where a clause of *re-entry* contained in a lease, made in execution of a power was disputed, the House of Lords received evidence, that the usual and accustomed form of leases by which the estate had been demised, had contained a proviso for re-entry, precisely similar to the one in the lease, whose validity was then disputed.

III.

2nd Exception. Antiquity.

The second exception to the general rule, is, that in cases, where from antiquity, the language of a deed or charter has become obscure, or the construction doubtful, parol evidence is allowed, to show what has been the constant, and immemorial usage under such deed or charter; but the courts will not receive such evidence, to control or contradict the express provisions of the instrument; nor will they allow evidence to be given, to prove acts done by the parties themselves under a *covenant*, in order to show their own interpretation of the covenant.

The following cases have been decided under this exception.

1.—Where a charter used the word "*commonalty*," parol evidence was admitted to show, that by the usage of the town, aldermen were included under that word.

2.—Where an ancient deed gave the *presentation* of a curacy, to the inhabitants and parishioners of a parish, parol evidence of the usage under the deed, was ad-

mitted to show, that the right of presentation extended to all the house-keepers within the parish.

3.—Evidence of usage was received, in order to show that an act, which by the terms of a charter was committed to the mayor, aldermen, and burgesses, or the greater part of them, was well executed by the majority present at a regular *meeting*, although not by a majority of the whole number.

4.—Evidence of usage was received, to show that the *mayor* and aldermen, had properly executed a presentation, given by charter to the mayor, aldermen, and burgesses.

5.—Usage was admitted to show that the *justices* of a county, had concurrent jurisdiction, with the justices of a borough under a charter.

6.—Evidence of usage was admitted to show, that the appointment of a *school-master*, by the minister and the *majority* of the church-wardens, was a good execution of a power of appointment, given to the minister and church-wardens by an ancient deed.

7.—Where an ancient charter appointed the corporation of London, to be *guagers* within the city, evidence of usage was admitted to extend the right, by proving, that the corporation had always guaged all articles within the liberties of the city.

8.—Where there was a copyhold admission to land, by the name of pratum, evidence of usage was received, to show that such admission extended only to the *forecrops*.

9.—Where an *award* under an inclosure act was ambiguous, a subsequent usage was admitted to explain its meaning, in relation to a road.

IV.

3rd Exception. Uncertain grant.

The third exception to the general rule, is, that where a grant appears uncertain, from not knowing the precise extent of the grantor's estate at the time, the courts will receive parol evidence, to show what estate he had at that time; as an illustration of this exception, the following case may be given.

If a man grant an estate for *life*, without saying whether it is for his own life, or that of the grantee, parol evidence is admissible to show, what interest he had in the estate; for if he was tenant in fee, the grantee shall take an estate for his own life, but if he was only tenant for life himself, the grantee will only take an estate for the grantor's life.

V.

4th Exception. Different consideration.

The fourth exception is, that parol evidence is allowed, to show a different consideration, consistent with, but not repuguant to that stated in the deed itself; the following cases are illustrations of this exception.

1.—If a deed is expressed to be made for divers good *considerations*, the bargainer may prove by parol evidence, what the particular consideration was, whether money or other valuable consideration.

2.—Where a deed was expressed to be in consideration of £28. parol evidence was admitted, to prove that by an *agreement* made before the execution, the consideration was altered to £30, which was paid.

3.—In cases of purchasing estates within the *statute* relating to settlements, parol evidence has been admitted to show, that in fact, the consideration given by the *purchaser* was less than £30, and not bonâ fide paid, although the deed expressed a greater consideration.

VI.

5th Exception. Time of delivery.

The fifth exception to the general rule, is, that parol evidence is admissible, to prove a different time of delivery, from that stated in the deed itself; the following are cases under this exception.

1.—In an action of debt on a *bond*, the plaintiff may declare upon a bond bearing date on a certain day, and prove a bond delivered on another day.

2.—In an action on a *deed*, the plaintiff may state in his pleading, that the deed was indented, made, and concluded, on a different day, from that on which the deed itself professes to have been indented and concluded.

3.—When a deed purported to bear *date* on the 20th November, and was executed by one of two defendants on the 16th of that month, and by the other, on a previous day, it was immaterial, as it did not appear that a blank had been left for the date at the time of the execution.

VII.

6th Exception. Customary right.

The sixth exception is that parol evidence may be admitted to prove a customary right, not expressed in the deed, if not inconsistent with any of its stipulations; the following are cases under this exception.

1.—It may be shown, that a *heriot* is due by custom on the death of a tenant for life, though not expressed in the lease.

2.—Although no right to an *away-going* crop, is reserved in a lease, if there are no *covenants* which either in express terms, or by implication of law exclude such right; the lessee may produce parol evidence, to show that he is entitled to such away-going crop by the custom of the country.

3.—Evidence of a custom for an away-going *tenant*, to provide work and labour, tillage and sowing, and all materials for the same, in his away-going year, the landlord making him a reasonable compensation, has been received, although there is an express written agreement between the landlord and tenant, but which is not inconsistent with such custom.

VIII.

7th Exception. Fraud and illegality.

The seventh exception to the general rule, is, that for the purpose of avoiding a deed on the ground of *fraud* or illegality; a party may give parol evidence, that at the time he executed, he was so *drunk*, as not to know what he did, or that he was *lunatic* at the time; or that it was obtained by fraud, or *duress*, and wrongful imprisonment, or by menace of life, member, mayhem, or imprisonment; or that the deed was obtained, without the real assent of the mind, having been falsely read over to him, who was a *blind* man, or unable to read; or that it was a forgery, or was delivered as an *escrow*, upon a condition not yet performed; or if the party charged be a woman, she may give parol evidence that she was a *feme covert* at the time of the execution: but the party charged with the fraud, will not be allowed to prove any different consideration in *support* of the deed.

The follcwing are cases decided under this exception.

1.—In an action on a *bail-bond*, the court received parol evidence, to show that the sheriff had taken it after the return of the writ, which makes it void: and in another case, parol evidence was received, to show that a bail-bond was sealed and delivered, when only the *penal* part was filled up, and consequently void as to the condition, which was inserted afterwards.

2.—Parol evidence is admissible, to show that a *mortgagee* who has drawn a mortgage deed, purposely omitted the covenant for redemption; or where there were to be two mortgage deeds, the one absolute, and the other a defeasance, to prove on the part of the mortgagor, an agreement to execute the latter.

IX.

Execution. The execution of deeds, generally consists of signing, sealing, and delivering; the first of these is not absolutely necessary to a deed, unless it is required, by particular acts of parliament, or in the due execution of powers. Sealing is an essential part of a deed, although it is not material, with what seal it is sealed, as any number of persons may use the same seal, or one person may seal for another with his *consent*, or evidence may be given to show that by the custom of a foreign country, a peculiar *penmark* is used instead of a seal; and proof that a party signed a deed, which bears upon the face of it a *declaration* that the deed was sealed by the party, is evidence to be left to a jury, that the party sealed and delivered the deed: a corporation seal, is sufficiently proved, by some one who is acquainted with its *impression*, showing that it is the seal of that particuiar corporation, as no evidence of its annexation need be given; and it is said, that the common seal of the City of *London* proves itself.

Delivery. The delivery of a deed, is the most important requisite of the execution, but it may be done with-

out any particular form or ceremony; as it is sufficient, if a party testify his intention in any manner, as by throwing the deed on the *table*, for the other party to take up; or by delivering it as his deed, into the *hands* of a stranger; or by allowing a *stranger* to deliver it for him; or in the case of a *corporation*, by affixing the common seal, which is equivalent to delivery in all cases, except where a corporation has given a letter of attorney to deliver a deed, when the deed will not be theirs, until actually delivered. In all cases where deeds are executed under powers of *attorney*, the attorney must execute in the name of his principal, and if that be done, it is not material, in what form of words such execution is denoted by the signature of the name. Regularly, the *power* of attorney itself should be produced, and have its execution proved; but an assignment of the lease of premises taken under an execution, made in the name, and executed under the seal of office of the *sheriff*, by the under-sheriff, may be proved without showing the appointment of the under-sheriff, or that he had power by deed, to execute such instruments in the sheriff's name. The execution of a deed is in general sufficiently proved by evidence of the delivery; or even by proof that the party who executed, after he had done so, brought the deed to the attesting witness, and told him that he had executed it, and desired him to attest it, even though the party had executed the deed in another *room*, and not in the sight of the witness.

But if the deed be made in the execution of a power, or under the express direction of an act of parliament, it must be attested, and proved in strict observance of all the *formalities*, and circumstances, prescribed by such power or statute; the application of this rule is shown in the following cases:— Execution of powers.

Where a power was to be executed, by writing under the hands and seals of *trustees*, and attested by two or more credible witnesses, it was held, that an *attestation* only expressing that the deed had been

sealed and delivered, was not *sufficient*; and that a subsequent attestation of the signature, made after the death of one of the parties, would not cure the defect.

2.—A *certificate* under the *statute* of William, signed by two church-wardens, and one overseer, but having only two seals, is not properly executed under the statute.

3.—An *award*, sealed but not signed, is not a good execution of the submission, which was, that the award should be delivered under the hands and seals of the arbitrators.

4.—But where the deed creating the power, directed it to be executed by any *writing*, to be signed and sealed in the presence of two or more witnesses, and the deed was expressed to be executed in the presence of the witnesses, but the attestation applied only to the sealing and delivery; it was a case for the jury to presume, that the deed was signed as it professed to be, in the presence of the witnesses, who attested the sealing and delivery.

X.

Possession of the party

When deeds are in the possession of the party intending to use them in evidence, he must *produce* them in court at the trial, that it may appear if *requisite*, that they are properly *stamped*; and any *rasure*, or blemish that may appear upon the face of them, must be explained: as that it was made before execution; or after delivery by a stranger, if the rasure or interlineation has been made in an immaterial part; or that an apparent cancelling was effected by *accident*, after the *execution* of the deed, and before the time of pleading; or by *fraud* and improper practice of the party charged; or after the deed was *pleaded*, and consequently in the custody of the law: and where a deed cannot be read in evidence, by reason of any defect, or on any other account, the effect with regard to evidence will be the same as if it was not in *existence*.

When attested.

If the deed was attested, and the witnesses are forthcoming, it must be proved by *one* at least of the attesting witnesses, when there are more than one, and if the instrument be under any doubt or suspicion, by them all. The courts are so strict

the application of this rule, that they will not *dispense* with it even in *criminal* cases; nor where the party charged, has *admitted* or acknowledged the execution of a deed, whether the action be brought against the obligor himself, or against his *assignees* after his bankruptcy; nor where the admission of the execution of a deed, has been made by a defendant in his *answer* to a bill in equity; nor is the rule superseded, whether the question be between the parties to the deed, or *strangers*; nor whether the deed be the foundation of the action, or but *collateral* evidence in the cause; nor whether it still exist as a deed, or has been *cancelled*; nor when the issue is merely directed by a court of equity only to try the *date*, and not the existence of a deed: But if the execution of a deed be deliberately admitted, for the purposes of the *cause*, the deed may be read in evidence without further proof. Although it is a general rule, that a deed must be proved by an attesting witness, yet the party is not concluded by the testimony of such witness, if he will not speak the truth; for if he wholly deny his attestation, proof may be given of the execution, by other *means*, as by proving the handwriting of the witness, or producing the other *witnesses* or even circumstantial evidence to contradict him, and even by proving the *handwriting* of the *party* making the deed.

XI.

Attesting witnesses not forthcoming,

If it be proved, that at the time of the trial, the attesting witnesses are *dead*, *blind*, or *insane*; or have become *infamous*, or interested subsequent to the *execution* of the deed, or that they are absent in a *foreign* country, even *Ireland*, either for a *permanent* residence or a *temporary* purpose; or that they have set out for the purpose of leaving the *kingdom*; or that from circumstances, it may fairly be presumed that they have left the *country*;

or that upon enquiry at the admiralty, it appears that they are serving in the *navy*, but in what ship, or on what station cannot be ascertained; or that on any other account, they are not amenable to the *process* of the court; or that they cannot be *found* after *strict* and *diligent enquiry*; then, after proof of any one of these circumstances, the execution of a deed may be proved, by evidence of the handwriting of the witness, and if there be more than one witness, it will be sufficient to prove the handwriting of only *one* of them; but proof of *illness*, or that the witness is keeping out of the way to avoid being *arrested*, are not sufficient reasons for dispensing with the *attendance* of the attesting witness; and although it is usual also in such cases, to prove the handwriting of the *party* executing the deed, it seems to be unnecessary in cases of deeds executed in this country, except to show the *identity* of the party.

By *statute*, deeds executed in the *East Indies*, when the subscribing witnesses are resident there, may be given in evidence in this country, upon proof of the handwriting of the parties, and of the witnesses.

XII.

No attesting witness.

But if the deed never was attested by any one, or had *fictitious* names upon it as witnesses, or was attested by such as were legally *incompetent* at the time of execution, or by persons who had attested without the knowledge or *consent* of the parties, it is the same in effect, as if it had never been attested at all; and may be proved, by the evidence of any person, who was present at the execution, although he is not *indorsed* as a witness; or by the acknowledgment of the instrument by the party charged, or by proof merely of his *handwriting*, which may be established by witnesses, who either know the party, and having *seen* him write, or

having received *letters* from him, are acquainted with his handwriting; and such witnesses are allowed to refer to the *signature*, to refresh their memories. But mere *comparison* of handwriting with that of any other writings acknowledged to be genuine, will not be sufficient proof of a signature, in either *criminal* or civil cases; except in the case of *ancient* deeds, which may be proved by a witness, who has merely *inspected* other ancient authentic documents, bearing the same signature. Handwriting cannot be *disproved* by a person, who has merely seen the party write since the commencement of the action, for the purpose of making him a witness.

Comparison of hands.

XIII.

The execution of deeds need not be proved, under either of the following circumstances: 1st. When upon production, they appear upon the *face* of them, free from *rasure* or interlineation, and to be above *thirty years* old; and are proved to have come from such *custody*, as to afford a reasonable presumption, that they were honestly and fairly obtained, and *preserved* for use, and are free from suspicion of dishonesty; in which case, the law makes it a *peremptory* rule, to suppose that the witnesses are dead, and does not require any proof of the execution; unless the deed be a *bond*, when payment of interest, or some other mark of authenticity must appear, as otherwise the presumption of law is, that the bond has been satisfied: 2ndly. When they are produced, under a *rule* of Court for that purpose: 3dly. When they come out of the *possession* of the opposite party under a notice to produce, and he *claims* a beneficial *interest* under them; or is a *public officer*, and in the discharge of his official duties, was obliged to, and did prepare such deeds, and get them duly executed: 4thly. When the party, or his attorney, deliberately *admits*

When execution need not be proved.

the execution, for the purposes of the cause: or 5thly. Where the deeds have been *enrolled* pursuant to the *statute.*

XIV.

Possession of adversary.

When deeds are not in the possession of the party intending to use them in evidence, he must be careful not to plead them with a profert, for if he does so, and cannot produce them, he will be *nonsuited;* but where a deed has been so improperly pleaded, the party may have leave to amend the record, at any time before the *trial.* When a deed is not in the possession of the party, it is either in that of the adversary in a civil suit, or the defendant in a *criminal* proceeding; or it is in the possession of third persons: in the two former cases, the opposite party, has in general, absolute means of compelling the production, unless the possession is in the other side, as a *trustee* for the benefit of all the parties interested, when the court will *oblige* them to furnish copies, and to produce the original at the trial, although the party is seeking to discover a defect therein. In any other case, where the adversary has possession of a deed which is required in evidence, a regular notice to produce such document, must be served; which if complied with, and the party having possession, produce the deed, the other party, although a *stranger* to the instrument, must prove the *execution* in the regular way; except, where a *party* is called upon, to produce a deed under which he holds an *estate,* or takes a beneficial interest, which shall be taken as duly executed as against him; or in actions against the *sheriff,* for taking insufficient pledges on a replevin bond, when it has been decided, that the execution of such bond, when produced by the sheriff, need not be proved. The party who produces any written instrument, is entitled to have the whole of it read; and if it

refers to others, which are necessary to complete the sense, he may insist on having them read also.

If the notice be not complied with, the party giving such notice, must prove that the deed required, is in the possession of the opposite party; for which purpose, in many cases *slight* evidence will be sufficient; after this is proved to the satisfaction of the court, it will be necessary to show, that the deed is a genuine instrument, and that the notice has been regularly served; proof of these facts will warrant the reception of *secondary* evidence, to show the contents of the deed; and as against the parties refusing to produce, it will be presumed to be properly *stamped*, although such party is at liberty to prove the contrary. But the mere *calling* for deeds, without inspecting, or using them, will not make them evidence for the party producing them, without the requisite proof of the execution; but if the party who calls for the documents, *inspects* them, although he does not use them as evidence for himself, he makes them admissible for the other side without proof of the execution. A party after having received a notice to produce, cannot get rid of the *obligation* to produce, by transferring a document to another person before the trial.

Time of production.

The regular time to call for the production of any documents, is when the party requiring them, has entered upon his *case;* for until that time 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; nor will either party be allowed to *elicit* evidence, either on the examination, or in cross-examination, to prove the contents of a deed, for which no notice to produce has been given, merely because the opposite party has the deed in court at the time of the trial.

Compelling production.

The court will not compel a person to produce a written instrument in his possession, that it may be

stamped, on the *application* of one who is not a party to the instrument, nor interested in its effect; but they would compel such production, on the application of a person who is interested, although not a party to the instrument. Nor, where there are two parts of an instrument, one in the hands of each of the two parties, will the court compel one of them to produce his part, in order to *support* an action against himself, on the ground that the other has been lost by the opposite party. Nor will a party be obliged to produce evidence against himself, although he has such evidence in *court*, and has been served with a notice to produce it. Nor is a plaintiff who is an original party, compellable to produce for inspection, an instrument on which he is suing, on suspicion that it is *forged*.

XV.

Notice to produce.

Notice to produce, must be served either upon the *party*, or his *attorney*, within a *reasonable* time before the trial; but service at the *dwelling-house* of the client, or the office of the attorney is sufficient; and although the notice is usually in writing, it may be given by *parol*, but when written, it is bad, if entitled in a *wrong* cause. When there is a close privity between any parties, a service upon either of them, will warrant the reception of secondary evidence, although the document is actually in the hands of the party not served; as in the case of the *owner* of a ship and the master, service of a notice on the owner, is sufficient to let in secondary evidence, although the document is in the hands of the master; or if it be proved that a deed came into the hands of the defendant's *brother*, under whom he claims, a service of notice to produce on the defendant, will be sufficient to warrant the reading of a copy, even thongh the defendant has sworn in an answer in Chancery, that he has not got the original.

How served.

When necessary.

Notice to produce should be given in all cases, except, 1st. Where from the nature of the proceedings, the party has sufficient notice from the pleadings; as in actions of trover for *bonds*, *agreements*, promissory *notes*, *certificates* of ship's registry; or on prosecutions for *stealing* bills of exchange, or other writings; or in trials for *treason* contained in letters or other papers, where the prisoner has been proved to be in possession of the original documents: 2dly. When the party has fraudulently got *possession* of written instruments belonging to third persons: 3dly. Where there is a *counterpart*, which will be evidence against the *person* who signed the original, or any one who claims in *privity* under him, without any notice to produce such original; but a counterpart cannot be read in evidence against a *stranger*, without accounting for the absence of the original, by proof that it is lost, or is in the possession of the party, and that he has had notice to produce: 4thly. In actions for wages by seamen, whether engaged on board *British* ships on foreign *voyages*, or in the *coasting* trade, the defendant is bound to produce the ship's *articles* without notice, if he intends to resort to them in proof: or 5thly. Where the party who has possession of the required document, has had such possession given to him, as a trustee for all the parties interested in the safety of the document; as where he was the defendant, in an action for a *stake* won at a horse-race, at which he was the stakeholder, the court ordered him to produce the racing articles, without a notice having been given him for that purpose; or where there is only one part of a *lease* executed, and that is deposited in the defendant's hands, in an action of covenant on such lease, the court will order the defendant to allow copies to be taken, and to produce the original at the trial.

How proved.

Where a notice is given by parol, it may be

proved by any person who heard it delivered; and a written notice, is proved by a *duplicate* original, or an examined copy; and when a notice has been given in *both forms*, it may be proved in either; but it seems that no *notice* need be given, to produce a notice calling for the production of documents.

XVI.

Possession of third persons.

When deeds are in the possession of third persons the usual course is, to serve the parties with a writ of subpœnâ duces tecum, which *obliges* them to attend at the trial with the deeds, and to *produce* them if required by the court; but which production the court will not compel, if it will tend to subject the witness to a criminal charge, or any kind of *penalty*, or forfeiture; but by analogy to the rule adopted with respect to parol testimony, a party will not be excused from producing a document in his possession, and which is relevant to the matter in issue, merely on the ground that it might establish, or tend to establish, that he owes a debt, or that it might make him liable to a *civil suit:* but if the party has no excuse for not attending, and producing the document, by neglecting to do so, he makes himself liable to the same punishment for the *contempt*, as if he had been served with a subpœnâ ad testificandum; and if he states as an excuse for not having *obeyed* a writ of subpœnâ duces tecum, that he had delivered over the document to the opposite party, after service of the writ; secondary evidence may be given of the contents of such document, and it will not be necessary, to serve the party with a notice to produce. But if the subpœnâ is complied with, and the deeds are produced, they must have their execution proved in the usual manner.

XVII.

Proof when lost, &c.

When deeds are lost, or destroyed, or are not

produced by the adversary after notice for that purpose, or by third persons, although served with a subpœnâ duces tecum; it is necessary in the first place, to account for their absence; either 1st. By proof of their actual loss; and if there are *several parts*, the loss or destruction of the *whole* of them should be satisfactorily proved: 2dly. By showing, that it may reasonably be presumed, that they are not in existence; which may be done, by a witness swearing, that they were thrown *aside* as useless, and that he *believed* them to be lost, or destroyed; or by proving, that every *search* and *inquiry* had been made for the documents in question, without success; and in general the loss, should be proved by the person, in whose *hands* they were at the time of the loss, or to whose *custody* they were last traced: or 3dly. By showing, that they are in the possession of the adversary, or third persons, in the manner before mentioned. When sufficient evidence to account for the absence of a deed has been given, it must be shown, that it existed as a *genuine* instrument, by proof that it was properly *stamped*, and that it was duly *executed*, unless proof of the execution would be dispensed with, if the original itself were produced, or the want of the original, is occasioned by the default of the other party.

Secondary Evidence.

After having thus accounted for the absence of a deed, and proved that it existed as a genuine instrument, the contents may be given in evidence, by means, either of a *counterpart*, or an *unstamped* part executed at the same time; or if there be no such counterpart in existence, it may be proved by an examined *copy*; and if there is no copy, by *recitals* in subsequent deeds, and even by an old *abstract*, or copy unexamined, if possession has gone along with the deed for many years: and it has been held, that *parol* evidence may be given, of the contents of a deed which is lost, or not *produced;* and that a witness when giving such

evidence, may refer to entries made in his memorandum book to refresh his memory.

XVIII.

Proof by admission.

The party to a suit, or the *attorney* on the record, or even any other attorney, if it be satisfactorily proved that he was the authorised agent of the party, may *deliberately* admit the validity of a deed, for the purpose of a suit; or a party may do the same thing by his *pleadings;* in which cases, the consent of the parties supersedes the necessity of the usual proof, and the mere production of the deed, without further proof of its authenticity, is sufficient evidence of its contents: but a mere parol admission, not made for the purposes of the cause, or even an admission made by a party of the execution of a deed, in an answer in *chancery*, are not sufficient.

XIX.

Proof by enrolment.

In cases, where the legislature expressly directs deeds to be enrolled, an examined *copy* of the enrolment, is good evidence of the *authenticity* of a deed, against all parties; but where deeds are enrolled merely for safe *custody*, the enrolment, is only evidence against the party acknowledging the deed, or persons claiming under him.

SECTION XXV.

WILLS.

CONTENTS.

I.

Parol evidence to explain them.

Wills, are either those of personal property, which have been mentioned under the head of "Probates of Wills," or they are those of real property, which are regulated by the statute of *frauds*. They must be construed in a liberal way, so as to give the greatest effect to the maker's intentions; therefore parol evidence is admissible, to *explain* them, when any ambiguity arises from *extrinsic* circumstances; or to show the situation, circumstances, or estate of the devisor, at the time of making the will; or in any case, if the will cannot be satisfied without such evidence.

The following are cases, which show the application of this rule.

1.—If a man has *two sons*, both of the same name, and conceiving that the elder of them is dead, devises his land to his son generally; the younger may produce witnesses, to prove his father's intent, and that he thought his brother was dead; or, to show, that at the time of making his will, he named the son by the addition of younger, but that the writer left out that description.

2.—Where a devisee gave an estate to her *cousin* by name, and there were two persons, father and son of that name, evidence was admitted, to show that the son was meant.

3.—Where a devise was to a person by his christian and surname, without any other description, and no such person appeared to claim the legacy, and it did not appear that any such person was known to the testator, parol evidence was admitted, to show that the *names* had been mistaken, by the person who took the instructions for the will.

4.—Where a *blank* was left, for the christian name of a person to whom a bequest was made; evidence was admitted, to prove acts of kindness on the part of the deceased, and that he had said, he would provide for the party who claimed the bequest, and had left him something in his will.

5.—Where there was a bequest to "Mrs. G.", evidence was admitted, to show who was intended by the *initial*.

6.—Where there is a devise to a person by a particular *description*, parol evidence may be given, to show that it neither applies to that person, nor to any one else, and the description may be rejected as surplussage.

7.—If a devise be made to the *son* of a person, by a particular christian name, parol evidence is admissible, to show that such person has only one son, having a different christian name, and that he is the person intended.

8.—Where a devise was made to one, by the name of "*Mary*," whose name was Elizabeth, parol evidence was admitted, to show the identity of the party, and that there was a mistake in the name.

9.—Where a testator gave a sum of money to the four *children* of a woman, and it appeared that had

four children by her latter husband and two by her former; a declaration by the testator, that he had provided for the woman's children, but that he would have nothing to do with the first husband's children was received, to show who were intended in the bequest.

10.—Where a testator bequeathed his stock in a particular *fund*, and it appeared, that he had not, at the time of making his will, or afterwards, any stock in that fund, having sold out, and purchased into another fund; evidence was received, to show whence the mistake arose, and the legacy was satisfied, out of the new fund into which the testator had purchased.

11.—If a party bequeath a certain sum in a particular *stock*, parol evidence is admissible, to show whether or not, he had a sufficient share in such stock, at the time he made his will, to cover the bequest, for if he had, it will be a specific bequest, but otherwise if he had not.

12.—Where a devise was "of all my farm and lands called Trogue's farm, now in the occupation of R. Jackson;" it was decided, that the bequest was not necessarily limited, only to the lands of Trogue's farm in the occupation of R. Jackson, but it was allowed to be shown in evidence, that two *closes* in the occupation of another person, but forming a part of Trogue's farm, were included by the devisor.

13.—Where a man devised all his "*household* goods, as woollen, linen, pewter, and brass whatsoever, except a trunk under the chamber window," the parol testimony of the person who drew the will, was admitted to explain these words.

14.—Where a testator gave legacies of the same amount in *two* different instruments, parol evidence was admitted, to show that he intended them to be accumulative.

15.—Where a man devised £.400 to his *wife*, and made her executrix, without disposing of the residue; evidence was received, to show that it was the testator's intention, that his wife should have such residue.

16.—Where a testator bequeathed a legacy, to the poor of two *hospitals* in a certain place, particularly naming them, and afterwards in a codicil, gave another sum to "all and every the hospitals," the second bequest was adjudged to be intended for all the hospitals in that place.

II.

Parol evidence to alter them.

Parol evidence is not allowed to add to, or alter the terms of a will, or to show an intention of the testator, in express contradiction to its stipulations; and if a will, be so defectively expressed, that the meaning of the devisor cannot be collected, even by reference to its other parts, it must be void on account of its uncertainty. But parol evidence is admissible, to show fraud or mistake in making the will; for which purpose, evidence may be given of what *passed* at the time the testator signed the will, and of what he said: or to show, that the person who drew the will, had mistaken the *name* of a legatee, and had inserted a name different from that intended by the testator. Or in avoidance of a will, it may be shown, 1st. That it was a forgery; or was *substituted* for the one which the party really intended to execute: 2dly. That it was obtained by duress: or 3dly. That the party who made it, was incompetent to do so, by reason of *coverture*, infancy, or want of sound *memory* and judgment at the time he made the will, even although he afterwards recovered his senses, or was at other times capable of doing an act of thought or judgment,

Cases. 1st. part of the rule.

The following cases have been decided under the first part of this rule, that parol evidence is not admissible to add to, or alter the express stipulations of a will.

1.—Where a man had three *brothers*, who each had a son of the name of Simon, and gave an estate to "Matthew Willis his brother, and to Simon Willis his brother's son," it was held, that parol evidence was inadmissible, to let in declarations of the devisor, as to the person meant, it being clear, that the person entitled was Simon the son of Matthew.

2.—Where a testator, had devised an estate to his *grand-daughter*, by a particular name and description, and he had a great grand-daughter the only one in the family who answered to the name, but who had never lived, or been in the place described in the will, and a grand-daughter whose descriptio

answered, but whose name was different; parol evidence was rejected, to show which of the two was meant, and the devise was held void.

3.—Where a testator gave a legacy to every of the sons and daughters of his late cousin, who had left one *legitimate* daughter, and one son and one daughter illegitimate; parol evidence was refused, to show that the testator intended, that the illegitimate children should take under the will.

4.—Where a man devised his lands, to one of the *sons* of a certain person, who had several sons; parol evidence was refused, to explain which of the sons he meant.

5.—Where a testator, after mentioning his wife and niece in his will, afterwards gave a particular estate to *her* for life, parol evidence of the testator's intention, was refused to show who was meant.

6.—Where a testator devised the *residue* to his executors, and one of them owed him money on a bond; parol evidence was refused, to show that he meant to extinguish the bond.

7.—Where a *legacy* was given to a person, who was dead at the time, parol evidence was held to be inadmissible, to show that it was the intent of the testator, that the legacy should be transmissible.

8.—If a *blank* be left in a will, for the devisee's name, evidence cannot be received, to show whose name the devisor intended to insert.

9.—Where a man devised his "estate of *Ashton*," parol evidence was not allowed, to show that the testator intended to *devise* all his maternal estate, which consisted of two manors in the parish of Ashton, and another in the adjoining parish.

10.—Where a man devised all the estate he had at *Coscomb*, parol evidence was rejected, to show that another estate, which was not situated at Coscomb, but which was formerly united to it, and had ever since been enjoyed with the Coscomb estate, was intended to pass under the devise.

11.—Parol evidence of *declarations* made by a testator, before the making of the will, are inadmissible to construe its terms.

12.—If a testator has left property which *corresponds* with the description in the will, evidence is not admissible, to show that he intended to include other property, not within that description.

III.

Who may attest.

The rule, with regard to who may be attesting *witnesses* to a will, is the same, as that regulating the admissibility of witnesses to give parol testimony; viz. that persons who have not the use of their reason, who have been convicted of any infamous crime, and who are influenced by interest at the *time* of execution, are not admissible witnesses to a will; but *executors* and *trustees*, who take no beneficial interest under a will, or the *wives* of such persons, and parties who are *equally* interested, whether a will be established or not, are good witnesses. And by *statute* several persons who would be otherwise inadmissible, are made good witnesses to attest a will, these are, 1st. Devisees and legatees who take an interest under the will, who may attest, and prove its execution, although by so doing, their devise or bequest becomes void; 2dly. Creditors, whose debts are charged by the will upon the estate; 3dly. Legatees, who have been paid, or have refused to accept their legacies; but this statute, does not extend to the *husband* of a devisee, who takes an estate in remainder under a will, although the wife dies after the death of the testator, and before the determination of the life estate, and the witness survives the wife.

IV.

How proved by attesting witnesses.

When a will becomes necessary in evidence, and is in existence, it must be produced, and have its execution proved; in courts of common *law*, by any one of the attesting witnesses, who can prove all the circumstances required by the statute to establish the validity of a will, but in *chancery*, or upon the trial of *issues* directed out of chancery, all the attesting witnesses must be examined before a will can be established; and although the devisee need only produce one witness, who can prove all the

statuary requisites, if the *heir* makes any objection to the will, he may have it proved by all the witnesses, but he must produce them himself.

Facts to be proved.

The facts to be proved by attesting witnesses, are 1st. That the devisor, or some other person in his presence, and by his express direction, signed the will; this may be done on any *part* of the will, either at the end, the *beginning*, or the side, but a mere *sealing* without signing, is not sufficient: and where the will consists of several distinct *sheets*, some of which the testator signs, and intends to sign the others, but is not able, it is not a sufficient signing of the whole; but where a will on three sheets of paper, concluded, by stating that the testator had signed his name to the first two sides, and had put his hand and seal to the last, when in fact he had signed and sealed the last, but had omitted to sign the other sides, it was held, that the will was good, and that the signing of the last sheet showed that the former intention had been *abandoned*. 2dly. They are to prove, that they saw the devisor sign the will, or that he *acknowledged* to them, that a signature thereon was in his handwriting. 3dly. They must prove, that they attested the devisor's signature, either in his actual presence, or in such a *situation*, that he might have *seen* them if he *wished*, and had chosen to *look*, although it would not be a good execution, if the devisor was in a state of *insensibility*, or could not by any *possibility* see the witnesses subscribe; unless the devisor were *blind*, when it seems only necessary, to take every precaution to prevent fraud. But it does not seem essential that the witnesses should express in their *attestation*, that they subscribed in the presence of the testator, for whether they did so or not, is a question for a jury, to be determined on evidence; nor does it seem necessary, that they should all attest at the same time, or by actually writing their names, for if a man publish his will, in the presence of two witnesses, who sign it in his

presence, and a *month* afterwards he sends for a third witness, and publishes it again in his presence, it will be good; and it has been decided, that the witnesses may subscribe the will at *several* times, and that an attestation by a *mark*, is a sufficient subscription within the statute.

It is not necessary, that a testator should *declare* the instrument executed by him to be his will, or that the witnesses should attest every page, or that every page should be particularly shown to them; but the whole will ought to be present at the time of attestation, for if a person make a will on several sheets of paper, and there are three witnesses to the last sheet, but none of them ever saw the *whole will*, it is not a sufficient execution; although the question, whether the entire will was in the *room*, is a question of fact for the consideration of a jury, unless there is positive evidence that it was not so.

V.

How proved when witnesses not forthcoming, &c.

When the attesting witnesses are *abroad*, or dead, or insane, or cannot be produced, for any of the causes before-mentioned, it is in the first place necessary to account for their absence; after which, a will may be proved by proof of their *hand-writing*, and the hand-writing of the devisor, and the jury are to judge, if all the directions of the statute were observed at the execution.

If a subscribing witness deny the execution, he may be contradicted by the others, or if they all *deny* it, the devisee may give circumstantial evidence to prove the due execution; or if one of them impeach a will on the ground of *fraud*, and implicate the others who are *dead*, evidence of their general good character may be given: and when the subscribing witnesses are dead, and no proof of their handwriting can be given, from the *antiquity* of the signature, it will be sufficient to prove the signature of the testator alone.

VI.

When a will is lost or destroyed, or cannot be procured from the possession of the adverse party, and any of these facts are clearly proved, its contents may be shown by secondary evidence; as by copies, the *ledger book*, in which the will is set out at length, or the *original* will itself produced by the officer of the ecclesiastical court, and under the seal of the court; but a probate is not of itself admissible evidence of a devise of real *property*, without positive proof that it is a true copy. How proved when lost, &c.

VII.

If a will has been admitted to be genuine, by the parties to a suit, or their attornies, it may be given in evidence without proof of the execution; but the mere fact, that it is above thirty years old, will not of itself, do away with the necessity of proof of the execution, unless it be proved, that *possession* has gone regularly under the will. Proof of execution unnecessary.

VIII.

A will may be shown to have been revoked, 1st. By proof of a subsequent will or codicil in writing, or other writing properly executed, in pursuance of the statute of frauds, which either in express terms, revokes the former will, or by operation of the law renders its effect nugatory; but if a man, by a second, revoke a former will, and keep the first undestroyed, and then cancel the second, or if the second be inoperative as a will, the first will be *revived:* 2dly. By proof that it was burnt, cancelled, torn, or obliterated, either by the testator himself, or by some other person in his presence, and by his direction and consent, and with an express *intention* to revoke the will; for any obliteration of a will, shall not operate as a revocation, when the party was of an *unsound* mind at the time of the act: Revocation.

3dly. Proof of the subsequent *marriage* of the testator, and the *birth* of a child, will afford a *presumption* of the revocation of a will, which would otherwise entirely exclude them, but the birth of a child will not be sufficient of itself: 4thly. The operation of a will of lands may be defeated as to a particular property, by showing that it was purchased after the execution of the will: 5thly. By levying a *fine*, or suffering a *recovery* of lands, which he had at the time of the execution of a will, a testator revokes the will, as to those lands; and if a testator after having made his will, levy a fine to such *uses*, as he shall by deed or will appoint, and die without making any new will, the will made prior to the fine is thereby revoked.

SECTION XXVI.

MERCANTILE CONTRACTS.

CONTENTS.

I.

Parol evidence to explain or alter them.

Wherever equivocal or ambiguous language is used in a mercantile contract, it may be construed and explained by evidence of the usage and custom of merchants, given by persons of competent *knowledge* and skill; although evidence of the usage of trade is not admissible, to contradict the

express words of a contract. But parol evidence is not allowed to alter, vary, or discharge a mercantile contract, by showing, that there was a different agreement between the parties, than that which is stated in the contract itself; although for the purpose of *showing* fraud or illegality in the creation of the instrument, parol evidence is admissible.

The following cases have been decided under the first branch of this rule, which relates to the admission of evidence of the usage and custom of merchants. Cases. 1st. branch.

1.—In policies of insurance, on ships chartered to the *East India* Company, if any doubt arise on the construction of the policy, they are explained, by the usage of that particular trade, and the underwriters are bound at the time they subscribe, to notice such usage.

2.—In an action on a policy of insurance to any port in the *Baltic*, evidence of the usage of trade was admitted, to prove that the Gulf of Finland, is considered by merchants as within the Baltic, although the two seas are considered as distinct by geographers.

3.—Evidence of the usage of the *Newfoundland* trade, was admitted to explain the meaning of the words "lost or not lost, at or from Newfoundland to any port in Europe" in a policy of insurance; by showing that by the usage of that trade, a vessel insured for a voyage from Newfoundland to Europe was allowed a certain time to fish on the banks, before she commenced her voyage.

4.—Evidence was received, to shew the usual practice of a trade in *landing* of goods, in an action on a policy of insurance, where the defence was, that the plaintiff had been guilty of unreasonable delay in landing them.

5.—Evidence of usage was received, to explain the meaning of a warranty in a policy of insurance, to depart with convoy; by showing that the warranty was not complied with, unless sailing *instructions* had been obtained, before the vessel left the place of rendezvous, if by due diligence they could have been obtained.

6.—When there was a warranty to sail with convoy, in a policy of insurance, it was held, that the word

"convoy" meant such a convoy as should be appointed by *government*.

7.—Where there was a warranty to sail with *convoy*, in a policy of insurance, evidence of the usage of trade was received, to show that the warranty meant, to sail with convoy from the *Downs*, or *Spithead*, which were the respective places where ships usually joined convoy.

8.—Where a particular average loss of £.54 per cent. had been settled by a memorandum of *adjustment*, indorsed on the back of a policy; parol evidence was allowed, to show that by a previous arrangement, it was agreed, that if the other underwriters paid a less sum, the surplus should be repaid.

9.—Where a ship was insured from London to Jamaica, and was lost in *coasting* the island, after she had touched for some days at one port there, but before she had delivered all her outward-bound cargo at the other ports of the island; evidence of the usage of merchants was received, to show that the risk ended, when the ship had moored in any port of the island.

10.—When the words "*at and from*" a place, are used in a policy, they mean the first arrival at the place.

11.—When in a representation made to an underwriter, it was said, that a ship would sail from St. Domingo in the *month* of October; evidence of the usage of trade was received, to show that by that expression, merchants generally understand that the ship will not sail, until the 25th of that month.

12.—Where a mate, had engaged to go a *voyage* for a sum certain, to be paid on arrival at the port of destination, and had taken a note for the sum, payable on such arrival, and died on the voyage; evidence was received, to show whether or not there was an usage in that particular trade, that the administratrix of such mate, was entitled to such portion of the whole sum, as he had earned prior to his death.

13.—Where the vendor of a *cargo*, covenanted to pay all duties and allowances, he was permitted to give in evidence, a custom of merchants, which limited such allowances to the price which he should receive.

14.—Where there was a clause in a *bill of lading*, that the cargo should be taken out in a certain number of days, or pay demurrage; evidence of the usage of trade was received, to show that the days meant, were working days, and not running days.

15.—Evidence of mercantile usage was received, to explain what was the precise extent of the *privilege* of an East India *captain*.

16.—Evidence of usage was received, to prove that a bill of exchange which was *negotiable* in its creation, still continued to be so by an indorsee, although it was indorsed to him, without the words "or order."

17.—Where a policy was to continue in force as usual, until the ship should be moored at anchor *twenty-four hours* in good safety, parol evidence of the usage of trade was refused, to show that the underwriter was liable, for a loss arising from a seizure, after she had been 24 hours in port, though such seizure, was in consequence of an act of barretry by the master during the voyage.

18.—When an insurance was effected, upon a "*Greenland* ship, tackle and furniture," evidence of the usage of trade was refused, to prove that the lines and tackle employed in the fishery, were included in the policy.

19.—When in a policy of insurance, there is liberty given to a letter-of-marque to *cruise* six weeks in the course of her voyage; evidence of usage can not be received, to show that the time meant, is six weeks made up of different detached periods of time.

The following cases have been decided under the second branch of the rule, that parol evidence, is not allowed to alter, vary, or discharge a mercantile contract, by showing an agreement between the parties, different from that stated in the contract itself. Cases 2nd branch.

1.—In an action on a policy of insurance, the court refused to receive evidence of the *broker's* representations, to restrain the effect of the policy.

2.—In an action on a *policy* of insurance from Archangel to Leghorn, the court refused evidence, to show that by an agreement between the parties, before the subscription of the policy, it was intended that the adventure should only begin from the Downs.

3.—In an action on a *charter-party*, where a ship was chartered to wait for a convoy at Portsmouth, evidence was refused, to show that by agreement, Corunna was substituted for Portsmouth.

4.—Where a plaintiff covenanted in a charter-party, to sail from London to *Gibraltar*, and there deliver an outward cargo, and receive from the defendant's agent an homeward cargo, and to sail direct for London; it was held, that evidence of a verbal direction by the agent, to sail to Liverpool instead of London, could not be received.

5.—In an action on *ship's articles*, evidence of an agreement, to pay further wages than those mentioned in the articles, was refused.

6.—In an action by drawer against acceptor of a bill for the freight of a chartered ship, parol evidence was refused, to show that the plaintiff had agreed to *renew* the bill, if the charterer did not return before the bill was due.

7.—In an action on a promissory note, evidence was refused, to prove an agreement, that payment should not be demanded when due, but that the note should be *renewed*.

8.—Evidence was refused, to show that a note purporting to be payable on demand, was intended to be payable on a contingency; as that it was not to be paid until after the *death* of the maker, or until certain *estates* had been sold, or unless a *bankrupt's* allowance would be sufficient to pay the amount.

9.—Parol evidence was not allowed to vary the *day* of payment in a note.

10.—A verbal understanding between the acceptor and the payee of a bill, that its amount should be paid out of a particular *fund*, will not control the legal operation of the instrument.

11.—Evidence of an usage in a public office, was refused to control the legal import of a *navy bill*.

12.—Parol evidence is not admissible, to explain an imperfectly worded contract, even when some parts of it are difficult to be understood from partial and incomplete *alteration*, which would have been perfected by the rejected evidence.

II.

How proved.

When mercantile contracts are necessary in evidence, and are in the hands of the party intending to use them, they must be *produced*, so that it may appear if *requisite*, that they are properly *stamped*; and if they be attested, it is absolutely necessary that the attesting witness be produced, or have his

absence accounted for, when proof of his hand-writing will be sufficient. If the contracts be not attested, they are proved by evidence of the handwriting of the party who executed them, which may be done by any one, who from being acquainted with the party, and having seen him write, or from having received letters from him, is acquainted with his handwriting. But if they are executed by an agent of the party, his handwriting must be proved, and it must be shown that he had an authority to execute from his principal; which may be done, either by proof that he is the *general* agent of the party for those purposes, or that he has been specially authorised in that particular instance, or that the principal has in other similar cases *recognised* his authority as an agent: and if a *written* authority has been given, it should be produced and proved; but if the authority is merely verbal, the agent himself is an admissible witness for the purpose of proving it. Proof of subscription by an authorised agent, is sufficient to satisfy an *allegation* of signature by a party.

When lost, &c.

If the contracts required in proof, are lost or destroyed, or are not produced by the opposite party after notice for that purpose, or by third persons, although served with a subpœná duces tecum; it is necessary to account for their absence to the satisfaction of the court, and to prove that they existed as *genuine* documents, and were properly stamped if that were necessary, and that they would have been admissible as evidence, if they had been produced; after these preliminary facts have been proved, their contents may be given in evidence, by means of copies, or even parol testimony.

SECTION XXVII.

OTHER PRIVATE DOCUMENTS.

CONTENTS.

I.

Agreements under the statute of frauds.

Parol evidence is not admitted, to supply a *deficiency*, or to cure a *defect* in any agreement, which is reduced into writing in pursuance of the statute of frauds; although it has been allowed, to alter the *time*, or particular *mode* of delivery of goods; or to show that one of the parties to the contract, stood in a different capacity or *character* from that which the contract described him to have filled; for if the parties be described on the document simply as buyer and seller, parol evidence is admissible, to show that in fact the contract was made by one of them, not on his own account, but as the *agent* of a third person.

The following cases have been decided, on the several parts of this rule.

1.—Where there was a written agreement, to pay a certain sum per year as *rent*; parol evidence was refused, to show that the tenant had agreed to pay the ground-rent besides.

2.—Where a tenant, who held under a written memorandum, which specified the rent and terms, but was silent as to payment of *taxes*, had paid land-tax, and brought an action against his landlord to recover it back; the defendant was not allowed to show by parol evidence, that at the time the agreement was made, it was understood between the parties, that the rent was to be paid clear of all taxes.

3.—Where there was a written agreement, to part with the *grass* and vesture off a certain meadow, parol evidence was refused, to show that by a verbal agreement made at the same time, it was intended to part with the whole possession of the soil and produce of that meadow and another besides.

4.—Parol evidence was admitted, to prolong the time limited in a written contract, for the *delivery* of a quantity of barley.

5.—Parol evidence was admitted, to show that the time for delivering the remaining part of goods had been *prolonged*, when the goods were to be delivered at certain fixed times, and a part had been delivered.

II.

Unsealed writings generally.

Other writings not under seal, as conditions of *sale*, and *contracts* of every description, are considered of such high authority, that their material terms cannot be altered, *varied*, or contradicted by parol evidence; although proof of *collateral* facts may be given, to *explain* the documents, and to show the *intention* of the parties: and a party may bring evidence to prove that he signed an instrument by *mistake*.

III.

How proved.

When writings of any description not under seal are required to be proved, they must be produced, so that it may appear that they are properly

stamped, if that be *necessary*; but an "*I O U*" may be given in evidence, without a stamp, as it is neither a promissory note, nor a receipt. If there is a subscribing witness to the document, and he is living, he must be *produced* to prove the execution; but if he is dead, or cannot be procured, on account of absence in a foreign country, or other sufficient excuse, it is sufficient to prove his handwriting; and it is usual for the purpose of showing the identity of the party who executed, to prove his handwriting also, although it does not seem generally necessary; but an instrument executed abroad, and witnessed by a *foreigner* residing there, must be proved by evidence of the handwriting of the witness, and the contracting party, as it is not sufficient to prove that of the latter alone. When there is no attesting witness, the document may be proved by evidence of the handwriting of the party charged, if he himself executed the instrument, or by proof of the authority of an agent, who executed for his principal, and evidence of his signature: and when a document comes out of the hands of the opposite party, under a notice to produce, the party who calls for it, must prove its *execution* in the usual way.

If the documents are lost, or destroyed, or are not produced; after properly accounting for their absence, and proving them to have had a genuine existence, their contents may be given in evidence by copies, or parol testimony; but if they would not have been admissible as evidence, if produced, from being *unstamped*, or from any other cause, evidence of their contents cannot be received, even if they were destroyed by the *wrongful* act of the party who makes the objection.

IV.

Receipts. A *receipt* for money, even the memorandum indorsed on a *deed*, although it is strong presump-

tive evidence against the party who gives it, is not conclusive upon him that he has received the money, for he may show that the money never was paid; but a receipt *in full* of all demands, when given with a full knowledge of all the circumstances, will in the absence of *fraud*, be conclusive upon the party; and the usual acknowledgement in a *policy* of insurance, of the receipt of the premium from the assured, is conclusive of the fact of payment, between the underwriter and the assured, although not so, as between the underwriter and the broker; but a receipt indorsed on a bill of *exchange*, is only primâ facie evidence of payment by the acceptor. Although a party has got a receipt, he is not bound to produce it in proof of payment, for he may notwithstanding, give *parol* testimony for that purpose.

V.

When notices for any purpose have been served, a notice to produce them at the time of the trial, should be given in all cases, except when the notices themselves, were given for the production of documents in the possession of the adversary; as it does not appear to have been clearly decided, in what cases, secondary evidence may be given, of the contents of a notice, without calling for its production in the regular way; although in one *case*, it was held, that a written copy of a letter, giving notice of the dishonour of a bill of exchange, and made at the same time, was sufficient, without proof of notice to produce the original. If the notices are produced, they will prove themselves, but if not, it will be necessary to prove the service, which may be done in several ways: 1st. By proof of personal service, either upon the adverse party, or his *attorney*; but when there is an *agent* in town, notices in the course of a cause, should be given to him, and not to the attorney in the country: 2dly. By proof of service at the *dwelling-house* of Notices.

the *client*, or the office of the attorney, which will be sufficient in all cases, but where a personal service is required, by some statutary provision: 3dly. By proof, that the notice was put into the *post-office*, which is considered sufficient, in cases of notices relating to bills of exchange; and where there is no post, it may be proved, that the notice was sent by the ordinary mode of *conveyance*: 4thly. By proof of the delivery of a *parol* notice, which is sufficient, where its object is merely the production of documents, or generally in all cases, except where a written notice is expressly required; and where a notice has been served, both in writing, and by parol, it may be proved in *either way*.

The next step, is to prove the contents of the notice, which may be done, by a *duplicate* original, or an examined copy; but a copy made by a copying *machine*, will not be sufficient, without proof, that it was afterwards examined with the original, and found to be correct. A notice cannot be given in evidence, if upon production, it appear that it was entitled in a *wrong* cause, even if the mistake be made in the most *trifling* particular.

VI.

Letters and entries of third persons.

Letters and entries of third persons, who are strangers to the parties in an action, are not in general admissible in evidence; but in the following cases, they are admitted, when the parties themselves are dead, and they would have been good witnesses, had they been alive; although *illness*, or being out of the *kingdom*, will not be sufficient to let in the entries of third persons, as evidence.

1.—In an action of *adultery*, letters written by the wife to the husband, whilst they were living apart from each other, and proved to have been written, at the time they bear date, and when there is no reason to suspect collusion, are admissible in evidence.

2.—A letter written by a stranger to a testator, acknowledging the receipt of a *will*, was received as evidence, to show that such a will had been sent, and was therefore in existence.

3.—A letter written by a confidential agent of a former tenant for life, and indorsed by the latter as a *particular* of his estate, was received as evidence, to show, that the rent reserved by a tenant for life, was less than the ancient rent, at the time to which the letter referred.

4.—Letters written by a foreign agent, assenting to an arrangement transferring property, are admissible, to prove such assent, on an *extent* against the principal.

5.—A letter written by a *witness*, falsifying his present testimony, may be used for the purpose of impeaching his credit.

6.—An entry in parish books, made by the officers of one township, of the receipt of a proportion of the *church-rates*, from the officers of another township, was received as evidence, to charge the latter, with the payment of the same sums in future.

7.—Entries in a *steward's* day-book, of sums received from different persons by him for a former owner, in satisfaction of trespasses, were received as evidence, in an action of trespass by the present owner; and if the entries were made more than thirty years ago, and the book be proved to have come from proper custody, they are admissible without proving the *handwriting* of the steward.

8.—Old rentals, by which *bailiffs* had acknowledged the receipt of monies, were received, to show the payment of such rents, and the right to receive them.

9.—The book of a *bursar* of a college, is evidence of money paid, or received by him, to the use of a third person.

10.—A bill of *lading*, signed by a master of a vessel, for the delivery of goods to a consignee or his assigns, on payment of freight, was received, to show that the consignee had an insurable interest in the goods.

11.—A *scrivener's* book of charges, was considered good evidence, of the payment of mortgage money.

12.—The debt book of an *attorney*, in which he had made charges, for suffering a recovery, and for drawing, and engrossing a surrender, was received as evidence of a common recovery having been suf-

fered; as was a book containing charges for preparing a *lease*, to prove the time of execution.

13.—A man *midwife's* book, which contained an entry of having delivered a woman of a child, on a particular day, was received, to prove the age of the child, at the time he afterwards suffered a recovery.

14.—An entry by a *rector* of his receipt of tithes, is evidence for his successor, to prove a liability to such tithes.

15.—An old receipt of a former rector, in the hands of the defendant, for the payment of money in lieu of tithes, and which was shown to have probably come to him from an ancestor of the same name, was received as evidence to support a *modus*.

VII.

Maps and surveys.

Maps and surveys of *estates*, are evidence to show the extent of a man's estate, when it is proved, that they have been made with the privity and consent of the *owners* of the adjoining lands and when two *manors* were in the hands of one person, and a map was made by him, and afterwards, one of the manors was conveyed to another person, and, at a distant time, a dispute arose as to the boundaries, the map so taken was received as evidence. But if maps be made, without the privity or consent of the owners of the adjoining lands, as if a lord describe the boundaries of his waste, or *church-wardens* cause an engraved map to be made, wherein they describe land which an individual claims, to be a highway, they will not be evidence against persons, who were not parties to their being made.

VIII.

Shop books.

The shop books of a tradesman or *banker*, are not evidence in any case, after a *year* has expired; nor are they of themselves, evidence within the year, unless it be *proved*, that the servant who wrote them is dead, and that the entries are made in his

handwriting, and that he was accustomed to make such entries in the *usual* course of business, and that the effect of such entry would be to *charge* the servant; although in one case, an entry made by a *defendant* himself in the course of business, and contemporary with the fact, was received as confirmatory evidence, to prove the delivery of goods: but the dangerous *illness* of a clerk, is not sufficient to make entries by him admissible as evidence, for if he be alive, and within the jurisdiction of the court, the entries can *only* be proved by himself.

IX.

Family papers.

Recitals in title deeds, *family* pedigrees hung up in the mansion, inscriptions on old family mourning rings, and tombstones; a statement of pedigree in a bill in *chancery*; an old special verdict stating a pedigree, or a paper writing purporting to be an old *will* in a cancelled state, and which never appeared to have been acted upon, but which was found amongst the title deeds of a former possessor of the estate, have been severally received as evidence, to prove *relationships*, and family descents; and an entry by a father, in a *bible*, or any other book, is good evidence to prove the time of the birth of a son, or his legitimacy.

SECTION XXVIII.

BEST EVIDENCE.

CONTENTS.

I.

General rule.

The first general rule applicable to the production of evidence, is, that THE BEST EVIDENCE THE NATURE OF THE CASE ADMITS, MUST BE PRODUCED; but when it is said, that the law requires the *highest evidence*, of which the nature of the thing is capable, it is not to be understood, that in every matter, there must be all the force of evidence, which by any possibility, might have been procured, and that nothing under the highest assurance possible, shall be given in evidence to prove any matter in question; but merely, that the law requires such evidence, as from the nature of the case, supposes that there is no better *behind*, in the possession or *power* of the party. And therefore, a person is not allowed to give any *secondary* evidence, which from its *nature*, presumes that greater evidence is in existence, until he has laid a foundation for so doing, by showing, that such greater evidence cannot be obtained.

Cases under the rule.

The following are the leading decisions, which have taken place under this rule.

1.—A copy of a *deed* cannot be received as evidence, when the original, or a counterpart can be produced; but if it be satisfactorily proved, that the original is lost or destroyed, or in the hands of the adverse party, and that there is no counterpart, a copy which is then the best evidence of the contents of the deed will be received.

2.—In an action by the owners of a ship, against the *East India* Company, for freighting combustible goods, without notice of their nature to the captain; it was decided, that the plaintiff ought to prove, that such notice was not given, by calling the person who either delivered, or received the goods, and because he did not call either of them, but proposed to show the fact by secondary evidence, he was nonsuited.

3.—In an indictment against a person, for having set fire to his house, with intent to defraud an *insurance* company; the insurance cannot be proved, by means of the entry in the company's books, unless a notice has been given to the defendant to produce the policy.

4.—The contents of a registered deed, cannot be proved by the *memorial*, or other secondary evidence, unless there has been a notice to the party in whose possession it is, to produce the original.

5.—Parol evidence is not admissible, to prove the taking of the *toleration* oaths, as the fact may be proved, by the records of the court in which they were taken.

6.—Dugdale's Monasticon was refused, to show whether an *abbey* was an inferior one or not, because the original records might be had at the augmentation office.

7.—To prove the day, on which the court sat for the trial of a cause at *nisi prius*, the record itself is the best evidence, and must therefore be produced.

8.—Parol evidence is not admissible, to prove a *license* to trade from the crown, even though it is lost, because the registry at the secretary of state's office is the best proof of its existence.

9.—An insolvent's *discharge*, by a court of quarter sessions, must be proved by calling the clerk of the peace, and giving in evidence the judgment of the court for the discharge, as parol evidence, or even an admission is not sufficient.

10.—To set aside a verdict and *judgment*, as obtained by the attorney without the consent of the client, the best evidence, is the affidavit of the client, which must therefore be produced.

11.—A bill for business done in a particular court, is not sufficient to prove that a party is an *attorney* of that court, for the best evidence, is the original *roll* of attornies.

12.—Where the *proceedings* in a former cause, form the inducement to an action, the plaintiff must prove

them, either by the production of the original, or by a copy of the roll, even if all the papers are in the hands of the defendant, who has had notice to produce them.

13.—An entry in the register book at the custom-house, stating that a certificate of the registry of a ship had been granted, on an affidavit made to procure such registry, is not sufficient to prove the *affidavit*; but some person should be called who has seen it, and knows that it was made.

14.—When it is necessary on the trial of an indictment, to prove that a party is an *apprentice*, the indentures are the best evidence of the fact, and must therefore be produced, and proved by the attesting witnesses in the usual way.

II.

Exceptions. There are several exceptions to this rule, requiring the production of the best evidence the nature of the case admits, these are, 1st. Records, which in courts, to which they do not belong, are proved by exemplifications, or other *copies* from a principle of public convenience: 2dly. Journals of parliament, proceedings in chancery, in the ecclesiastical, admiralty, and inferior courts, parish registers, entries in corporation and public books, and indeed all documents of a public nature, and which upon production, would require no *collateral* proof to support them, may be proved by examined copies; but a copy *of a copy*, will not be evidence in any case: 3dly. In cases respecting *justices* of the peace, *constables*, officers of the *revenue*, collectors of *taxes*, or other authorised public officers, as *surrogates*, and officers in the *army*, it is sufficient, to prove that they have acted in their several capacities, without producing their appointments: 4thly. When *handwriting* is to be proved or disproved, it is not absolutely essential, to call the writer himself, as it may be done, by other *persons* who either from having seen him write, or having received letters from him, are acquainted with the character of his handwriting; but the handwriting

of a deceased person, cannot be proved by comparing it with official *returns*, made by him, and signed with his name; nor can handwriting be proved, or disproved, by a person who has merely seen the party sign his name since the *commencement* of the action, for the purpose of making him a witness; nor by a witness who has only seen him write his name once before, when he used a different *form* of signature.

SECTION XXIX.

CONFINED TO THE ISSUE.

CONTENTS.

I.

The second rule, is, that THE EVIDENCE OFFERED, MUST IN BOTH CIVIL AND CRIMINAL CASES, BE CONFINED TO THE POINTS IN ISSUE BETWEEN THE PARTIES, for if it neither tends to prove, nor disprove those points, it cannot be received; and as all matters, which are admitted by the pleadings on the record, are no longer in issue between the parties, they require no proof. But it may be frequently absolutely necessary, to receive evidence of transactions previous, or foreign to the immediate subject of inquiry, for the purpose of

General rule.

discovering the knowledge of the parties, their motives or intentions.

Cases under the 1st. part.

The following cases, will show what matters have been decided to be extraneous to the subject in issue, and which were therefore rejected in evidence.

1.—In an action on a bill of exchange against the acceptor, who defended on the ground that his signature was *forged*, evidence was not allowed, to show that the person charged with the forgery, had forged the acceptor's name to *other bills*, and had absconded.

2.—In an action against a publican on a brewer's agreement, the *brewer* cannot prove, that he furnished good beer, by showing the quality of the beer he furnished to other purchasers during the same period of time.

3.—In a question between *landlord* and tenant, whether rent was payable quarterly or half yearly, evidence of the mode, in which other tenants of the same landlord paid their rent is not admissible.

4.—Where the question was, whether the office of registrar to an *Archdeacon*, had been usually granted for three lives, evidence was refused, to show that the office was usually so granted, in other Archdeaconries within the same diocese.

5.—Where a right is claimed by custom, in a particular *manor* or *parish*, proof of a *similar* custom in an adjoining manor or parish is not admissible; unless it be first proved, that both manors were *formerly* one, or were held under one lord, or the custom is laid as a general custom of the country, or of that particular *district*.

6.—In an action of trespass, when the question was, whether certain *common land* was the soil and freehold of the lord of the manor, on which the plaintiff had a right of common, or the soil and freehold of the plaintiff; leases of minerals granted by the lord to other persons, in other parts of the uninclosed waste land, were decided not to be admissible in evidence, unless it was first shown, that the locus in quo formed part of one entire waste, to which those leases were applicable.

7.—Where an issue in covenant, was whether a tenant had committed *waste* on a farm, evidence of an unhusbandlike treatment of the farm but not amounting to waste, was refused.

8.—Where a prisoner was indicted for a *burglary*, evidence of his having committed a larceny in the same house on the previous day, was refused.

The following are cases, where it was allowed, to inquire concerning transactions, which had happened previous to the immediate subject of inquiry, or which at first sight appeared foreign to its merits, for the purpose of showing the nature of the particular case under consideration. Cases under 2d. part.

1.—In order to prove that the *acceptor* of a bill of exchange, knew the name of the payee to be fictitious, evidence was received, to show that he had accepted similar bills, before they could according to their date, have arrived from the place of date; and to prove, that the indorsee had a general authority from the acceptor, to fill up bills with the name of a fictitious payee.

2.—Evidence of *skill* and judgment, although in some respects collateral, may be given in many cases to prove the issue.

3.—Former threats, and ill will, are admissible to prove malice on indictments for murder.

4.—On an indictment for *arson*, evidence was received, to show that property taken out of the house at the time of firing, was afterwards found secreted in the possession of the prisoner.

5.—On an indictment for *treason*, the declarations and seditions language of the prisoner are admissible in evidence.

6.—On an indictment for sending a threatening *letter*, a subsequent letter from the prisoner, explanatory of that stated on the record, was considered as admissible.

7.—In prosecutions for uttering forged documents, with a knowledge of the fact, it may be proved that the prisoner had *uttered* other forged documents of the same kind, or perhaps of a *different* description, or that he had such others in his *possession*.

8.—In prosecutions for uttering counterfeit *money*, proof may be given of the conduct of the prisoner at the time, or that he had previously uttered other counterfeits, or that he had others in his possession.

9.—On an indictment against several, for a conspiracy to carry on the business of common *cheats*, evidence was received, to show that the prisoners had made

similar representations to other tradesmen, besides those named on the record.

10.—On an indictment against a county for not repairing a *bridge*, the defendants may show by whom it has heretofore been repaired, for the purpose of ascertaining whether or not it is a public bridge.

II.

Character. In civil cases, evidence of the *character* of either *party* cannot be received, unless by the nature of the proceedings themselves, such character is indirectly put in issue; as in actions to set aside instruments on the ground of *fraud*, and imposition; or in actions for libel, slander, seduction, or *criminal* conversation; in which last action the defendant may give evidence of the previous bad character of the wife, but will not be allowed to prove any circumstances of her misconduct *subsequent* to the act of adultery; but the plaintiff will not in general, be allowed to give evidence of *good* character, until it has been impeached by the defendant. In criminal prosecutions, which have for their object the punishment of the offence, the defendant's character is put in issue by the prosecution; and the prisoner is always allowed to call witnesses to speak to his *general* good character, but not as to particular acts: and in cases of *rape*, or assault with intent to commit a rape, where the prosecutrix's character is collaterally put in issue, general evidence of her bad character, is admissible, although evidence of particular facts to impeach her chastity, cannot be received, even for the purpose of contradicting her answers in cross-examination.

SECTION XXX.

SUBSTANCE OF THE ISSUE.

CONTENTS.

I.

General rule.

The third rule, is, that IT IS SUFFICIENT TO PROVE THE SUBSTANCE OF THE ISSUE; and the degree of proof requisite, will vary with the manner in which the alledged facts are introduced, for matters of *inducement*, do not require such *strict proof*, as those facts, which are directly put in issue between the parties.

Cases of sufficient proof.

To explain the application of this rule, the following cases will show what proof is sufficient to support particular issues.

1.—In actions on simple contracts, whether of assumpsit or debt, the plaintiff may prove, and recover a less sum, than he has demanded in his writ.

2.—In an action of *waste*, for cutting down trees, the plaintiff may prove a less number cut down, than what is mentioned in the declaration.

3.—In covenant upon a bond, conditioned to perform covenants, and breach assigned in cutting down *trees*, the plaintiff may prove a less number than that mentioned in the breach.

4.—If a plaintiff declare on a *policy* for a total loss, he may recover for a partial loss.

5.—If a plaintiff declare in *ejectment*, for a fourth part of an estate, he may recover a third of one fourth part.

6.—Proof of the *tender* of a larger sum will support an allegation of the tender of a smaller sum.

7.—When the issue, was whether a sheriff had taken a man and his wife in *execution*, and suffered them to escape; it was held that the issue was sufficiently proved, by evidence that he had taken the man alone, and that he escaped, the execution being for a debt due from the wife before her coverture.

8.—In actions of *slander*, it is sufficient if the plaintiff prove some material part of the words alledged on the record.

9.—If the issue, be whether or not a party was taken in execution under a *ca. sa.* it is sufficiently proved by showing that he was taken under an alias ca. sa.

10.—Under a count against a sheriff for a voluntary *escape*, the plaintiff is entitled to recover if he prove a negligent escape.

11.—Where a defendant is charged with composing, printing and publishing a *libel*, he may be convicted of the *printing* and publishing only, or of composing and publishing without the printing.

12.—If a plea in *trespass* alledge two matters, either of which would amount to a justification, it is sufficient to prove one of them, although the whole be put in issue by the general plea of de injuriâ.

13.—On a charge of *petit treason*, if the killing with malice is proved, the defendant may be found guilty of murder.

14.—On an indictment for *burglary*, and stealing goods, or robbery, and it cannot be proved, that in the first case, the offence was committed in the night, or in the second, that the property was taken with violence, the prisoner may be convicted of simple larceny.

15.—If an indictment for *treason* charge several overt acts it is sufficient to prove one.

16.—If an *offence* at common law, be laid to have been committed against the form of the statute, the allegation may be rejected.

17.—On an indictment for *murder*, the jury may find the prisoner guilty of manslaughter.

18.—On an indictment for murder, by killing with a dagger, it is sufficient to prove a killing with a

staff; or in a similar charge, for killing by *poison* of one sort, evidence to prove a killing by another sort of poison is admissible.

The following cases will show what proof is not sufficient to support particular issues. Cases of insufficient proof.

1.—When the issue was, whether or not two persons were *churchwardens*, proof that one was, and not the other, was held not to be sufficient.

2.—Upon an issue joined on a plea of tender, that the plaintiff, before the action, and after the tender, demanded the sum tendered, he will be obliged to prove the *demand* of the specific sum, for proof of the demand of a larger sum will not support the issue.

3.—When the issue was whether Lord Delaware *demised* or not, it was held, that proof that a person had demised, who was not Lord Delaware at the time of demise, but had become so at the time of trial, was not sufficient.

4.—If in *replevin* the defendant avow damage-feasant, and the plaintiff justify for common, and aver, that the cattle were levant and couchant, and there is issue thereupon, proof only for part of the cattle is not sufficient.

5.—If in an indictment for murder, the charge is for poisoning, proof that the *death* was caused by stabbing, starving, or other means distinct from poison, will not support the indictment.

II.

All the material facts of a case when put in issue, must be supported by proof; and an averment, is said to be material, when it cannot be *struck out* of a declaration or indictment, without getting rid of a part *essential* to the cause of action, or the essence of the *offence*, in which case, although it may be more particular than it need have been, the whole of it must be proved, or the plaintiff cannot *recover*; but immaterial *averments*, that is, such as may be struck out, without destroying the right to the action, or affecting the *charge* against a *prisoner*, need not be proved. And although an averment might have been *unnecessary*, Materiality of averments.

it is not consequently immaterial, for if a party aver an *indorsement* on a note payable to bearer, or that he was *baptized*, as well as known by a certain name, he will be obliged to prove the averments, although they are unnecessary, and might have been altogether omitted.

III.

Material variance.

The facts upon which the action is grounded, or which constitute the offence, having been correctly stated, with all their attendant circumstances upon the pleadings; they must be proved precisely as laid, for if the proof, materially differ from the statement on the pleadings, the variance will be fatal, and the whole foundation of the proceeding will be destroyed; and a defendant, is not precluded from insisting upon a *variance*, by an admission produced at the trial, "of the due execution of the deed mentioned in the declaration," but it would be otherwise, if the admission had been, "of the deed as mentioned in the declaration."

The following are cases of material variance.

Contracts.

1.—When a declaration stated, that the defendant was indebted, for goods delivered to him, to be sold and disposed of; and it appeared in evidence, that he had received a *del credere* commission, on guaranteeing the solvency of the purchasers, the declaration was held bad, as the commission was not therein stated.

2.—An averment, that *stock* was to be transferred on request, is not proved by evidence that it was to be transferred on a certain day.

3.—Where the contract stated, was to deliver *tallow* at 4s. per stone; and that proved, was for delivery at 4s. per stone and so much more as the plaintiff paid to any other person, it was a variance.

4.—Evidence of an *agreement*, to deliver goods to the defendant, is a variance from a count, on an agreement to deliver them to another person.

5.—An agreement declared on, for the sale of *oats* at so much per bushel, means Winchester measure, and is not proved, by evidence of an agreement to sell by some other measure.

6.—Under a count, for *money* had and received by three defendants, the plaintiff cannot give evidence of money had and received by them, and a fourth partner who is dead.

7.—When the declaration stated a *forbearance*, in consideration of a certain sum without a videlicet, evidence of the forbearance of a less sum was a variance.

8.—When the consideration for the purchase of *sheep*, was stated as a certain sum, and the sum proved was less, it was a variance because the sum was not laid under a videlicet.

9.—When the declaration stated the defendant's tenancy in one place at a certain rent, as a *consideration* for his promise to manage in a husbandlike manner, and the evidence proved that the land for which the rent was received, was in that place and another, it was a fatal variance in stating the consideration for the promise.

10.—When the promise declared on, was for the delivery of good merchantable *wheat*, and the promise proved, was to deliver good second sort of wheat, it was a fatal variance.

11.—When the declaration stated, that a person was justly indebted, and by the evidence it appeared that such person was a *feme covert*, it was a fatal variance.

12.—When the declaration stated a contract to *remove* goods in a reasonable time, and the contract proved, was to remove in a month, the variance was fatal.

13.—When a declaration stated a contract, to sell goods *expected* by the Fanny Almira, and the evidence proved the contract to be of goods expected by the Fanny and Almira, the variance was fatal.

14.—An undertaking to deliver goods to a person, is not proved, by an agreement to deliver goods to the bearer of a *receipt* for such goods, given by the defendant.

15.—It is a fatal variance, to describe a contract to deliver *soil*, as a contract to deliver soil or breeze.

16.—If in an action against a *carrier*, it is alledged, that the contract was to carry from one place to another, these names are material, and a variance between the pleadings and the proof will be fatal.

17.—A declaration stating that a bill of exchange was drawn and accepted at *Dublin*, to wit at Westminster, for a certain sum therein mentioned, without alledging it to be at Dublin in Ireland, Bills and Notes.

means that it was drawn in England, for English money, and is not supported by proof of a bill drawn at Dublin in *Ireland*, for the same sum in Irish money.

18.—A bill declared upon, as drawn by John Couch, is not proved, by the production of a bill drawn by John *C ouch*.

19.—If a plaintiff declares, that on such a day the defendant made his bill, bearing *date* the same day and year aforesaid, and the real date is different, it is a fatal variance.

20.—When a bill was alledged to be for *value* received of a certain person, and on production, it appeared to be for value received generally, it was a fatal variance.

21.—In an action against the *acceptor* of a bill, if the declaration describe the bill as directed to the defendant, and the bill is made payable at a certain place named, but not by any particular person, it is a fatal variance, although the defendant lives at that place.

22.—Where a bill was stated, even under a *videlicet*, to be *drawn* on one person, and on production, it appeared to have been drawn on another, it was a fatal variance.

23.—If in a declaration on a joint and several note payable by *instalments*, the day on which one of them becomes due, be misrecited in the declaration, it is a fatal variance.

Deeds. 24.—Where a declaration stated an absolute covenant to *repair*, it was not supported, by production of a covenant to repair the premises at all times, as often as need or occasion should require, and at farthest within three months after notice.

25.—When a declaration stated a covenant to *build* houses within a certain time, and averred that they were built within the time; it was held, that evidence of an enlargement of the time by parol agreement, and that the houses were finished, within the enlarged time, would not support the declaration.

26.—When a declaration stated, that *land* was set out by "admeasurement," and the deed by "reputation," it was a fatal variance.

27.—Where the consideration for a demise, was stated, to be the erection of certain *furnaces*, and on producing the deed in evidence, it appeared, to be as well in consideration of the erection of the fur-

naces, as also of building certain houses, and payment of rent, it was a fatal variance.

28.—Where a declaration stated that *storehouses* had been demised, and the word in the deed, was "storehouse," it was fatal, although no breach was assigned upon the demise of the storehouse.

29.—If a covenant to repair, "fire and all other *casualties* excepted," be declared on, as a covenant to repair generally, it is a fatal variance.

30.—A declaration of covenant in setting out a deed, stated that "it was witnessed that *as well* in consideration of, &c.," and then only mentioned one part of the consideration, with nothing to answer to the phrase "as well," it was a fatal variance.

31.—Where a declaration in covenant, recited premises to be late in the occupation of "Samuel R.," and in the lease it was "*Saul R.*," it was a fatal variance.

32.—In an action on a *judgment*, if the declaration state Records.
the judgment to have been recovered in a term, different from that which appears on the record, it is a fatal variance; it is also a variance, if the declaration state the judgment against one defendant, when it was against more than one.

33.—To plead a *recognizance* as taken in court, when in fact it was taken at the judge's chambers, is a variance.

34.—It was a fatal variance, between an indictment for perjury on articles of the peace, which stated, that the defendant swore in substance and effect that a party assaulted her, and at the same *time* threatened to shoot her, and the articles themselves, in which the word "time" had been omitted.

35.—It is a fatal misdescription of a trial at *nisi prius*, to state that it came on to be heard in the court of King's Bench, as those words are exclusively *applicable* to a trial at bar.

36.—In an action on a *foreign* judgment, for the nonperformance of certain promises and undertakings, and it appeared upon the production of the record, that the judgment was entered for the nonperformance of one promise only, it was fatal variance.

37.—A variance between the day of the return of a *writ*, as appears upon its production, and the day mentioned in a declaration as that upon which it is returnable, is fatal, although the return day was laid under a videlicet.

38.—If a judgment be described as in a suit during the *reign* of the present King, and the evidence is of a judgment in the preceding reign, it is a fatal variance.

39.—If a judgment be pleaded as of Hilary *Term*, and on production, it appear to be of Easter Term, the variance is fatal.

40.—A judgment was declared on, as against H. Fleming, Esq. and on *nul tiel* record pleaded, it proved to be against the right honourable H. Fleming, Earl of Wigton having privilege of peerage, the variance was fatal.

Torts. 41.—When the declaration stated, that the defendant had wrongfully placed, and continued a *heap* of earth, whereby the refuse water was prevented from flowing away from his house, down a ditch at the back thereof; and the evidence proved, that the heap was not originally placed so as obstruct the water, but that in process of time, earth from the heap was trodden and fell into the ditch, and obstructed it, this was a fatal variance.

42.—In an action for deceitful representation in the sale of a *business* to the plaintiff, an averment, that the defendant represented the returns to amount to a certain sum, is material, and notwithstanding it is laid under a videlicet, a variance between the allegation and proof, is good ground of nonsuit.

43.—Evidence of the improperstowage of an *anchor*, whereby it broke, and stove in another vessel, and damaged goods, will not support a count, charging the injury on the unskilful steerage of the ship.

44.—If a declaration state a diverting, and turning a stream of *water*, and there is only proof of penning it back and checking its course, whereby it was made to overflow the plaintiff's meadow, the variance is fatal.

Slander and Libel. 45.—Where the words charged, were "this is my *umbrella* he stole it from my back door," and the words proved, were "it is my umbrella," it was a fatal variance.

46.—A count for slanderous words spoken *affirmatively*, is not supported by proof that they were spoken negatively.

47.—Proof of words spoken to a person, will not support an *indictment* charging that the defendant spoke them of such person.

48.—Where the words alledged, were "the plaintiff is a great thief and ought to have been *transported* seven years ago" and the words proved, were "she is a bad one, and orght to have been transported years ago" the words proved, did not support the declaration.

49.—A declaration for a libel, alledged that the defendant

had *composed*, written, and published the libellous matter; and it appeared from the libel itself, that he had given references to another work, from which the libel was taken, the variance was fatal.

50.—In stating a *covenant* upon which breaches were assigned, "Cellar beer field" was put for "Aller beer field," it was a fatal variance. Place.

51.—Where a declaration stated the lands demised, to be in the *parish* of B and M, and the deed in the parishes of B & M, it was a fatal variance.

52.—Where a declaration stated a trespass, in the parish of *Clerkenwell*, and it was proved that Clerkenwell consisted of two parishes, although it was generally known by the name of St. James Clerkenwell, it was an insufficient description.

53.—In an action for a nuisance in erecting a *weir*, if it be described in the declaration, to be at one place, and proved to be at the lower part of the same water, at a place having another name, the variance is fatal.

54.—In an action for *non-residence*, the parish was stiled in the declaration, St. Ethelburg, and the evidence proved, that its real name was St. Ethelburga, it was a fatal variance.

55.—When the declaration stated, that the defendant went before the Baron of Waterfork, in a certain county, and charged the plaintiff with a felony, and it was proved, that the title of the magistrate was Baron of *Waterpark*, it was a fatal variance.

56.—Where premises where described, as being in the parish of St. George the Martyr, *Bloomsbury*, and were proved to be in the parish of St. George, Bloomsbury, the variance was fatal.

57.—When in ejectment, the premises were described to be situated in two *united* parishes, and it appeared that they were situated in one of them only, and that the parishes were united for maintaining their poor, but for no other purpose, the variance was fatal.

58.—A plea of tender of half a year's *rent* simply, is not supported, by evidence of a tender of the half year's rent, requiring the lessor to get change and pay back the property tax. Tender.

59.—If a tender be alledged, and a tender *accompanied* by a demand of a receipt in full, or under a *condition*, that it shall be received as the whole of the balance due is proved, it is a fatal variance.

60.—Proof of a tender, upon condition that a particular

document should be given up to be cancelled, will not support a plea of tender generally.

Custom and prescription. 61.—On a justification under a *custom*, that the lord of a manor should have the best beast at the tenant's death, the custom proved, was that he should have the best beast or good, it is a fatal variance.

62.—An allegation, that there has immemorially been a *vestry*, composed of a certain number of select persons, can only be supported, by proof that the vestry consisted of a definite number.

63.—If an allegation be of an absolute *prescription*, or custom, and the evidence prove a conditional or limited one, it is a fatal variance.

Character. 64.—Where it was alledged that a party was the proprietor and editor of a *newspaper*, and only proved that he was the proprietor, it was a fatal variance.

Statute. 65.—A declaration, in reciting the *statute* of Elizabeth relating to sheriffs, used the *words* "body, lands, goods and chattels," instead of "body, lands, goods or chattels," it was a fatal variance.

Process. 66.—An allegation, that an action is depending in his Majesty's Court of the *Beach* at Westminster, is not supported by proof of a pluries bill of Middlesex.

67.—When a defendant justifies under a *peace officer*, and that person appears to be merely a patrole employed by the parish, but not a constable, the evidence does not support the plea.

68.—An allegation that the plaintiff gave *bail* to the sheriff, is not supported by proof that he paid the debt, and £10 for costs into the hands of the sheriff.

Partner. 69.—A surviving *partner* may declare, without naming the deceased; but if goods sold by the two partners, be described as the goods of the survivor, the variance is fatal.

Policy. 70.—Where a declaration stated that a *ship* was lost after she had departed on her voyage, and it was proved that she was lost whilst at her moorings, it was a fatal variance.

Replevin. 71.—If a defendant in *replevin*, avow on a contract for £110 rent, and prove a demise of 15s. an acre, amounting to £111, it is a fatal variance.

Money. 72.—An averment that a person has received a sum of *money*, is not supported by proof of the transfer into his name, of that amount in stock.

IV.

Immaterial variance.

The omission to prove facts, which as mere surplusage are not necessary, and might have been wholly omitted, without injury to the statement of the cause of action or the offence, or the proof of redundant facts, which are not stated in the pleadings, will not be a material variance.

The following are cases of immaterial variance:

Contracts.

1.—Proof of the acknowledgment of one *item* of debt only, will support a count upon an account stated.

2.—In an action for non-delivery of goods, proof that they were to be paid for "by a bill at *two months*, on invoice or delivery," is not a variance from a statement in the declaration, that they were to be paid for "by a bill at two months."

3.—Where the contract declared upon, was for the *sale* of a large quantity of goods, which was afterwards ascertained to be a given quantity, and the evidence proved a contract for the sale of all the goods per a certain ship, there was no variance.

4.—When a particular sum was mentioned under a videlicet in the inducement of a declaration, as the *balance* of a larger sum, and was referred to as such by the subsequent averments, it was no variance, that the balance proved was less than that sum.

5.—Where the contract laid, was for the delivery of a *young horse* worth £80, and there was a breach alledged in both respects; it was no variance, that the contract proved, was for the delivery of a young horse worth £80, which was sound, and had never been in harness.

6.—A contract declared on, as for the purchase of a certain quantity of *hemp*, to wit 8 tons; was sufficiently proved, by evidence of a contract to purchase about 8 tons, the exact amount not being then known, but afterwards ascertained.

7.—Where the contract declared on, was for the sale of 308 chests, and 30 half chests of *oranges* and lemons at a certain price, to wit a certain sum; it was no variance, that the contract proved, was for 308 chests, and 30 half chests of china oranges, and 20 chests of lemons without specifying the price.

8.—A contract declared upon, to deliver stock on a certain day, was sufficiently proved, by evidence of a contract to deliver on the *settling day*, which at that time was fixed for, and understood by the parties, to mean the day mentioned in the declaration.

9.—If a declaration state a condition to be a certain reasonable *reward*, evidence that a specific sum was agreed upon, is no variance.

10.—An allegation of a *loan* of lawful money of Great Britain is sufficiently proved, by evidence that it consisted of foreign coin.

11.—Where the declaration alledged a certain sum due as *rum-money*, it was no variance to prove it, by a note for that sum, with an additional stipulation written after the signature of the note, for a pint of rum per day.

12.—Where the contract proved, was for the *delivery* of goods at a certain price, warranted ready for delivery from ship or warehouse by a certain day, and that stated in the declaration, had omitted the words "ship or warehouse" it was no variance.

13.—Where the declaration stated, that the *carriage* of goods was to be paid for by the consignor, and the evidence showed, that it was to be paid by the consignee, it was no variance.

14.—Where the contract stated, was that the defendant would take proper care of a *borrowed horse*, and return him in as good condition as he was at the time of the promise, or pay 15 guineas, and it was proved in addition, that the defendant should find the horse, meat for his work, it was no variance.

15.—Where a declaration stated the consideration of a *guarantee*, to be that the plaintiff would give credit to a third person "in manner then and there agreed upon between them" and in evidence, the terms were "to be agreed upon," there was no variance.

16.—Where a declaration in describing a guarantee, stated *credit* generally, and in the instrument the expression was usual credit, there was no variance.

17.—Where a declaration on a guarantee, stated that the defendants undertook to indemnify a person, for holding goods in his *warehouse* on their behalf, and delivering the same up to them when requested to do; and on production of the instrument, it appeared, that the defendants only guaranteed

him for holding the goods in his warehouse on their behalf, there was no variance.

Bills and notes.

18.—A bill of exchange drawn in the name of two persons & Co. may be declared on, as a bill drawn by an aggregate *firm*, and if it be proved that the firm only consists of one person, it is no variance.

19.—A declaration stated a bill to have been drawn upon, and accepted by *three persons*, it was no variance, that it was proved to have been drawn upon and accepted by the three jointly with a fourth.

20.—A bill made payable to a certain person or order *value* received, may be alledged in pleading, to be a bill for value received by the drawer.

21.—It is no variance, that a bill signed by a firm, and declared on as accepted by the firm, was proved to be *accepted* by one person who had no partner, but whose name was used in the firm.

22.—A general averment that a bill was accepted by the defendants, is proved by evidence of an acceptance by their authorised *agent*.

23.—A bill was stated in the declaration, to have been *indorsed* before it became due, and it appeared in evidence that it had been indorsed after, it was no variance.

24.—In a declaration on a bill of exchange, the omission of the word "*sterling*" is immaterial.

25.—In an action by indorsee against acceptor of a bill payable 50 days after *sight*, the declaration alledged an acceptance on the 11th August, and a presentment for payment on the 3rd October, and the evidence proved an acceptance on the 19th September and a presentment for payment on the 11th March, it was not a material variance.

26.—Where a declaration alledged, that a bill was presented for payment by a particular person, and the plaintiff proved a *presentment*, but not by that person, it was no variance.

27.—If a note be made payable at a particular *town*, and the maker has no residence there, proof of a presentment at the banking houses there, will justify, and support an allegation that it was presented there to the maker.

Deeds.

28.—Where a declaration stated, that a mining lease granted liberty to make levels, pits and *sloughs;* and upon production of the lease it appeared, that the word was "soughs," it was not a fatal variance

29.—Where lands were stated to be in the *occupation* of

three persons, instead of the several occupations, as in the deed, it was immaterial.

30.—It is not a material variance, that a declaration on a *mortgage* deed, states that the defendant bound himself, his heirs, executors and administrators, and upon production of the deed, it appears that he only bound himself, his executors and administrators.

31.—Where a declaration stated a bond to have been given to a man, then being *treasurer* of a friendly society, and the deed appeared to have been given without stating him to be such treasurer, it was no variance

32.—A joint and several *bond*, may be declared on simply as a joint bond.

33.—A deed was stated to have been made by the plaintiff of the one part, and the defendant of the other; and on production, it appeared to have been made by the plaintiff and his wife of the one part, and the defendant of the other, this was no variance, although the property demised was the property of the wife before *marriage*.

Records. 34.—In an action for a malicious prosecution, when the declaration in setting out the *judgment* by default, stated "that the plaintiffs should take nothing by their writ, but that they, and their pledges to prosecute, should be in mercy, &c." it was no material variance, that the record produced had not the words "and their pledges to prosecute," but only an "&c."

35.—An indictment for an assault, had the words "whereby his life was greatly despaired of," it was no variance, that an indictment for perjury committed on that trial, in setting out the former indictment, had omitted the word "*despaired*."

36—The word "undertood" for "*understood*" in an indictment for perjury, is immaterial.

37.—When an indictment for *perjury*, alledged that the cause was tried before a judge by name, and the nisi prius record proved as usual, that it was tried before the two judges of assize, of whom the judge named was one, it was no variance.

38.—When an instrument is alledged to have issued under the great *seal* of Great Britain, it is sufficiently proved, by evidence that it issued under the seal of the United Kingdom of Great Britain and Ireland.

39.—A declaration stated an indictment at the general

quarter *sessions*, which was in fact at the general sessions, it was no variance, as the word "quarter" was surplusage.

40.—The introduction of an *unmeaning* word, in the recital of any instrument, is not a fatal variance.

41.—There is no material difference, between *costs* and damages.

42.—An averment that an *issue* was joined, is proved by the production of an information containing two counts, upon each of which issue was separately taken.

43.—The omission of a party's *addition* of younger, is not a fatal misrecital of a record, when it gives rise to no ambiguity.

44.—It was no variance in describing a record in an indictment, to call the *Palace Court* "the Court of the King's Palace at Westminster," instead of "the Court of the King's Palace of Westminster."

45.—In an action for a malicious prosecution, the plaintiff stated under a videlicet, that on a certain day he was *acquitted*, a variance between that day and the day mentioned in the record of acquittal is not material.

46.—In assumpsit for *use* and occupation, the name of the parish is immaterial, and therefore if it be described by a wrong name, it is no variance. Place.

47.—In ejectment, the premises were laid to be in *Farnham*, and proved to be in Farnham Royal, it was not a fatal variance, as it was not shown that there were two Farnhams.

48.—In ejectment, the demise was laid to be by the mayor &c. of the borough town of Maldon, and the charter proved, that the name of the *corporation* was the mayor, &c. of Malden, it was no variance.

49.—In ejectment, premises were described as situate in the parish of *Westbury*, and it was proved that there were two parishes of that name, the one on Tryn, and the other on Severn, it was no variance.

50.—When it was alledged, that the defendant's ship ran down the plaintiff's boat in the *Thames* near the Half-way reach, and it was proved, that it was done in the Half-way reach, it was no variance.

51.—When in ejectment, the premises were described as situate in the parish of West Putworth and Bradford, and it was proved that there was a *part* in each parish, it was no variance.

Statutes. 52.—In an action on the *statute*, to recover double the value of goods removed to prevent a *distress*, if the declaration state that a certain sum is due for rent, it need not be precisely proved as laid, for it is no variance if a less sum be proved.

53.—In an action for the *penalty* on the statute of *usury*, the declaration stated that a specific sum had been lent, but it appeared in evidence that the loan was part money, and part goods of a known definite value, which the party had agreed to take as cash, it was no variance.

Crimes. 54.—An allegation of a charge of *felony*, is supported by proof of a charge upon suspicion of felony.

55.—A variance as to the owner's name, in an indictment for *robbery* in a dwelling house, is not material.

56.—It is no variance, if *arson* be alledged to have been committed in the night time, and the proof shows that it was committed in the day.

Process. 57.—When a declaration for a false return to a *fi. fa.* against two persons, alledged that both of them had goods within the bailiwick, and the evidence only proved that one of them had, it was no variance.

Policy. 58.—If the declaration on a policy of *insurance*, state that the ship sailed after the making of the policy, and the evidence shows that she sailed before, it is an immaterial variance.

Prescription. 59.—A declaration stated a right of common of *pasture*, in respect of a messuage and land, and the proof only established a right of common in respect of the land, there was no variance.

60.—Evidence of a right of common for sheep and *cows*, will support a plea prescribing for common only for sheep.

61.—Where the allegation was, that the plaintiff was entitled to a right of common in respect of a certain *quantity* of land, and it was proved, that he was entitled in respect of a part only of that land, it was sufficient.

Time. 62.—In an action of debt upon a bond, the plaintiff may declare upon a bond bearing *date* on a certain day, and prove a bond delivered on another day, and it is no variance.

SECTION XXXI.

AFFIRMATIVE OF THE ISSUE.

CONTENTS.

1.—*General rule, and its application.*
2.—*Exceptions to the rule.*

I.

General rule.

The fourth rule is, that THE OBLIGATION OF PROVING A FACT, LIES UPON THE PARTY WHO ASSERTS THE AFFIRMATIVE OF THE ISSUE: and as a negative cannot regularly be proved, it is therefore sufficient to deny what is affirmed, until it be established in evidence; but when the *affirmative* has been proved, the other side may contest it with opposite proofs, for it is not merely proving a negative, but establishing some proposition totally inconsistent with what is affirmed. And as a consequence of this rule, that party is entitled to begin, who has asserted the affirmative of the issue; but he must open his whole case in chief, and cannot proceed in parts; for although a *plaintiff*, must have an opportunity of answering any specific fact, which may be adduced by the defendant, and to which an answer may be given, yet he cannot go into general evidence in reply to the defendant's case; for under no circumstances is a plaintiff entitled to go into half his case, and reserve the remainder.

II.

Exceptions. The following are particular cases, where it has been decided, that a party is bound to prove certain facts, although in so doing, he may be obliged to prove a negative, and they may therefore be mentioned as exceptions to the general rule.

1.—When the issue is on the life or death of a person, the proof of the fact, lies upon that party who asserts the *death*.

2.—In prosecutions on the *statute*, for coursing *deer* in inclosed grounds, without the consent of the owner of the deer, it ought to appear, from the evidence produced on the part of the prosecution, that the owner had not given his consent.

3.—When a defendant in a suit for *tithes* in the spiritual court, pleaded that the plaintiff had not read the thirty-nine articles, the defendant was bound to prove that fact, although a negative.

4.—In an action by the owner of a ship, against parties for putting on board a quantity of *combustible* and dangerous articles "without giving due notice thereof" the plaintiff was bound to prove this negative averment.

5.—On an information, for refusing to deliver up the rolls of the auditor of the *exchequer*, the plaintiff must prove the negative.

6.—In an information in the nature of quo warranto, because a defendant has not taken the *sacrament* within a year, the fact that he has not done so, must be proved by the plaintiff.

7.—When the validity of the *seizure* of smuggled goods is in issue, and it is averred to have been unlawful by the plaintiff, the defendant must disprove the illegality.

8.—Where a *servant* has been accustomed to account with her master without any written vouchers, for monies received for his use; it is not sufficient to charge the servant, to show that certain sums have been received by her, it lies upon the master to prove further, that she has not paid them over.

9—In an action by *assignees* of a bankrupt, where the defendant under a notice of set-off, gives in evidence promissory notes dated before the bankruptcy, he must also show, that they came into his hands before that time.

10.—In *informations* on the *game laws*, although the plaintiff must aver that the defendant is not qualified, the proof of that fact, will lie upon the latter, as it is a fact peculiarly within his own knowledge.

11.—When in assumpsit, a defendant pleads *infancy*, and the plaintiff replies, that "the defendant after he had obtained his full age, ratified and confirmed the promise," the ground of defence must be proved by the defendant.

12.—On an agreement to pay £.100, if the plaintiff would not send *herrings* to the London market for a twelvemonth, it was the plaintiff's part to prove that he had not done so.

13.—When there is a *presumption* of law in the favour of one party, the other must disprove it, although his evidence may involve the proof of a negative.

SECTION XXXII.

HEARSAY.

CONTENTS.

I.

General rule.

The fifth rule regulating the production of *proof*, is, that HEARSAY IS NOT ADMISSIBLE AS EVIDENCE OF A FACT; except in the following cases,

1st. The testimony given at a former trial between the same parties, may be received under certain restrictions: 2dly. Dying declarations are admissible in certain criminal cases: 3dly. Declarations which are contemporaneous with an act done, and which are necessary to show its true nature, are admissible: 4thly. Hearsay evidence is admissible in questions of pedigree, and legitimacy: and 5thly. Evidence of reputation and tradition, may be received in questions of public rights, customs, boundaries and prescriptions.

II.

1st. exception. Second trial.

The first exception, to the rule excluding the admission of hearsay evidence, is where there is a second *trial* between the same parties, and in which, the point at issue is precisely the same; and when a *witness*, who was sworn and examined at the former trial, is dead, or does not appear upon his subpœnâ, and there is reason to believe, that he is kept away by the *contrivance* of the opposite party; the courts will allow the testimony he gave at the former trial, to be proved either by the judge's notes, or by any one who heard him give the evidence, if that person, will undertake to swear to the *precise* words used by the witness, and not merely to their effect. And for the purpose of introducing an account of what a deceased witness swore on the first trial, the *nisi prius* record with the postea indorsed, is good evidence, to show that the cause came on to be tried, or that it actually was tried.

III.

2d. exception. Dying declarations

The second exception is, that declarations made by a person, who has received a mortal injury, and who is under the apprehension of immediate *death*, are admitted as evidence, after the decease of the party, if he would have been an admissible witness

whilst living; but only in cases, where the death of the deceased, is the crime charged against the prisoner; for evidence of the dying declarations of a person who was not a relation, nor in any manner connected with the parties, was refused, on a question of pedigree, tried in an action of *ejectment*. As a preliminary step to the reception of dying declarations, even in cases where they are admissible as evidence, it is necessary to satisfy the court, either from the nature of the injury sustained by the deceased, or from his expressions, that at the time of making the declarations, he was fully aware of his danger, and had given up all hopes of recovery. The declarations of a person, who has been convicted of an offence for which he is to suffer death, even when made just before his *execution*, are not admissible in evidence against an accomplice, inasmuch as the party himself could not have been examined as a witness, at any time after his conviction.

IV.

3d. exception. Contemporaneous declarations.

The third exception to the rule is, that in cases where it is necessary in the course of a trial, to inquire into the nature of any particular act; proof may be given, of what the party who did the act, said or wrote at the time, in order to show the true nature of the transaction; but evidence of the declarations of a man since dead, as to a fact done by *himself* is not admissible.

The following cases are given as illustrations, where evidence of hearsay, has been admitted under this exception.

1.—In an action by the assignees of a *bankrupt*, his declarations, made at the time of his absenting himself from his house, were received to show his motive for so doing.

2.—In an action of assault by husband and wife, for an assault upon the *wife*, her declarations immedi-

ately upon receiving the hurt, were considered as admissible in evidence.

3.—In actions of assault, what a man has said to his *surgeon*, is received as evidence, to show the extent of the injury received by the assault.

4.—In an action by a husband, on a policy of *insurance* on the life of his wife, her declarations made at the time it was effected, were received in evidence to show her own opinion of her health at that time.

5.—In actions for criminal conversation, the declarations of the wife at the time of her *elopement*, and which state her reason for so doing, are received as evidence against the *husband*.

6.—In an action for destroying a *picture*, which was exposed to public inspection, the declarations of the spectators made at the time, were received to show a libellous meaning in the picture.

V.

4th. Exception. Of pedigree, &c.

The fourth exception is, that in questions of pedigree, legitimacy, or the time of the *birth* of a child, hearsay and reputation are admitted as evidence; if it be shown, that "the *tradition* comes from persons having such a connection with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken." But declarations which are made, either when a suit has been commenced, or when there is a *controversy* preparatory to one, upon their subject matter; or when they are made by a party, who could not have been examined as a *witness*, had he been alive; or such as are of matters of public *notoriety*, and which may therefore be proved by better proof, are not admissible in evidence.

The following cases are given as illustrations, where evidence of hearsay has been received under this exception.

1.—Proof by one of the family, that a particular person had gone *abroad* many years before, and was supposed to have died there, and that the witness had not heard in the family, of his having married,

was considered as good *prima facie* evidence of the person's death without lawful issue.

2.—Declarations made by a deceased husband, as to the *legitimacy* of his wife, are evidence, although he is not related to her by blood.

3.—The declarations of deceased persons supposed to have been married, are admissible to disprove the fact of *marriage*.

4.—The declarations of a parent, are good evidence after his or her death, to prove that a *child* was born before or after marriage; but not to prove want of *access*, so as to bastardize a child born during the supposed marriage.

5.—The declarations of a deceased parent are admissible to prove the *time* of the birth of a child, but not the *place*.

VI.

5th. exception. Questions of public rights, &c.

The last exception to the general rule is, that in questions of *public rights*, customs, *boundaries*, or *prescriptions*, reputation or tradition is good evidence, if it come from an unpolluted quarter; and the declarations on which it is founded, were not made after the same *question*, was become a subject of *controversy*; but the tradition of a particular *fact*, said to have been done in the exercise of the right, which is the subject of litigation, will not be evidence of that right. Nor will reputation be evidence of *private* rights, as of the privilege of cutting *wood*, or of the boundaries between two *estates*; although it has been received to show, whether or not a place is parcel of a *sheep walk*, and to show that *rent*, which was to be payable by a parol demise, from Lady-day, was meant by the custom of the country, to be payable from Old Lady-day. And the declarations of deceased *tenants*, are admissible to show that particular pieces of land, are part of an estate which they occupied; and proof that they exercised acts of ownership upon it, when not resisted by contrary evidence, is decisive.

SECTION XXXIII.

DEMURRERS TO EVIDENCE.

Demurrers to evidence.

These are *analogous* to demurrers upon facts alledged in pleading, and are the proceedings by which a judge is called upon, to determine what the law is upon the facts in evidence; and the party demurring, must *admit* every fact and conclusion, which the evidence conduces to prove.

SECTION XXXIV.

BILLS OF EXCEPTIONS.

Bills of exceptions.

If a judge at the *trial* of *civil cases*, either at bar, or at nisi prius, decide upon the admissibility, or inadmissibility of any particular evidence, to the aggrievance of *either* the plaintiff, or the defendant; the aggrieved party may tender to such judge, a bill of exceptions, which he is bound to seal, in all cases where a writ of *error* will lie, and to acknowledge, when the error comes on to be tried.

TABLE OF AUTHORITIES.

In the following table, a similar division into sections and clauses has been adopted; and it may perhaps be necessary to observe, that the detached words refer to, and correspond with, the words printed in italics, in the corresponding sections and clauses in the body of the work; and also, that the book cited as an authority, is always a report, unless particularly distinguished.

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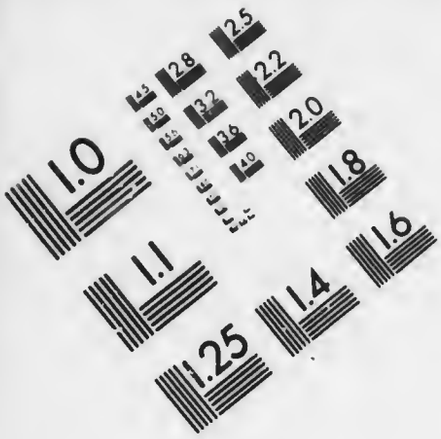

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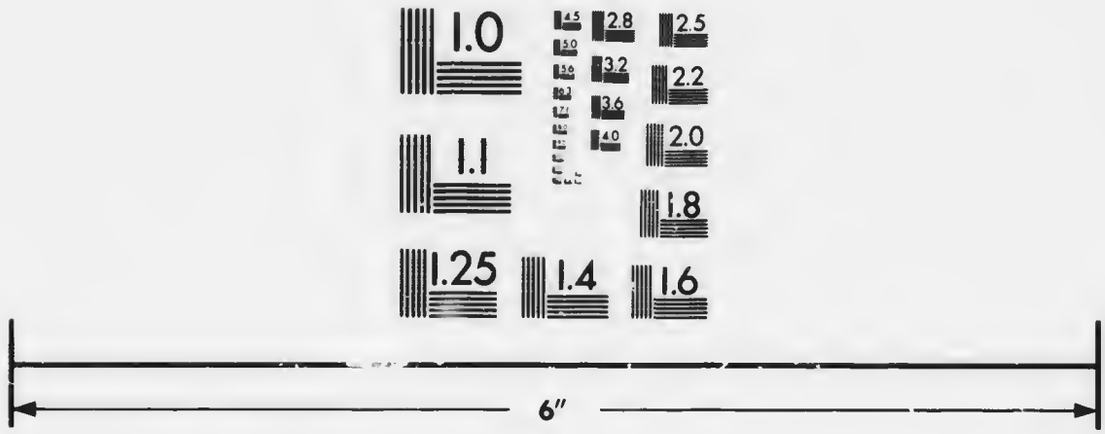

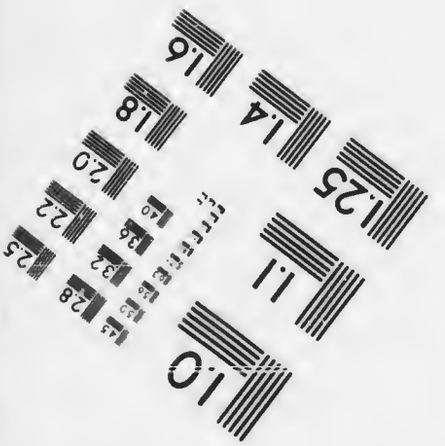

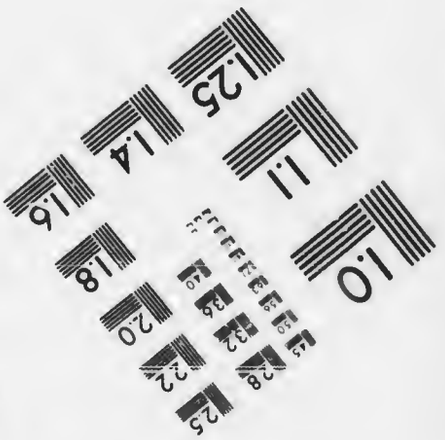

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