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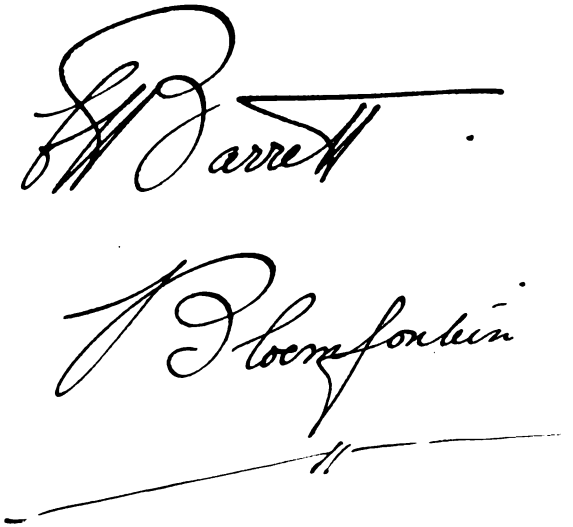

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IN preparing this Edition for the Press we have not departed from the lines on which the previous Editions were based. We have considered all the cases upon the subjects dealt with in this Book which have been reported since the last Edition down to April, 1904, and have incorporated such of them as we deemed of sufficient importance in this Edition, and have also incorporated a few cases reported since that date. We have eliminated certain matters mainly of historical interest, and have otherwise compressed the present Edition, so that in spite of the very considerable amount of new matter introduced into this Edition it will be found to be shorter by several pages than the previous Edition.

JOHN CUTLER,
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LINCOLN'S INN,
July, 1904.

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c. 43.	(County Courts Act, 1888)—	
	ss. 110, 111, 112	396
	s. 180	281
52 & 53 Vict. c. 10.	(Commissioners for Oaths Act, 1889), s. 6 ...	271
c. 63.	(Interpretation Act, 1889)—	
	s. 9	279
	s. 26	71
53 & 54 Vict. c. 5.	(Lunacy Act, 1890), s. 329	69, 72
c. 63.	(Companies (Winding-up) Act, 1890), s. 8 ...	399
c. 71.	(Bankruptcy Act, 1890), s. 27	98
54 & 55 Vict. c. 17.	(Charitable Trusts Recovery Act, 1891), s. 5...	304
c. 39.	(Stamp Act, 1891)—	
	s. 10	510
	s. 12	506
	s. 14	505
	s. 15 (1)	506
55 & 56 Vict. c. 4.	(Betting and Loans (Infants) Act, 1892)—	
	s. 1	55
	s. 3	265
c. 37.	(Merchant Shipping Act, 1892), s. 1	55
c. 57.	(Private Street Works Act, 1892), s. 57 ...	192
c. 64.	(Witnesses (Public Inquiries) Protection Act, 1892), ss. 1, 2	424
56 & 57 Vict. c. 71.	(Sale of Goods Act, 1893)	13
	s. 4	346
57 & 58 Vict. c. 16.	(Judicature Act, 1894), s. 3	8, 136
c. 41.	(Prevention of Cruelty to Children Act, 1894)—	
	ss. 13, 14	461
	s. 15	23, 42
	s. 17	263
c. 60.	(Merchant Shipping Act, 1894)—	
	s. 24	331
	s. 697	267
58 & 59 Vict. c. 9.	(Documentary Evidence Act, 1895)	270
61 & 62 Vict. c. 36.	(Criminal Evidence Act, 1898)... ...	33, 37
	s. 1 (e)	99
c. 41.	(Prisons Act, 1898), s. 11	403

CORRIGENDA.

Page 15, note (*b*), for "*McQuin*" read "*McQuire*"; and for "111" read "100."

Page 16, note (*f*), for "*McQuin*" read "*McQuire.*"

Page 42, note (*q*), for "*Farmer*" read "*Farman.*"

Page 47, note (*c*), for "*Williamson*, L. R." read "*Williams & Sons*, [1892]."

Page 56, note (*t*), for "*Paris*" read "*Pares.*"

„ note (*y*), *Moore, Nettlefold & Co.* v. *Singer* on appeal is now reported [1904] 1 K. B. 820; 73 L. J. K. B. 457; 90 L. T. 469; 52 W. R. 385.

Page 78, note (*d*), *Attorney-General* v. *Winans* in the House of Lords is now reported [1904] A. C. 287; 73 L. J. K. B. 613. The decision of the Court of Appeal was reversed on the ground that the Crown had not proved a fixed and settled intention of the testator to abandon his domicil of origin and to finally settle in England.

Page 87, note (*e*), for "*Baines*" read "*Daines.*"

Page 107, note (*q*), for "243" read "143."

Page 145, note (*z*), for "6 Ch. 716" read "3 Eq. 683."

Page 152, note (*k*), for "*Sampter*" read "*Samples.*"

Page 177, note (*q*), for "*Toucke*" read "*Touche.*"

Page 182, note (*u*), for "*Price*" read "*Preece.*"

Page 203, note (*b*), for "*Collins*" read "*Collinson.*"

Page 209, note (*s*), for "*Squire*" read "*Ogilvie.*"

Page 359, note (*a*), for "1902" read "1901."

Page 389. Words which have been deleted on a written contract by the intention of all the parties cannot be regarded as bearing upon the construction of the contract (*Inglis* v. *Buttery*, 3 App. Cas. 552). Nor can words removed from the specification of a patent by amendment be regarded in construing the specification (*Hattersley* v. *Hodgson*, 21 R. P. C. 517).

Page 517. The House of Lords, when sitting as the court of final appeal, can and will hear witnesses.

[*To face page 1.*

THE

Principles and Practice

OF THE

LAW OF EVIDENCE.

PART I.

CHAPTER I.

GENERAL PRINCIPLES OF EVIDENCE.

EVIDENCE plays such an important part in the practical administration of justice, that a knowledge of the law of evidence is obviously of the greatest importance. As preliminary to treating of the rules of law applicable to evidence, the question must be propounded, and, as far as possible, answered—What is evidence?

Since demonstrative certainty is unattainable in any of the affairs of daily life, Courts of Justice, like individuals, are compelled to be satisfied with that inferior kind of certainty which is called moral. All moral science, of which law is the practical expression, consists intrinsically of inquiry and investigation, which are infinite by nature, but finite by necessity; and, in the administration of justice, the exigencies of public and private business require that this limit should be neither recondite nor fanciful, but well

defined and according with the maxims and experience of common sense. Therefore moral probability, or, as it is somewhat erroneously termed, moral certainty, is the utmost to which the science of legal evidence aspires. In this respect, the analogy between ethics, or moral philosophy, and the English Law of Evidence, is complete. As in ethics, and in all purely transcendental inquiries which seek for knowledge beyond the limits of the senses, the logical result is seldom more than a slight elevation or depression of one of two or more sets of competitive probabilities (*a*): so moral philosophy, when applied to the daily business of life, and made a standard and a test of the existence or non-existence of uncertain and disputable facts, gives, as the result, only a greater or less amount of verisimilitude, or probability. The region of evidence lies, therefore, between moral certainty on the one hand, as its most perfect extreme, and moral possibility on the other, as its most imperfect extreme. It does not look for more than the first, and it will not act on less than the last. Its whole object is to produce those convictions which spring spontaneously from the suggestions of the intuition, as embodied in the conclusions of the reasoning or comparative faculty of the mind: and in every case the last conclusion of the speculative intellect rightly suggests and governs the first outward operation of the practical mind (*b*). From such a speculative conclusion there may spring also ulterior inferences, connected strictly in a chain of cause and effect: for if a strong probability be raised by express evidence, unless the probable consequence may be inferred, the business of life could not be conducted, and justice could not be administered (*c*). Although it is true that civil cases may be decided on

(*a*) Cicero de Officiis: Butler's Analogy of Religion.
(*b*) Aristotle, Eth. Nic. lib. 6.
(*c*) *Per* Lord CAMPBELL: *Wheelton* v. *Hardisty*, 8 E. & B. 279.

a preponderance of probability in criminal cases there must exist no reasonable doubt (*d*).

Evidence of eye-witnesses.—It is often stated that the English Law of Evidence may be regarded as primarily always striving after the testimony of eye-witnesses. Yet the statements of eye-witnesses, although always valuable, are so far from being, as is sometimes supposed, of a demonstrative character, that they are often intrinsically less satisfactory than many other grades of presumptive evidence, which are nominally inferior. Ignorance, passion, prejudice, and other constitutional infirmities of a witness, which are far beyond the sight or conjecture of either a judge or a jury, may, and constantly do, without the consciousness of the deponent, distort his evidence so far as to render it absolutely worthless; although it may be delivered with perfect calmness and consistency, and even remain unshaken by the most searching cross-examination. As a general rule, however, a rigid cross-examination, coupled with a careful observation of the demeanour of the witness, will throw considerable light upon his credibility. Simplicity, minuteness, and ease are the characteristics of truth; evasion, exaggeration, over-zeal for either party, too great readiness in answering, are indications of insincerity, if not of falsehood. A still more alarming ground for distrust lies in the possibility that a witness may be committing deliberate perjury; and the experience of the profession adds weight to this deplorable hypothesis.

Reliance placed upon statements of others.—The reliance placed upon the statements of others arises from an instinctive tendency to confide in their veracity, and from our faith in human testimony being on the whole sanctioned by experience. This reliance is

(*d*) *R.* v. *White*, 4 F. & F. 383.

increased by corroboration. In spite of the maxim *testimonia ponderanda sunt non numeranda*, the evidence of three witnesses carries more weight than that of two, *i.e.*, where the three witnesses are independent, and the weight of their evidence has not been lessened by cross-examination or otherwise. It should also be noted, that in estimating the value of evidence more weight should be given in matters of observation to the testimony of an educated than to that of an uneducated man; and that the testimony of a man who swears positively that a certain conversation took place is of more value than that of one who says that it did not, because the evidence of the latter may be explained by supposing that his attention was not drawn to the latter at the time (*e*). Another ground for reliance on human testimony is its probability, *i.e.*, its accordance with facts previously known and believed. But although probability is useful as an aid to considering the true value of direct evidence, it can seldom with safety be had recourse to alone for the purpose of entirely invalidating direct evidence. As connected with this subject the remarks of Lord WENSLEYDALE may be quoted, that—

"There is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts, according to the ordinary course of human affairs and the usual habits of life" (*f*).

Another valuable maxim is that when any inconsistency is apparent between the testimony of a witness and his previous conduct, the court should look rather to the acts of the witness than to his statements when called as a witness (*g*).

(*e*) *Chowdry Debi Persad* v. *Dowlut Sing*, 3 Moo. I. A. 357.
(*f*) *Mir Asadulah* v. *Bibi Imaman*, 5 Cal. W. R., P. C. 26.
(*g*) See *Re Barr's Trusts*, 4 K. & J. 236.

The best evidence is required by Courts.—It is universally the object of courts to obtain the *best* evidence. Hence secondary or second-hand evidence is generally inadmissible; and it is an inflexible rule, that secondary evidence is always inadmissible until the absence of primary evidence has been explained to the satisfaction of the court. Thus, in a dispute on a contract under seal, the deed is primary evidence, and should be produced to show the terms of the contract. As long as it exists, and can be obtained by reasonable diligence, no other written or oral evidence of its contents will be received; but if it be destroyed, or if it cannot be found after proper search, or if an adverse party, holding it, refuses to produce it after due notice, then either written or oral evidence may be given by anyone who is acquainted with the contents of the deed. The rule is the same in the case of written contracts, not under seal. As long as the writing exists, it must be produced, if possible; but if it be impossible to produce it, the court will allow the contract to be proved by secondary evidence.

Indirect evidence.—Where direct evidence is not obtainable, and in many cases where it is, the law permits facts to be proved by indirect evidence, which is usually called presumptive or circumstantial, but is better described as inferential. Even direct evidence, when analysed, is found to be to a certain extent presumptive, as it depends for its weight on a number of circumstantial peculiarities which affect the credibility of the witness or other proof: while it has been asserted that what is termed circumstantial evidence is of a nature identical with direct evidence (*h*). It is, however, desirable to treat it as differing. Presumptive or circumstantial evidence, as distinct from direct evidence, consists of inferences drawn from established

(*h*) Wills on Circumstantial Evidence, p. 23.

facts, *i.e.*, certain collateral facts being established or assumed, the court either presumes or is asked to presume from these the *factum probandum*. To give two simple illustrations: If a man be stabbed in a house, and another man be seen running from the house immediately after, with a blood-stained sword in his hand, the flight, the weapon, and the blood raise, in legal language, a violent presumption that the second man murdered the first (*i*). Similarly, in larceny, where goods have been stolen by a person unknown, and they have been found shortly after in the possession of the prisoner, juries are always told by judges that on this evidence alone they are bound to convict, unless they are satisfied with the prisoner's explanation of the manner in which he obtained the goods. In dealing with this class of evidence it is necessary to consider the weight which is to be given to the united force of all the circumstances put together (*k*), or, as has been remarked by a learned writer (*l*) (and the remark is universally applicable to all presumptive evidence), it must be admitted that, like every other rule of human institution, it will sometimes fail to guide rightly. Lord HALE mentions a case, which he says was tried before a very learned and wary judge, where a man was condemned and executed for horse-stealing, upon proof of his having been apprehended with the horse shortly after it was stolen; and afterwards it came out that the real thief, being closely pursued, had overtaken the man upon the road, and asked him to hold the horse for him for a few minutes. The thief escaped, and the innocent man was apprehended with the horse (*m*). In such cases, and generally, it is well to bear in mind, that where it is sought to establish a theory by circumstantial evidence, all the facts proved must be consistent with the theory;

(*i*) Co. Litt. 6, b.
(*k*) *Per* Lord CAIRNS: *Belhaven Peerage Case*, 1 App. Cas. 279.
(*l*) Russell on Crimes, by Greaves; note by editor.
(*m*) 2 Hale, P. C. 289.

but there must also be some one substantial credible fact inconsistent with the contrary (*n*). Hence it has been decided, that since there can be no larceny of goods unless there be a felonious intention in the taker's mind at the time of the taking, a mere fraudulent conversion of goods by the taker after the taking is no evidence that he had a felonious intention at the time of taking, because such a mis-appropriation is consistent with the theory that he had no felonious intention at the time of the taking, but that he conceived the intention subsequently (*o*).

What, then, is meant by the term evidence?—In the first place it must be borne in mind that there is a wide distinction between evidence and proof, which is the effect of evidence. When the result of evidence is undoubting assent to the certainty of the event or proposition which is the subject-matter of the inquiry, such event or proposition is said to be proved (*p*). Evidence, then, includes all legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation (*q*). There are several divisions of evidence, of which the most important are the divisions into (1) primary and secondary, (2) sufficient and satisfactory, (3) direct and inferential, (4) original and second-hand, (5) oral, documentary and real. The first four divisions will be discussed elsewhere. The fifth, which is a threefold division, explains itself; but an illustration may convey a clearer notice of real evidence to the student: When a knife, covered with blood, is found close to the body of a murdered man, the production of the knife in court is offering real evidence.

(*n*) *Per* WILLES, J.: *Great Western Rail. Co.* v. *Rimmell*, 18 C. B. 575.
(*o*) *R.* v. *Christopher*, Bell, 27.
(*p*) Whately's Logic, book iv. ch. iii. s. i.
(*q*) Taylor on Evidence, s. 1.

The law of evidence applicable in every case is that of the lex fori. To quote the words of Lord BROUGHAM:

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

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

By s. 3 of the Judicature Act, 1894 (57 & 58 Vict. c. 16), power was given to the Rule Committee to make Rules for regulating the means by which particular facts may be proved, and the mode in which evidence thereof may be given (a) on applications in matters relating to the distribution of any fund or property, and (b) on any application upon summons for directions pursuant to the Rules. The only Rule which has been made under this power is Rule 7 of Order XXX., which is that on the hearing of a summons for directions: "The court or a judge may order that evidence of any particular fact, to be specified in the Order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries, or otherwise as the court or judge may direct."

This Rule, which applies to the Chancery Division as well as to the King's Bench Division, embodies the only existing power enabling judges of the High Court to dispense with the technical rules of evidence otherwise than by consent (*s*).

(*r*) *Bain* v. *Whitehaven Rail. Co.*, 3 H. L. Cas. 1.
(*s*) *Baerlein* v. *Chartered Mercantile Bank*, [1895] 2 Ch. p. 492.

CHAPTER II.

THE FUNCTIONS OF JUDGE AND JURY.

Questions of law (other than foreign law) are for the judge; questions of fact are (subject to what is hereinafter mentioned) for the jury.

It is for the judge to explain the law to a jury; and the jury is bound to take the law to be that which the judge tells them that it is. It is for the judge to tell them how the law is applicable to the issues of fact, and to distinguish for them questions of law from those of fact; and to decide on the competency of witnesses. So also it is the function of the judge to determine whether a witness be sane or insane; whether dying declarations, in cases of homicide, are admissible evidence as having been made by the deceased in the expectation of immediate death; whether secondary evidence may be substituted for primary evidence (*a*); whether a document comes from proper custody, or is properly stamped; and generally on all conditions precedent to the reception of evidence. But when the existence or non-existence of a document is a substantial issue in an action, that question is for the jury. In such a case, if a copy is tendered as secondary evidence, the judge will admit it, but the question of the existence or non-existence of the original must ultimately be left to the jury (*b*). When the judge has once admitted evidence, his function is complete (*c*): though if, after admitting a witness to give evidence, he

(*a*) *Boyle* v. *Wiseman*, 10 Ex. 647.
(*b*) *Stowe* v. *Querner*, L. R. 5 Ex. 155.
(*c*) *Heslop* v. *Chapman*, 12 Q. B. 928.

is convinced by proof of subsequent facts, and by observation of the witness's demeanour, that the latter is not competent, he may withdraw such evidence from the jury (*d*). He has nothing whatever to do with the *credibility* of evidence, which is a consideration solely for the jury. Of course where the judge discharges at once his own peculiar functions and also those of the jury, then it is his duty to estimate the credibility as well as the admissibility of evidence: and in such cases where the testimony being conflicting, a judge of first instance has based his decision on the credibility of the witnesses, a Court of Appeal will not, except in cases of extreme pressure, reverse his decision. When, however, the decision does not depend on the credibility of the witnesses, but is based on inferences drawn from the evidence, it may, even without such pressure, be reversed by the Court of Appeal (*e*). This has been sometimes pressed so far as to say that a Court of Appeal cannot, or perhaps rather ought not to, interfere with the finding of a judge of first instance on a question of fact, but this is not so. The hearing upon an appeal is a rehearing, and there is no presumption that the judgment in the court below is right. Of course when the judge of first instance has heard the witnesses, and has had an opportunity of testing their credit by their demeanour under examination, which the appellate tribunal does not possess, great weight should be attached to the finding of fact at which a judge of first instance has arrived: and where a jury has found a fact, an appeal is not a rehearing of such a fact, because the constitution has placed in the hands of the jury the jurisdiction to find the fact, and in such a case the appellate court can only disturb the verdict where, in their judgment, the jury have not done their duty: but upon appeal from a judge, where both fact and law

(*d*) *R.* v. *Whitehead*, L. R. 1 C. C. R. 33. See also *R.* v. *Hill*, 2 Den. 254.
(*e*) *The Glannibanta*, 1 P. D. 283.

are open to appeal, the appellate tribunal is bound to pronounce such judgment as in their view ought to have been pronounced by the court from which the appeal proceeds (*f*).

It is also the duty of the judge to instruct the jury in the rules of law, by which evidence in particular cases has to be weighed; but in summing up a case to a jury the judge will, in his discretion, comment, or decline to comment, on the weight of evidence. It would appear that the latter course is his strict duty; and that he may be regarded as *functus officio* when he has laid the real issues, with the evidence that bears on them, before the jury, and stated the rules of law applicable to the evidence, and the general principles applicable to the case. Practically, however, this rule is not observed inflexibly; and in many cases, which consist in equal and inseparable parts of law and fact, it is found to be impossible to declare the former without revealing opinions as to the latter. Subject to the above, the effect of the evidence in proving or disproving a question of fact is for the jury. But before a question of fact falls for the decision of the jury, the judge must first decide whether there is any sufficient evidence to be left to the jury.

The ancient rule is, however, exploded, by which a judge was bound to leave a case to a jury if there was *any* evidence for their consideration. Where there is merely a *scintilla* of evidence a judge ought not to leave it to a jury (*g*); and the test whether any evidence only amounts to a *scintilla* is to assume that there is no evidence to contradict such evidence, and then to inquire whether there would be evidence which would justify a jury in finding a verdict (*h*). It is of course a

(*f*) See *per* Lord HALSBURY, L.C., in *Rickmann* v. *Thierry*, 14 R. P. C. 116.

(*g*) *Giblin* v. *McMullen*, L. R. 2 P. C. 335; *Ryder* v. *Wombwell*, L. R. 4 Ex. 32.

(*h*) *Per* MELLISH, L.J.: *Ex parte Morgan*, 2 Ch. D. 90.

very delicate function for a judge to withdraw a case from a jury on the ground either that there is no evidence, or merely a *scintilla;* and it seems that, when there is any sort of *primâ facie* presumption in a case (*i*), or a condition of facts which does not clearly negative the supposition that there is *some* evidence, the decision is for the jury, and not for the judge (*j*), and the evidence has never been held to amount to a *scintilla* only in a case where a witness has positively sworn to something having taken place within his own knowledge, by which, if it did take place, the case was proved (*k*). A judge at a trial cannot nonsuit a plaintiff upon the opening of his counsel without that counsel's consent when he desires to call his witnesses (*l*).

Reasonable and probable cause is generally for the jury, although in actions for malicious prosecution and false imprisonment the question is one for the judge. But in all these cases the jury find the facts, and the inferences from facts, on which the theory of reasonableness or probability is founded.

In an action for false imprisonment the judge is to say whether the facts, as found by the jury, disclose reasonable and probable cause for arresting (*m*), and in an action for malicious prosecution, what circumstances would show that the defendant was actuated by malice (*n*). Malice is always a question for the jury, and it is noticeable that the absence of reasonable and probable cause is some evidence from which malice may be inferred, but only in conjunction with the other facts of the case which go to establish the exist-

(*i*) *Dare* v. *Heathcote*, 25 L. J. Ex. 245.
(*j*) *Jewsbury* v. *Newbold*, 26 L. J. Ex. 247.
(*k*) *Ex parte Morgan*, 2 Ch. D. 90.
(*l*) *Fletcher* v. *London and North Western Rail Co.*, [1892]1 Q. B. 122.
(*m*) *Lister* v. *Perryman*, L. R. 4 E. & I. 521 ; *cf. West* v. *Baxendale*, 9 C. B. 141.
(*n*) *Haddrick* v. *Heslop*, 12 Q. B. 275.

ence of malice (*o*). In an action for false imprisonment, where the defendant relied on the Pawnbrokers Act, 1872, it was held that the question whether the defendant reasonably suspected that a certain article had been stolen was for the judge (*p*).

What is a reasonable time for the performance of an act?

This question is generally governed by fixed legal rules, as in cases of notices to terminate service or employment. In other cases, what is a reasonable time is for the jury. But there are a few exceptional cases in which the question is considered to be for the judge, as what is a reasonable time for an executor to remove goods from the testator's mansion. Formerly what was a reasonable time for delivering goods was treated as a question for the judge (*q*), but now all questions of reasonable time in regard to the sale of goods are questions of fact under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

Contracts in restraint of trade.

The question whether a contract in restraint of trade is reasonable is for the judge, although there may be matters of fact forming elements in the determination of the question, which, if undisputed, may have to be ascertained through the medium of the jury (*r*).

Reasonable skill, due diligence, and negligence, are questions for a jury.

Whether a surgeon has treated his patient with reasonable skill, and whether an agent is fitted to perform his duties (*s*), are examples of this rule.

(*o*) See *Brown* v. *Hawkes*, [1891] 2 Q. B. 718.
(*p*) *Howard* v. *Clarke*, 20 Q. B. D. 558.
(*q*) *Startup* v. *Macdonald*, 6 M. & G. 593.
(*r*) *Dowden and Pook Limited* v. *Pook*, [1904] 1 K. B. 45.
(*s*) *McCall* v. *Australian Meat Co.*, 19 W. R. 189.

It was laid down by the House of Lords in *Metropolitan Rail. Co.* v. *Jackson* (*t*) that in actions for negligence it is for the judge to say whether from any given state of facts negligence *can* legitimately be inferred, and it is for the jury to say whether it *ought to be* inferred. In such actions it has been held that there are some accidents which imply negligence from the very nature of the circumstances (*u*), as where the plaintiff was struck by a brick which unexpectedly fell from a railway viaduct immediately after a train had passed, though when there is no such presumption, the plaintiff must, of course, give affirmative evidence of negligence (*x*); and where the evidence for the plaintiff is equally consistent with the existence or absence of negligence, the case must be withdrawn from the jury (*y*).

The rule applies equally where gross negligence is charged. In *Doorman* v. *Jenkins* (*z*), TAUNTON, J., said:

"A great deal has been said on the question whether gross negligence is a question of law or fact. Such a question will always depend on circumstances. There may be cases where the question of gross negligence is matter of law more than of fact, and others where it is matter of fact more than of law. An action brought against an attorney for negligence turns upon matter of law rather than fact. It charges the attorney with having undertaken to perform the business properly; and alleges, that from his failure to do so, such and such injuries resulted to the plaintiff. Now, in nineteen cases out of twenty, unless the court told the jury that the injurious consequences did, *in point of law*, follow from the misconduct of the defendant, they would be utterly unable to form a judgment on the matter. Yet even there the jury have to determine whether in point of fact the defendant has been guilty of that particular misconduct. On the other hand, take the case of an action against a surgeon for negligence in the treatment of his patient. What law can there possibly be in the question whether such and such conduct amounts to negligence? That must be determined entirely by the jury."

(*t*) 3 App. Cas. 193.
(*u*) *Scott* v. *London Dock Co.*, 3 H. & C. 596; *Kearney* v. *London, Brighton and South Coast Rail. Co.*, L. R. 6 Q. B. 759.
(*x*) *Manzoni* v. *Douglas*, 6 Q. B. D. 145.
(*y*) *Cotton* v. *Wood*, 8 C. B. (N.S.) 568. (*z*) 2 Ad. & E. 261.

Malice, *bona fides*, actual knowledge, and real intention, are questions for a jury.

In actions for defamation it is matter of law for the judges to determine whether the occasion of writing or speaking defamatory language, which would be otherwise actionable, repels the inference of malice, and constitutes what is called a privileged communication. If, however, there is any evidence of malice it should be left to the jury (*a*); although, if there is no evidence of malice, the judge must direct a verdict for the defendant. As to a statement in the nature of a criticism on any public matter (whether it be the conduct of public men or the proceedings in courts of justice or in Parliament, or the publication of a scheme or a literary work), it is for the judge to decide whether there is any evidence on which a rational verdict for the plaintiff can be founded (*b*), *e.g.*, in the case of a document, whether it is capable of being reasonably interpreted as travelling beyond the limits of fair criticism; subject to this, it is for the jury to decide whether the statement goes beyond the limits of fair comment (*c*). The question whether a report of legal proceedings is a fair one is also for the jury (*d*).

The question, libel or no libel, is, since Fox's Act (32 Geo. 3, c. 60), for the jury, subject to the direction of the judge in criminal cases: and it was formerly held that the practice in civil cases should be the same as in criminal cases (*e*). A judge, however, can and ought to withdraw the case from the jury when the words are in his opinion not reasonably capable of

(*a*) *Harrison* v. *Bush*, 5 E. & B. 344. As to the way in which such cases should be left to the jury, see *Hart* v. *Gumpach*, L. R. 4 P. C. 434; *Clark* v. *Molyneux*, 3 Q. B. D. 237; and *Jenoure* v. *Delmege*, [1891] A. C. 73.

(*b*) *McQuin* v. *Western Morning News*, [1903] 2 K. B. 111.

(*c*) See *Merivale* v. *Carson*, 20 Q. B. D., at p. 280.

(*d*) *Street* v. *Licensed Victuallers' Society*, 22 W. R. 553.

(*e*) *Baylis* v. *Lawrence*, 11 A. & E. 920.

defamatory meaning (*f*), although it is only when the judge is satisfied that the publication cannot be a libel, and that, if it is found by the jury to be such, their verdict will be set aside, that he is justified in withdrawing the question from their cognizance (*g*). But where the plaintiffs complained of a circular published by the defendants, to which the plaintiffs, by innuendo, attached a particular meaning, namely that it imputed to them insolvency in their business, but at the trial gave no evidence in support of such innuendo, it was held by the House of Lords that the case might be dealt with as if there was no innuendo, and that there was no case to go to a jury (*h*). In *Thomas* v. *Williams* (*i*), where the plaintiff sought an injunction from a judge of the Chancery Division to restrain the publication of a libel injurious to his trade, it was objected by the defendants that, since Fox's Act, no relief could be given by any court upon a libel unless the libel had been in the first place submitted to the decision of a jury. But FRY, J., granted the injunction, and said that the objection was untenable, that Fox's Act has nothing to do with civil actions based on libel, and that under the Judicature Act an action for libel can be tried in the same way as any other action.

It is for the judge to say whether words in ordinary use have a defamatory meaning; but for the jury to say whether words of a cant or slang character have acquired such a meaning (*k*), or what meaning and construction would render the publication of the words complained of libellous *per se* (*l*); and the substantial truth of an alleged libel will also be for the jury (*m*).

(*f*) *Hunt* v. *Goodlake*, 43 L. J. C. P. 54; *cf. McQuin* v. *Western Morning News*, *ubi supra*.
(*g*) *Cox* v. *Lee*, L. R. 4 Ex. 288.
(*h*) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741.
(*i*) 14 Ch. D. 864.
(*k*) *Barnett* v. *Allen*, 3 H. & N. 376.
(*l*) *Stannus* v. *Finlay*, Ir. R. 8 C. L. 264.
(*m*) *Alexander* v. *North Eastern Rail. Co.*, 6 B. & S. 340.

What are "necessaries" in the case of infants.

In an action for goods sold and delivered, where the plea is infancy, and the replication that the goods are necessaries, the jury will pronounce them to be necessaries or not necessaries according to the condition of the infant. But it was laid down by the Exchequer Chamber, that before they do so the judge must decide, first, whether the case is such as to throw on the plaintiff the *onus* of proving that the articles are necessaries, and, secondly, whether there is any evidence to go to the jury to satisfy that *onus* (*n*).

The construction of written documents is for the judge; but the construction of peculiar or technical phrases is for the jury.

Thus the judge will instruct the jury as to the meaning of Acts of Parliament, records, deeds, wills, and written contracts generally, even where the evidence is secondary (*o*); and the jury is bound to follow his construction. But it seems that the question, whether an article is of a certain description mentioned in an Act of Parliament, is for the jury (*p*). In *Hutchinson* v. *Bowker* (*q*), PARKE, B., said:

"The law I take to be this: that it is the duty of the court to construe all written instruments; if there are peculiar expressions used in it which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what *the meaning of those expressions* was, but for the court to decide what *the meaning of the contract* was."

In that case, it was attempted to prove a contract for the sale of barley, by letters, one of which offered *good* barley, and the other accepted the offer, "expecting

(*n*) *Ryder* v. *Wombwell*, L. R. 4 Ex. 42.
(*o*) *Herwick* v. *Horsfall*, 4 C. B. (N.S.) 450.
(*p*) *Brunt* v. *Midland Rail. Co.*, 2 H. & C. 889; *Woodward* v. *London and North Western Rail. Co.*, 26 W. R. 354.
(*q*) 5 M. & W. 542.

you will give us *fine* barley and good weight"; and the court held that, though the jury might be asked as to the mercantile meaning of the words "*good*" and "*fine*," yet, after having found a distinction between them, they could not further decide that the parties did not misunderstand each other, but were bound to take the interpretation of the contract as a matter of law from the judge.

Foreign contracts.—The rules by which an English court ought to be governed in construing a foreign contract were thus laid down by Lord CRANWORTH (*r*):

"When a written contract is made in a foreign country and in a foreign language, the court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if it contains any); thirdly, evidence of any foreign law applicable to the case; and fourthly, evidence of any peculiar rules of construction (if any such rules exist) by the foreign law. With this assistance the court must interpret the contract itself on ordinary principles of construction."

The question whether a writing constitutes a sufficient acknowledgment within the meaning of the Statutes of Limitation is for the judge, unless there is extrinsic evidence affecting the construction, when it is a question for the jury (*s*).

In patent cases it is for the judge to construe the specification after the jury have ascertained the meaning of the technical terms (if any) (*t*). Novelty and infringement, when they depend merely on the construction of the specification, are, of course, questions for the judge, but they are generally mixed questions of law and fact (*u*).

Meaning of words (*x*).—The court has also directed juries that the words "as soon as possible," in a contract, mean without unreasonable delay according

(*r*) *De Sora* v. *Phillips*, 10 H. L. Cas. 633.
(*s*) *Routledge* v. *Ramsay*, 6 A. & E. 231.
(*t*) *Neilson* v. *Harford*, 1 Web. Pat. Cas. 370.
(*u*) *Delarue* v. *Dickenson*, 7 E. & B. 738; *Seed* v. *Higgins*, 8 H. L. Cas. 550.
(*x*) See, too, *ante*, p. 17.

to the circumstances (*y*); that "forthwith" has a similar meaning (*z*); but the signification of words, according to the custom of particular trades, such as "bales," is for a jury (*a*); and where on a sale of goods the invoice provided that they should be paid for "in from six to eight weeks," this was held to be a phrase for the jury to interpret (*b*).

Under this rule also is contained the general principle that, whenever facts have to be proved by oral evidence or extrinsic circumstances, the jury pronounce the inference: but when the evidence assumes a written form this function belongs to the judge. Thus when the question is whether a contract has been executed as an escrow, or not, if the question depends on facts the jury decides: if on the construction of writings it belongs to the judge (*c*). But when secondary oral evidence of writings is admitted it has been decided that the judge and not the jury construes the evidence, because the issue is substantially one on the construction of a writing (*d*).

In cases of indictable tort, where guilt or innocence is to be inferred from the contents and meaning of a writing, the construction is for the jury. Thus, on an indictment for writing a menacing letter, the jury will say whether the language amounts to a menace (*e*).

Foreign law.—It is for the jury to determine the meaning of foreign law on the testimony of skilled witnesses; but for the judge to decide on the competency of such witnesses, and the applicability of the foreign law to the matter in issue (*f*).

(*y*) *Attwood* v. *Emery*, 1 C. B. (N.S.) 110; *Hydraulic Engineering Co.* v. *McHaffie*, 4 Q. B. D. 670.
(*z*) *Roberts* v. *Brett*, 6 C. B. (N.S.) 611.
(*a*) *Gorrissen* v. *Perrin*, 2 C. B. (N.S.) 631.
(*b*) *Ashworth* v. *Retford*, L. R. 9 C. P. 20.
(*c*) *Furness* v. *Meek*, 27 L. J. Ex. 34.
(*d*) *Berwick* v. *Horsfall*, 4 C. B. (N.S.) 450.
(*e*) *R.* v. *Girdwood*, 3 East, P. C. 1120.
(*f*) *R.* v. *Picton*, 30 How. St. Tr. 536—540, 864—870.

CHAPTER III.

THE COMPETENCY OF WITNESSES.

It has already been stated (*f*) that all objections to the competency of witnesses are for the decision of the judge, who will, if there appear to be any doubt on the subject, examine into the competency or incompetency of the proposed witness before allowing him to be sworn. This preliminary examination is called the examination on the *voir dire*, i.e., *vrai dire*, and witnesses may be called for the purposes thereof, to establish the competency or incompetency of the person tendered as a witness. Under this head it may be considered to be the general and established principle of evidence that—

All persons of sound and adult mind, provided they take an oath, or make a solemn affirmation to speak the truth (including the parties to civil proceedings, but not, as a general rule, a prisoner or defendant, on a criminal charge), are competent, and, in general, compellable, witnesses in every court of justice concerning the matters in issue.

Under this rule the first consideration will be—

Sect. 1.—*The Incompetency from defect of Understanding in Witnesses.*

Persons who have not the use of reason are, from their infirmity, utterly incapable of giving evidence, and are therefore excluded as incompetent witnesses.

This description of incompetency may be either constitutional or accidental: and in the latter case it may

(*f*) *Supra*, p. 9.

be either temporary or permanent. It may also arise from imperfect development. Hence we have three classes of persons as to whom it may (subject to the qualifications hereinafter mentioned) be said that they are incompetent witnesses:

(1) *Idiots.*
(2) *Lunatics.*
(3) *Children of immature intelligence.*

(1) An idiot is one that hath had no understanding from his nativity, and therefore is by law presumed never likely to attain any; and such a person is incapable of giving evidence. Deaf and dumb persons were formerly regarded as idiots, and therefore incompetent to testify, but the modern doctrine is that if they are of sufficient understanding, and know the nature of an oath, they may give evidence (*g*) either by signs, or through an interpreter, or in writing. It has been laid down that the presumption is always in favour of sanity, and there is no exception to this rule in the case of a deaf and dumb person, but the *onus* of proving the unsoundness of mind of such a person must rest on those who dispute the sanity (*h*). When a deaf and dumb witness has been pronounced competent to testify, but it appears in the course of taking his evidence that he is incompetent, his evidence may be withdrawn from the jury (*i*).

(2) A lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident, has lost the use of his reason (*k*).

As long as the suspension of the intelligence continues, the lunatic is an incompetent witness: but his competency is restored during a lucid interval (*l*). Nor will the disability extend to cases of mere monomania,

(*g*) 1 Hale P. C. 34; *Rushton's Case*, 1 Leach C. C. 408; *Morrison* v. *Lennard*, 3 Car. & P. 127.
(*h*) *Per* Lord HATHERLEY: *Harrod* v. *Harrod*, 4 K. & J. 9.
(*i*) *R.* v. *Whitehead*, L. R. 1 C. C. R. 33.
(*k*) 1 Bl. Com. 304. (*l*) Com. Dig. Testim. (A. 1).

nor where the hallucination permits the witness to understand the nature of the duty which is expected from him (*m*). But where a person is tendered as a witness who is believed to be suffering from monomania, a preliminary inquiry as to his capacity to give evidence must be instituted and he himself must be examined (*n*).

(3) Infants.—There is no period of legal discretion under which an infant is an incompetent witness. The rule by which an infant under seven years of age cannot commit a felony, because the law presumes him conclusively not to have sufficient intelligence for the act, has no analogy in the evidence (*o*). Age is immaterial; and the question is entirely one of intelligence, which, whenever a doubt arises, the court will ascertain to its own satisfaction, by examining the infant on his knowledge of the obligation of an oath, and, if necessary, of the obligation of a solemn affirmation under the Oaths Act, 1888 (*p*). Although tender age is no objection to the infant's competency, he cannot, when wholly destitute of religious education, be made competent by being superficially instructed just before a trial, with a view to qualify him (*q*). A judge may, however, in his discretion, postpone a trial, in order that the witness may be instructed in the nature of an oath, but the inclination of judges is against this practice.

Upon the hearing of a charge under s. 4 of the Criminal Law Amendment Act, 1885 (*r*), the evidence of a child of tender years is admissible though not given on oath, if the court is of opinion that the child is possessed of sufficient intelligence and understands

(*m*) *R.* v. *Hill*, 2 Den. 254.
(*n*) *Spittle* v. *Walton*, L. R. 11 Eq. 420.
(*o*) *Per* PATTESON, J.: *R.* v. *Williams*, 7 C. & P. 320.
(*p*) 51 & 52 Vict. c. 46.
(*q*) 1 Leach, 430 n.; *R.* v. *Nicholas*, 2 C. & K. 246.
(*r*) 48 & 49 Vict. c. 69.

the duty of speaking the truth; but corroboration of such evidence is necessary for a conviction. Similar provisions are contained in the Prevention of Cruelty to Children Act, 1894 (*s*), in respect of offences under that Act, including those mentioned in the schedule thereto (*t*).

SECT. 2.—*On Incompetency from Defect of Religious Principle.*

The principle on this head formerly was that no person was a competent witness unless he believed in a Supreme Being who would punish him, either in the present or a future life, for perjury. Under the law as it now stands, the evidence of Atheists is admissible, subject to any observations as to its credibility.

So, too, it was formerly the established principle of English law, that no witnesses were to be believed unless they delivered their evidence on oath. Exceptions to this rule were granted by the legislature to satisfy the conscientious scruples of Quakers, Moravians, and Separatists; members of which sects were allowed to give evidence on affirmation instead of oath. This principle was further encroached upon from time to time by various Acts of Parliament, and in particular by s. 4 of the Evidence Further Amendment Act, 1869 (*u*), which provided that if any person called to give evidence in any court of justice, objected to take an oath, or was objected to as incompetent to take an oath, such person should, if the presiding judge were satisfied that the taking of an oath would have no binding effect on his conscience, make the promise and declaration set forth in the section.

(*s*) 57 & 58 Vict. c. 41, s. 15.

(*t*) A charge of an unnatural offence or attempt thereat, or indecent assault, although bodily injury is charged as incidental, is not within the Act (*R.* v. *Beer*, 62 J. P. 120).

(*u*) 32 & 33 Vict. c. 68.

Ultimately in 1888 was passed the Oaths Act, 1888 (*x*), which repealed the previous statutory provisions on the subject, and enacted:

"1. Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath; and if any person making such affirmation shall wilfully, falsely, and corruptly affirm any matter or thing which, if deposed on oath, would have amounted to wilful and corrupt perjury, he shall be liable to prosecution, indictment, sentence, and punishment in all respects as if he had committed wilful and corrupt perjury.

"2. Every such affirmation shall be as follows: 'I, A.B., do solemnly, sincerely, and truly declare and affirm,' and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.

"3. Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, shall not for any purpose affect the validity of such oath.

"4. Every affirmation in writing shall commence, 'I, , of , do solemnly and sincerely affirm,' and the form in lieu of jurat shall be 'Affirmed at , this day of , 18 . Before me.'"

This Act applies to all cases in which oaths are administered in or out of court in any part of the United Kingdom.

It is noticeable that it is only an objection to take the oath emanating from the deponent that enables an affirmation to be substituted for an oath. A deponent cannot now, as he could under the Act of 1869, be objected to as incompetent to take an oath. It is also noticeable that the ground of the objection must be stated, and such ground must be one of the two mentioned in the Act, viz., absence of religious belief, or that the taking of an oath is contrary to deponent's religious belief. An objection based on any other ground, or an objection based on no stated ground,

(*x*) 51 & 52 Vict. c. 46.

will be insufficient. The judge on a trial in court must satisfy himself that a witness is entitled to affirm before he can be allowed to give evidence on affirmation; and an objection to evidence as inadmissible under this statute can be taken after verdict (*y*).

The mode of administering an oath is regulated by the 1 & 2 Vict. c. 105, which enacts that:

"In all cases in which an oath may lawfully be and shall have been administered to any person, either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

If there is any doubt as to the proper form to be adopted in administering the oath to any particular witness, such witness should be asked what form he considers binding on his conscience. If a witness is sworn in the usual way as a Christian, the objection may be subsequently taken that he has been informally sworn; but if he states that the oath as administered is binding on his conscience, his answer is conclusive (*z*).

Section 5 of the Oaths Act, 1888 (*a*), provides that:

"If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question."

As a witness can claim to be sworn in this manner as a matter of right, "kissing the Book" is optional.

(*y*) See *R.* v. *Moore*, 17 Cox C. C. 458.
(*z*) *The Queen's Case*, 2 B. & B. 284. (*a*) 51 & 52 Vict. c. 46.

It may be remarked that the justices in licensing sessions may hear evidence not upon oath if they think fit when dealing with new licenses or transfers (*b*). But in cases of renewal of licenses the evidence must be given on oath because of the provisions of the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 42.

SECT. 3.—*The Competency of Parties to Civil Proceedings.*

It is no objection to the competency of a witness that he is of infamous character; or that he is a party to the record, or otherwise interested in the result of the issue.

Formerly, following the principle of the Roman law (*c*), a witness might be objected to as being of infamous character, or a party to the record, or otherwise *interested* in the result of the issue. The first important inroad on this principle was made by the 6 & 7 Vict. c. 85 (usually called Lord Denman's Act), which enacted (by s. 1) that no person offered as a witness should thereafter be excluded by reason of incapacity, from crime or interest, from giving evidence.

This Act, however, left the actual parties to the record incompetent witnesses. This disability was removed by s. 2 of the Law of Evidence Amendment Act, 1851 (*d*), which enacted that:

"On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the person in whose behalf any such suit, action, or other proceeding may be brought or defended, shall,

(*b*) *R.* v. *Sharman*, [1898] 1 Q. B. 578.
(*c*) Rattigan's Roman Law of Persons, p. 83.
(*d*) 14 & 15 Vict. c. 99.

except as hereinafter excepted, be competent and compellable (*e*) to give evidence, either viva voce or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

But it was by s. 4 of this Act provided, that nothing therein contained should apply to proceedings instituted in consequence of adultery, or to actions for breach of promise of marriage. Section 43 of the Divorce Act (*f*) however, enacted that, on a petition for a divorce, the petitioner may be examined by order of the court, but is not compellable to answer questions which tend to show that he or she has committed adultery, nor, as was held (*g*), open to cross-examination by the respondent. Respondents and co-respondents were not compellable or competent witnesses under this Act (*h*).

The Law of Evidence Further Amendment Act, 1869 (*i*), abolished the two exceptions retained by the Law of Evidence Amendment Act, 1851. After repealing s. 4 of the last-mentioned Act, the Act of 1869 renders (s. 2) the parties to actions for breach of promise of marriage competent witnesses. The uncorroborated testimony of the plaintiff is, however, not to be sufficient proof of a promise to marry to entitle the jury to give a verdict for the plaintiff; his or her testimony must be corroborated by some *material evidence* in support of the alleged promise. Section 3 of this Act renders the parties to proceedings instituted in consequence of adultery, and the husbands and wives of such parties, *competent* witnesses; with the proviso that no witness in any proceeding, whether a party or not, is to be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness has

(*e*) "Compellable" means "compellable by process of law" (*Kops* v. *The Queen*, [1894] A. C., p. 652.
(*f*) 20 & 21 Vict. c. 85.
(*g*) *Giles* v. *Giles*, 32 L. J., P. M. & A. 209.
(*h*) *Robinson* v. *Lane*, 1 S. & T. 362. (*i*) 32 & 33 Vict. c. 68.

already given evidence in the same proceeding in disproof of such adultery. The great aim of the legislature would seem to have been to enable persons charged with adultery in the Divorce Court to deny the charge on oath. This is effected by making such persons competent witnesses. In the measure, as originally brought into the House of Commons, the parties were to be compellable as well as competent. To this two objections were raised—first, that it would induce parties to introduce proceedings on very slender grounds in the expectation of being able to elicit something in cross-examination of the respondent or co-respondent to establish their case; second, that an adulteress or adulterer would be very much tempted to commit perjury to screen the partner in guilt. In deference to these objections the above-mentioned proviso was added to the third section.

One question presents itself upon these two sections —are the parties to an action for breach of promise of marriage and to proceedings instituted in consequence of adultery, *compellable* as well as competent witnesses? *Primâ facie* every witness who is competent is also compellable unless some privilege intervenes, and therefore the proper construction to be placed upon these sections is, that the parties mentioned are compellable as well as competent except so far as they can claim the protection of the proviso to s. 3. No doubt would present itself but for the language of s. 2 of the Law of Evidence Amendment Act, 1851, which enacts, that the parties to any action (except as thereinafter excepted) shall "be competent and compellable to give evidence."

The proviso above referred to (which has been held only to be operative in suits instituted in consequence of adultery (*k*)) does not protect a person, coming

(*k*) *M.* v. *D.*, 10 P. D. 175.

forward as a witness to disprove an act of adultery, from being cross-examined as to other acts of adultery, provided they are charged in the pleadings either specifically or generally (*l*). The protection of the proviso is the protection of the witness, and can be claimed by the witness only (*m*), and if not claimed the evidence is admissible. In short, subject to the proviso, the competency of parties to proceedings instituted in consequence of adultery is absolute, and in respect of examination and cross-examination they are on the same footing as other witnesses. This the Court of Appeal were disposed to hold, but did not hold, in a case which involved the question whether, in a divorce case, the judge was right in refusing to allow the co-respondent to cross-examine the respondent, and yet in his summing-up contrasting the evidence given by the one with the evidence given by the other. As they held the judge wrong in the latter matter, they thought it unnecessary to "express a concluded opinion" on the former, which is to be regretted (*n*).

It was held by two judges of the Common Pleas Division, in *Guardians of Nottingham* v. *Tomkinson* (*o*), that in proceedings by the guardians of the union against a husband to compel him to maintain a child of his wife born in wedlock, which he refused to maintain on the ground that he was not its father, the evidence of the husband was inadmissible to prove non-access to his wife, as the proceedings were not "proceedings instituted in consequence of adultery" within the meaning of s. 3 of the Act. In *Re Rideout's Trusts* (*p*), which was a petition for the payment out of a fund in court to a father and five children, the

(*l*) *Brown* v. *Brown*, L. R. 3 P. & D. 198.
(*m*) *Hebblethwaite* v. *Hebblethwaite*, L. R. 2 P. & D. 29.
(*n*) *Allen* v. *Allen*, [1894] P. 248.
(*o*) 4 C. P. D. 343.
(*p*) L. R. 10 Eq. 41.

evidence of the father was tendered before JAMES, V.-C., to prove non-access to his wife so as to bastardize the respondent, a child of hers, on the ground that the proceedings were "instituted in consequence of adultery" within the meaning of the Act. The Vice-Chancellor said that he must have other evidence. But it is not clear from the Reports whether he intended to exclude the evidence of the father or not. HALL, V.-C., in the similar case of *Re Yearwood's Trusts* (*q*), considered that the Vice-Chancellor intended not to exclude the evidence, and therefore he (HALL, V.-C.) admitted the evidence of the father in the case before him. The judges of the Common Pleas Division, however, were of opinion that JAMES, V.-C., intended to exclude the evidence, and that the case of *Re Rideout's Trusts* was therefore in favour of the decision which they came to, and that the decision in *Re Yearwood's Trusts* was founded upon a mistaken view of *Re Rideout's Trusts*. In *Re Walker* (*r*), which was an application by an infant for maintenance, resisted on the ground that the infant was illegitimate, KAY, J., and in *Burnaby* v. *Baillie* (*s*), which was an action by a husband, who had been divorced from his wife, for a declaration that there was no legitimate child of the marriage, NORTH, J., followed *Guardians of Nottingham* v. *Tomkinson*; the *ratio decidendi* in both the last-cited cases being that the proceedings were not "instituted in consequence of adultery" within the meaning of the Act of 1869.

Of course a witness is protected by the proviso from answering questions put by interrogatory, as well as oral examination. But further than this, in the Divorce Court, no discovery either by interrogatory or affidavit of documents will be allowed which is addressed solely to the issue of adultery (*t*).

(*q*) 5 Ch. D. 545.
(*r*) 34 W. R. 95.
(*s*) 42 Ch. D. 282.
(*t*) *Redfern* v. *Redfern*, [1891] P. 139.

Any discussion as to the testimony of interested witnesses cannot be more appropriately closed than by quoting the remarks of JAMES, L.J., when Vice-Chancellor (*u*):

"It has been pressed on me that I cannot decide against the positive oath of the respondent without convicting him of wilful and corrupt perjury. I have had occasion more than once to say that this is not a criminal court, that I am trying no one for any crime. I am here bound by my own judicial oath to well and truly try the issue joined between the parties, and a true verdict give according to the evidence, that is to say, according as I, weighing all the evidence, by all the lights I can get, and as best I may, find the testimony credible or incredible, trustworthy or the reverse. The law which admitted the testimony of the parties and of interested persons was passed in full reliance on the judges and on juries that they would carefully scrutinize such testimony and give it such weight as it deserved, and no more, or no weight at all."

SECT. 4.—*As to the Competency of Parties to Criminal Proceedings.*

It has long been held that a prosecutor, in a criminal proceeding, is a competent witness against a prisoner; and, although there were formerly exceptions to the rule, they have all been removed by Lord Denman's Act and other statutes.

Lord Denman's Act (*v*), by rendering all persons competent as witnesses notwithstanding they may have an interest in the matter in question, or the event of the trial, removed all doubt as to the admissibility of informers and accomplices as witnesses. All such persons are competent witnesses; but the objections to their credibility remain as before (*x*).

At Common Law, a defendant in a criminal charge, so far from being bound or competent to give evidence against himself, was never bound even to answer the questions put to him upon his examination before a

(*u*) *Pike* v. *Nicholas*, 17 W. R. 845.
(*v*) 6 & 7 Vict. c. 85.
(*x*) *Vide*, p. 43.

magistrate. Section 3 of the Evidence Amendment Act, 1851 (14 & 15 Vict. c. 99), confirms this state of the law; and enacts that—

"Nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband."

It might, perhaps, have been inferred from the language of this section that a defendant in a criminal proceeding cannot, in any case, be convicted on his own evidence. But this is not the construction which has been put on this part of the Act, although it might, perhaps, be contended that, according to the letter, the Common Law principle that no man is *bound* to criminate or betray himself (*nemo tenetur seipsum prodere*) is enlarged to the extent of an absolute and universal prohibition. Prisoners are, however, daily not merely suffered to plead guilty, and so become convicted in the eye of the law on their own evidence, but their statements before magistrates, after the statutory caution of the 11 & 12 Vict. c. 42, s. 18, and their subsequent confessions, are always received as evidence on which alone a jury may convict.

Legislative inroads were from time to time made on the principles embodied in s. 3 of the Evidence Amendment Act of 1851. By a great number of Statutes creating offences passed since its date the persons charged with such offences, and their husbands and wives, have been made competent witnesses. Most of these Statutes will be found mentioned in the last edition of this book; but as their provisions in respect of the matter under consideration have been, with one exception, superseded by the Criminal Evidence Act, 1898,

hereinafter mentioned, it is unnecessary to set out any such provisions other than the first section of the Evidence Act, 1877 (40 & 41 Vict. c. 14), which is as follows:

"On the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant shall be admissible witnesses and compellable to give evidence."

This enactment remains unaffected by the Act of 1898.

Several attempts have been made to get an Act passed rendering the defendants in all criminal proceedings competent to give evidence on oath, but without success until 1898, when, in spite of much opposition in and out of Parliament, the Criminal Evidence Act, 1898 (*s*), was passed. This Act, which is henceforth to apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of the Act (*t*), makes every person charged with an offence a competent witness for the defence at every stage of the proceedings, but he cannot be called except on his own application. He is, of course, liable to cross-examination and cannot refuse to answer any question on the ground that it would criminate him as to the offence charged, but his cross-examination as to other offences and as to character is governed by the provisions of s. 1 (f) of the Act (for which, see Appendix).

Counsel for the prosecution may comment upon any evidence given under the Act by a person charged, but he must not comment upon the failure of any such person, or of the wife or husband of such person, to

(*s*) 61 & 62 Vict. c. 36, for which, together with some of the leading decisions thereon, see Appendix.

(*t*) *Charnock* v. *Marchant*, [1900] 1 Q. B. 474. Consequently the provisions as to cross-examination in the Act of 1898 now govern all criminal proceedings.

give evidence (*u*). The presiding judge may of course comment upon such failure (*x*). But certainly there are many cases in which it would not be expedient or calculated to further the ends of justice so to do (*y*). No general rule can be laid down, and the matter must be left to the discretion of the judge in the particular case, but such a comment would appear to be, to say the least, undesirable, except under special circumstances. Now that it has become generally known that an accused person can give evidence if he chooses, even without such comment, the jury would be naturally inclined to draw an adverse inference from a person charged abstaining to give evidence, so that although he is not legally compellable to give evidence, he would seem to be practically compellable. But the jury ought to be cautioned that it is for the prosecution to make out their case, and if not made out independently of a prisoner's evidence, his failure to offer himself as a witness cannot legally turn the scale against him.

What is a criminal proceeding, and what is a civil proceeding? This question arose in *Attorney-General* v. *Radloff* (*z*), which was an information for penalties under the repealed Prevention of Smuggling Act, 1845 (8 & 9 Vict. c. 87); the defendant offered himself as a witness, and the court was divided as to his competency. It was held by POLLOCK, C.B., and PARKE, B., that he was not a competent witness, because it was a criminal proceeding punishable on summary conviction; but PLATT, B., and MARTIN, B., held it to be not of a criminal nature, and that the defendant was a competent witness. The view of PLATT, B., appears to contain the true solution of all such difficulties:

"What is a civil proceeding as contradistinguished from a criminal proceeding? It strikes me that the true test is to see if

(*u*) 61 & 62 Vict. c. 36, s. 1 (6).
(*x*) *R.* v. *Rhodes*, [1899] 1 Q. B. 77.
(*y*) *Kops* v. *The Queen*. [1894] A. C. 653.
(*z*) 10 Ex. 84.

the subject-matter be of a personal character; that is, if the proceeding relates to goods or property which it is sought to recover by legal proceedings, that is a *civil* proceeding; but if it is one which may at once affect the defendant personally, by the imprisonment of his body in the event of a verdict of guilty being pronounced against him as a public offender, that is what I consider a *criminal* proceeding. . . . Now, although informations of this kind by the Attorney-General may by some be considered criminal proceedings, I rather deem them in the nature of civil proceedings, and like the old actions to recover penalties under the Game Laws, which we all remember were civil proceedings. . . . Here the object is to recover money—to recover that which, by the law, is made a debt."

Now the Crown Suits Act, 1865 (*a*), s. 34, has removed all doubt as to proceedings on the revenue side of the Court of Exchequer by making the 14 & 15 Vict. c. 99, ss. 2, 3, and the 16 & 17 Vict. c. 83, applicable to such proceedings, which, for the purpose of these enactments, are not to be deemed criminal proceedings. Similar doubts were raised in bastardy cases as to the competency of the putative father to be sworn as a witness on his own behalf; but ERLE, J., held him to be competent, on the ground that the proceedings or an affiliation order are of a civil, and not of a criminal nature (*b*). This view is confirmed by the language of Lord CAMPBELL in another case (*c*), in which the proceedings against the defendant were for a breach of the Game Laws, viz., for using snares for game without having a certificate. The inclination of the court in this case was, to hold all proceedings to be of a criminal nature when the judgment assumes the form of a fine, which may be enforced by imprisonment. The test, according to Lord CAMPBELL, in such cases seems to be to consider whether it is sought to recover a sum of money in the nature of a debt from a person, as in bastardy cases; or to inflict punishment of an exemplary and public nature.

(*a*) 28 & 29 Vict. c. 104.
(*b*) *Ex parte Crowley*, 24 L. T. 244.
(*c*) *Cattell* v. *Ireson*, E. B. & E. 91.

SECT. 5.—*As to the Competency of Husbands and Wives as Witnesses for or against each other.*

In civil cases, previously to the Evidence Further Amendment Act, 1853 (*d*), husbands and wives were not competent to give evidence for or against each other (*e*). But that Act rendered husbands and wives competent and compellable, in all *civil* cases, to give evidence "on behalf of any or either of the parties to the said suit, action, or proceeding." But neither husband nor wife is made compellable to disclose any *communication* whatsoever made to him or her by the other during marriage (*f*). These provisions were, by the Act, not to apply in criminal cases, nor in proceedings instituted in consequence of adultery; but, as stated above, the Evidence Further Amendment Act, 1869, made the husbands and wives of parties to proceedings instituted in consequence of adultery competent witnesses (*g*).

In criminal cases the old rule was that husbands and wives were not competent to give evidence for or against each other (*h*), and this rule prevented such witnesses from being examined either as to circumstances that happened before marriage, or as to the fact of marriage. Nor could a wife or husband be a witness for or against any person who was indicted jointly with the husband or wife (*i*); nor, on an indictment for a conspiracy, could formerly the wife of one of the conspirators give evidence in favour of the others; because their acquittal must enure to the benefit of the husband (*k*). This rule was preserved by s. 3 of the 14 & 15 Vict. c. 99, which provided that nothing contained in that Act should on any criminal proceeding,

(*d*) 16 & 17 Vict. c. 83.
(*e*) *Barbat* v. *Allen*, 7 Ex. 609; *Stapleton* v. *Crofts*, 18 Q. B. 367.
(*f*) After the death of either husband or wife the privilege enures for the benefit of the survivor. See *O'Connor* v. *Marjoribanks*, 4 M. & G. 435.
(*g*) See *ante*, p. 27.
(*h*) Co. Litt. 6 b.
(*i*) *R.* v. *Thompson*, L. R. 1 C. C. R. 377.
(*k*) *R.* v. *Locker*, 5 Esp. 107.

render any husband competent or compellable to give evidence for or against his wife, or any wife competent, or compellable to give evidence for or against her husband, and by the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), which provided that nothing therein should render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband in any criminal proceeding, or in any proceeding instituted in consequence of adultery. But, as appears from what has been said in connection with the competency of persons charged in criminal cases, legislative inroads have also been made on this rule; and under various Statutes the husband or wife of a person charged with an offence under such Statutes was made a competent and in some cases a compellable witness. Now, by the Criminal Evidence Act, 1898 (*l*), the wife or husband of a person charged with an offence is made a competent witness for the defence at every stage of the proceedings; but such a witness cannot be called except on the application of the person charged, unless the offence is under one of the six enactments mentioned in the schedule to the Act (*m*), or in cases where at common law the wife or husband of a person charged can be called without the consent of such person (see below). Communications between husband and wife during marriage are expressly protected from compulsory disclosure by the Act (*n*).

In all cases where the husband is charged with a personal injury to the wife, or the wife with a personal injury to her husband, the injured party is at common

(*l*) 61 & 62 Vict. c. 36; see Appendix.

(*m*) *I.e.*, the Vagrancy Act, 1824; the Poor Law (Scotland) Act, 1845; the Offences Against the Person Act, 1861; the Married Women's Property Act, 1882; the Criminal Law Amendment Act, 1885; and the Prevention of Cruelty to Children Act, 1894. When a person is charged with an offence under any of these enactments the wife or husband may be called as a witness for the prosecution or defence without the consent of the person charged (s. 4 (1)).

(*n*) Section 1 (d).

law a competent witness against the other. This is confined to cases of personal injuries effected by violence or coercion, and does not extend to defamatory libels (*o*) nor to injuries to the children of the marriage. The dying declarations of a wife who has been murdered by her husband, if not otherwise inadmissible, are evidence against him (*p*). In high treason it is doubtful whether a wife may or may not be made a witness against her husband (*q*).

It should be observed that the Married Women's Property Act, 1884 (*r*), enacts that in any such criminal proceeding against a husband or a wife as is authorised by the Married Women's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and except when defendant, compellable to give evidence.

In an action against a husband for necessaries supplied to his wife when living apart from her, the defence being the wife's adultery, she is admissible to prove the adultery (*s*); though such evidence would be, of course, open to suspicion.

SECT. 6.—*Matters not proveable by a single Witness.*

As a general rule, the testimony of a single witness, or any documentary evidence, however slight, provided it be admissible, is *sufficient* evidence to establish any fact, but it does not follow that it is *satisfactory* evidence for that purpose.

Sufficient evidence, it may be stated, is the minimum which will satisfy the requirements of the law; **satisfactory evidence** is that which satisfies or convinces the court on any given point.

(*o*) *R.* v. *Lord Mayor of London*, 16 Q. B. D. 772.
(*p*) *R.* v. *John*, 1 East P. C. 357.
(*q*) *R.* v. *Griggs*, T. Raym. 2.
(*r*) 47 & 48 Vict. c. 14.
(*s*) *Cooper* v. *Lloyd*, 6 C. B. (N.S.) 519.

It should be observed, that where an Act of Parliament enacts what shall be "sufficient" evidence of any fact, the question arises whether sufficient means *primâ facie* or conclusive evidence. This was discussed by JESSEL, M.R., in *Ystalyfera Iron Co.* v. *Neath and Brecon Rail. Co.* (*t*). He expressed an opinion that no general rule could be laid down, but held that in the statutory enactment affecting that case (ss. 16 and 17 of the Lands Clauses Act), "sufficient" means "conclusive" evidence, except in the event of fraud being proved.

By the general rule, stated in the heading to this section, a jury are quite justified, if they think proper, in finding a verdict on the uncorroborated statements of a single witness, as that would be sufficient evidence. But where there is but one witness, if he gives his testimony in an unsatisfactory way, or, *a fortiori*, if he is manifestly unworthy of credit, his evidence will not satisfy the jury, and they will not found a verdict upon it (*u*). Even where the only evidence consists of the directly opposite statements of adverse witnesses, the jury may believe which they like (*x*). So also where any question of fact depends on the testimony of a single witness, and any inconsistency is apparent between such testimony and the previous conduct of the witness, the court should look at the acts done by him at the time rather than to his statements when called as a witness (*y*).

Exceptions to the above-mentioned general rule: *First.*—In charges of treason no person can be convicted but upon the oaths and testimony of two lawful witnesses, either both to the same overt act or one to one, and the other to another overt act of the same treason, unless the accused shall willingly and without violence in open court confess the same; and if two or more

(*t*) L. R. 17 Eq. 150.
(*u*) *Vide supra*, p. 3.
(*x*) *Vide supra*, p. 4.
(*y*) *Per* Lord HATHERLEY, in *Barr's Trusts*, 4 K. & J. 236.

distinct treasons of divers heads or kinds shall be alleged in one indictment, one witness produced to prove one of these treasons, and another another, shall not be deemed to be two witnesses to the same treason (*z*). *Secondly*.—In order to convict a defendant of perjury it is necessary that there should be something more than the evidence of one witness to prove the falsehood: for this reason, that if there be the oath of one person only against that of the defendant, it may be considered doubtful which of the two is true; but it is never necessary that there should be two independent witnesses to contradict the defendant on any one particular point, and it is sufficient that there should be two pieces of evidence, proved by separate witnesses, in direct contradiction to the statement of the accused on which the perjury is alleged (*a*). It was formerly considered that to prove a charge of perjury there must be at least two witnesses, but it is now deemed sufficient if there is some other evidence *strongly* corroborating a single witness. Thus, a letter written by the defendant contradicting his statement upon oath has been held to render it unnecessary to call a second witness (*b*). The prosecution must turn the scale by corroborating the witness, but the degree of corroboration which is necessary is not definable (*c*). *Thirdly*.—In cases of bastardy an affiliation order on a putative father cannot, under 35 & 36 Vict. c. 65, be made unless the evidence of the mother is corroborated by other evidence in *some material particular*. Evidence of acts of familiarity between the mother and the defendant, although before the time when the child would have been begotten, are corroborative evidence within the meaning of the Statute, although, of course,

(*z*) 7 Will. 3, c. 3, ss. 2, 4.
(*a*) *Per* WIGHTMAN, J.: *R.* v. *Hook*, D. & B. 607.
(*b*) *Per* Lord DENMAN: *R.* v. *Mayhew*, 6 Car. & P. 315.
(*c*) *Per* ERLE, C.J.: *R.* v. *Shaw*, L. & C. 590.

the weight to be attached thereto is a matter for the court (*d*). *Fourthly.*—The evidence of a plaintiff in an action for breach of promise of marriage does not entitle him or her to a verdict unless corroborated by some other material evidence in support of such promise (*e*). The conduct and letters of the defendant may afford the necessary corroborative evidence. It may also be observed that the corroborative evidence must be in support of the promise, and it will not be sufficient to corroborate the testimony of the plaintiff on other points, if it is uncorroborated in respect of the alleged promise: but the corroborative evidence need not be such as would alone establish the promise if it supports it (*f*). It has been held, that the corroborative evidence may relate to matters anterior to the date of the alleged promise (*g*). The corroborative evidence must not be that of the plaintiff (*h*). The fact of the defendant in the action not answering letters written by the plaintiff, in which she stated he had promised to marry her, is not corroborative evidence (*i*). But the fact of the defendant not answering when charged orally by the plaintiff with having promised to marry her is corroborative evidence (*k*). *Fifthly.*—In divorce cases a decree will not be pronounced upon the uncorroborated evidence of a woman of loose character (*l*). *Sixthly.*—The courts do not generally consider a claim against the estate of a deceased person established by the uncorroborated testimony of the claimant; but this is a rule of practice, not a rule of law (*m*), and if a jury were to find a claim against the estate of a deceased

(*d*) *Cole* v. *Manning*, 2 Q. B. D. 611.
(*e*) 32 & 33 Vict. c. 68, s. 2.
(*f*) *Bessela* v. *Stern*, 2 C. P. D. 265.
(*g*) *Wilcox* v. *Gotfrey*, 26 L. T. (N.S.) 328, 481.
(*h*) *Owen* v. *Moberley*, 64 J. P. 88.
(*i*) *Wiedeman* v. *Walpole*, [1891] 2 Q. B. 534.
(*k*) *Bessela* v. *Stern*, *ubi supra*.
(*l*) *Ginger* v. *Ginger*, L. R. 1 P. & D. 37.
(*m*) See *Beckett* v. *Ramsdale*, 31 Ch. D., p. 183.

person established by the uncorroborated evidence of the claimant, the verdict would not be interfered with (*n*). It is the duty of the judge to direct the jury not to act upon such evidence unless they are convinced of its truth. It should be examined with care, even with suspicion (*o*). In one case, a release to a trustee was set aside after the death of the trustee, on the evidence of the plaintiff corroborated by the tenor of the deed (*p*). A *donatio mortis causâ* has been considered established by the uncorroborated evidence of the donee (*q*): it should, however, be observed that the donee was not cross-examined in this case (*r*). *Seventhly.*—An unwritten retainer, if denied on oath by the client, is not proved by the uncorroborated oath of the solicitor (*s*). *Eighthly.*—Although the evidence of children of tender years, not upon oath, is admissible under the Criminal Law Amendment Act, 1885, s. 4, and also under the Prevention of Cruelty to Children Act, 1894, s. 15, such evidence is not sufficient for a conviction without corroboration (*t*).

Ninthly, there is the well-known rule that—

A prisoner ought not to be convicted upon the evidence of any number of accomplices, if unconfirmed or uncorroborated by other testimony (*u*)

The reasonableness of this rule is obvious from the suspicious character which is inseparable from this kind of evidence. The legislature has held that this quality is not sufficient of itself to justify the exclusion of such evidence from a jury; or the laying down of any

(*n*) *Per* JESSEL, M.R.: *Finch* v. *Finch*, 23 Ch. D. 271. See also *Beckett* v. *Ramsdale*, 31 Ch. D. 177.
(*o*) *Rawlinson* v. *Scholes*, 79 L. T. 350.
(*p*) *Gandy* v. *Macaulay*, 31 Ch. D. 1.
(*q*) *Farmer* v. *Smith*, 58 L. T. (N.S.) 12.
(*r*) Or in *Bartholomew* v. *Menzies*, [1902] 1 Ch. 680.
(*s*) *Bird* v. *Harris*, 29 W. R. 45.
(*t*) See *ante*, p. 23.
(*u*) *R.* v. *Noakes*, 5 C. & P. 236.

principle by which it shall be denied all the elements of credibility. It may be tendered from motives of conscientious penitence; but ordinary experience, and knowledge of human nature, must convince every one that it is still more likely to be tendered from motives of interested treachery or revenge; and in every such case the amount of credibility sinks to a minimum.

Extent of corroboration.—It is therefore held that the evidence of accomplices ought not merely to be corroborated, and that in the absence of corroboration a prisoner ought to be acquitted, but that the corroboration of an accomplice's evidence ought to go to the *identity* of the prisoner: *i.e.*, it should satisfy a jury that the prisoner is *the person* who committed the crime with which he is charged by the accomplice (*x*). Where several prisoners are indicted together, and the evidence of an accomplice is only corroborated as to some of them, the jury ought to acquit the others (*y*).

The jury may convict on the uncorroborated evidence of an accomplice (*z*); and it is only a rule of practice, and not of law, for a judge to tell a jury that they ought not to convict on the uncorroborated evidence of an accomplice (*y*). In *R.* v. *Jones* (*a*), Lord ELLENBOROUGH, in dealing with the subject now under consideration, said:

"No one can seriously doubt that a conviction is strictly legal, though it proceed upon the evidence of an accomplice only. Judges, in their discretion, will advise a jury not to believe an accomplice, unless he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts to which he deposes."

On an indictment for receiving stolen goods the principal thief is a competent witness (*b*). The

(*x*) *R.* v. *Foster*, 8 C. & P. 107.
(*y*) *R.* v. *Stubbs*, Dears. 555.
(*z*) *In re Meunier*, [1894] 2 Q. B. 415.
(*a*) 2 Camp. 133.
(*b*) *R.* v. *Patram*, 2 East, P. C. 782.

ordinary common law rule was and (subject to what is hereinafter stated) is, that the evidence of one defendant in a criminal trial cannot be received as evidence either for or against another defendant (*c*). But the Criminal Evidence Act, 1898, which makes a person charged with an offence a competent witness for the defence, whether charged solely or jointly with any other person, has created an exception to the rule. When two persons are jointly charged, if one of them applies to be called as a witness (he cannot otherwise be called), then if the evidence which he gives inculpates the other it is evidence against that other, who has an unrestricted right to cross-examine him (*d*). If the evidence which he gives exculpates the other, is it evidence for that other? It appears that it is; because a prisoner who elects to give evidence is, subject to the qualifications contained in the Act, in the same position as any other witness for the defence (*e*). Where several persons are indicted, the prosecutor may, by leave of the court, take a verdict of acquittal as to one or more, and call them as witnesses against the remaining prisoners (*f*). It appears also that an accomplice, who is himself charged on a separate indictment, is a competent witness for a prisoner (*g*); and a prisoner, who has pleaded guilty, may be called for or against his co-defendants (*h*). So where the evidence against one of several prisoners is slight, the judge may direct an acquittal in order to enable the others to call him as a witness; and it seems that this may be done without taking a verdict against the prisoner who is called as a witness (*i*); though it would, as a general rule, be

(*c*) *R.* v. *Payne*, L. R. 1 C. C. R. 349.
(*d*) *R.* v. *Hadwen*, [1902] 1 K. B. 882.
(*e*) *Cf. R.* v. *Hadwen*, *ubi supra*.
(*f*) *R.* v. *Owen*, 9 C. & P. 83.
(*g*) 2 Hale, P. C. 280.
(*h*) *R.* v. *George*, C. & M. 111; *R.* v. *Hincks*, 1 Den. 84.
(*i*) *Windsor* v. *R.*, 7 B. & S. 360.

judicious, where the accomplice is indicted with the prisoner, to dispose of the indictment by acquitting or convicting the prisoner, before he is called as a witness, so that the temptation to strain the truth should be as slight as possible (*k*).

(*k*) See *R.* v. *Payne*, L. R. 1 C. C. R., at p. 354.

CHAPTER IV.

THE RULE THAT THE BEST EVIDENCE MUST BE GIVEN: PRIMARY AND SECONDARY EVIDENCE.

It is an inflexible rule that—

The best evidence must be given.

This rule may also be stated thus:

The law requires that evidence which is the best attainable of its class.

Meaning of rule.—The meaning of this rule is that no such evidence shall be brought, as *ex naturâ rei* supposes still greater evidence behind in the parties' own possession or power (*a*). The rule is founded on the presumption that if inferior evidence is offered, when evidence of a better and more original nature is attainable, the substitution of the former for the latter arises either from fraud, or from gross negligence, which is tantamount to fraud. Thus, if a copy of a deed or will be tendered, while the original exists and is producible, it is reasonable to assume that the person who might have produced the original, but who omits to produce it, has some interested motive for tendering a copy in its place. Here the deed or will itself is the *best* and *primary* evidence of its contents. The copy is *secondary*, and however indisputably it may be authenticated, it is inadmissible in evidence as long as the original can be produced, unless its production is dispensed with. Where secondary evidence of a document is admitted at any stage of an action without

(*a*) Gilbert on Evidence, p. 5.

objection by the party against whom it is tendered, it is too late for such party to object to it at any later stage (*b*).

What is primary and what is secondary evidence?—"Primary evidence" is evidence which the law requires to be given first (because it is the best evidence); "secondary evidence" is evidence which may be given, in the absence of the better evidence which the law requires to be given first, when a proper explanation can be given of the absence of that better evidence (*c*).

In the case of written contracts.—It is a rule that when a contract has been reduced to writing, the writing, as long as it exists, is the best and only evidence of the terms of the contract. Oral evidence is admissible to explain, but not to contradict it. But if the writing be destroyed; or if it cannot be found after diligent search; or if an adverse party, in whose hands it is, refuses to produce it, after having received due notice; then it is considered fair and reasonable, that any competent witness who is acquainted with the terms of the contract should be allowed to give oral evidence of it, or that a copy of it should be admitted.

Depositions of witnesses in criminal cases.—So, too, if a prisoner has been committed for trial on the oral depositions of witnesses, it would be manifestly unfair to admit their depositions, even when reduced to writing and certified by the committing magistrate, to be given in evidence against the prisoner, as long as the original witnesses can be produced before a jury, confronted with the prisoner, and subjected to the cross-examination of the latter, or his counsel; and therefore such depositions are secondary evidence

(*b*) *Robinson* v. *Davies*, 5 Q. B. D. 26.
(*c*) *Per* Lord ESHER, M.R., in *Lucas* v. *Williamson*, L. R. 2 Q. B. 116.

which is admissible only in certain cases where the original deponents cannot be produced. This subject will be more fully discussed in a later chapter.

There may be distinct sources of evidence, one of which may be oral, and another contained in writing. In such a case both will be primary, and therefore either will be admissible. Thus, a written receipt is *primâ facie* evidence of payment; but it is not the only evidence, because a written acknowledgment by a creditor that he has been paid is not necessarily better evidence than the oral evidence of a debtor who swears that he has paid the money. Accordingly, the payment may be proved either by producing the creditor's receipt and proving his signature, or by the oral testimony of the debtor. So, too, what a debtor says in admission of a debt may be proved, although there be a written promise to pay (*d*). Again, although there may be a written instrument between a landlord and tenant, defining the terms of the tenancy, the fact of tenancy may be proved by oral evidence (*e*). But the terms of the tenancy, and the amount of rent payable under, and the parties to a written agreement for, a tenancy, can only be proved by the written document (*f*).

The exceptions to the general rule can be maintained only where the fact, of which oral evidence is admitted, is something extrinsic and collateral to the written contract (*g*). If it be in any degree of the essence and substance of the contract, then the writing must be produced; *e.g.*, on a question of title to land (*h*). The fact of the existence of a writing or of its execution may be proved without producing the writing; but not any part of its contents (*i*). In the case of *Yorke* v.

(*d*) *Singleton* v. *Barrett*, 2 C. & J. 369.
(*e*) *R.* v. *Kingston-upon-Hull*, 7 B. & C. 611.
(*f*) *R.* v. *Kingston-upon-Hull*, 7 B. & C. 611.
(*g*) *R.* v. *Castle Morton*, 3 B. & Ald. 590.
(*h*) *Cotterill* v. *Hobby*, 4 B. & C. 465.
(*i*) *Darby* v. *Ouseley*, 1 H. & N. 1.

Smith (*k*), where a bill of sale was inadmissible for want of a stamp, it was held that oral evidence of the fact that there had been a sale was wrongly admitted. But if a contract be established by oral evidence, it is for the adverse party to prove that it was in writing. In *R.* v. *Rawdon* (*l*), BAYLEY, J., said:

"There can be no doubt that a party may, by keeping out of view a written instrument, make out by parol testimony a *primâ facie* case of tenancy, and that it then lies on the opposite party to rebut the *primâ facie* case so made out."

In an action to recover a written document, oral evidence of its contents may be given, without previous notice to produce it (*m*). Where a prisoner was indicted for arson with intent to defraud a fire office, it was held that secondary evidence of the policy was inadmissible, as due notice had not been given to produce it (*n*).

The subject of Secondary Evidence in the case of documents will be further investigated in a later portion of this work (*o*).

When it is necessary to prove the handwriting of a document in any case, civil or criminal, the most satisfactory (though, of course, not the only) evidence is that of the person who wrote or signed. But other evidence is equally admissible. In an action for infringement of copyright of a picture, it was held unnecessary to produce the original picture to establish that the alleged copy was an infringement (*p*).

On account of the physical impossibility or difficulty of producing the originals in court, inscriptions on tombstones, escutcheons, and walls, may be proved by witnesses or examined copies.

(*k*) 21 L. J. Q. B. 53.
(*l*) 8 B. & C. 710.
(*m*) *Jolly* v. *Taylor*, 1 Camp. 143.
(*n*) *R.* v. *Kitson*, Dears. 187; *cf. R.* v. *Elworthy*, L. R. 1 C. C. R. 103.
(*o*) *Vide* Part II., Ch. I. and IV.
(*p*) *Lucas* v. *Williams*, [1892] 2 Q. B. 113.

The fullest proof of a fact need not be given.—It is held that this rule relates not to the measure and *quantity* of evidence, but to the *quality*. It is not necessary to give the fullest proof of which a fact may admit. Thus, in the cases where there are several attesting witnesses, it is sufficient to call one only where one only is required by law to the validity of the instrument; or, in the event of the death of all the witnesses, it is sufficient to prove the handwriting of any one; and if attestation is not made necessary to the validity of the instrument by statute or otherwise, the witness need not be called (*q*).

So, too, there are no degrees in secondary evidence. The oral testimony of a witness is as sufficient secondary evidence of the contents of a written instrument as a copy of such instrument would be, although the latter may be more satisfactory.

(*q*) 28 Vict. c. 18, s. 7.

CHAPTER V.

PRESUMPTIVE EVIDENCE.

WHERE no direct evidence is offered or obtainable, disputed facts are sometimes inferred from other facts which are proved or known. In such cases, the inference is called a presumption.

In *R.* v. *Burdett* (*a*), ABBOTT, C.J., said:

"A presumption of any fact is properly an inference of that fact from other facts that are known; it is an act of reasoning: and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given: the man who is charged with theft is rarely seen to break the house or take the goods; and in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction: but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction; if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily."

In the same case his lordship recognised a principle which, although laid down by Lord HALE (*b*), and correct to a large extent, does not appear, according to other cases, to be true universally. The rule is—Never

(*a*) 4 B. & Ald. 161. (*b*) Hale's Pleas of the Crown, 290.

to convict where the *corpus delicti* (the substantial crime or act of guilt) is not established.

In *Evans* v. *Evans* (*c*), Lord STOWELL said:

"It has been asked, and very properly asked, Do not courts of justice admit presumptive proof? Do you expect ocular proof in all cases? I take the rule to be this—If you have a criminal fact ascertained, you may then take presumptive proof to show who did it—to fix the criminal—having then an actual *corpus delicti*."

But the same learned judge, in a later case (*d*), stated the evidence which is required in cases of adultery; and his judgment there contains a more comprehensive statement of this rule. He said:

"It is a fundamental rule that it is not necessary to prove the direct fact of adultery, because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that parties are surprised in the direct act of adultery. In every case almost, the fact is inferred from circumstances that lead to it by a fair and necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally . . . because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations; neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties and remote and artificial reasonings upon such subjects. Upon such subjects the rational and the legal interpretation must be the same."

Presumptions of law and of fact.—Presumptions of fact (termed by the civilians *præsumptiones hominis*)

(*c*) 1 Hagg. Cons. 105.
(*d*) 2 Hagg. Cons. 2.

are rebuttable, and, even if not rebutted, are not conclusive. Presumptions of law are divided into those which are rebuttable, but, if not rebutted, are conclusive (*præsumptiones juris*), and those which are irrebuttable, and therefore conclusive (*præsumptiones juris et de jure*). There are also mixed presumptions, or presumptions of mixed law and fact.

Conflicting presumptions.—In connexion with the maxim of the law, "*stabitur præsumptioni donec in contrarium probetur*" (*e*), comes the doctrine of conflicting presumptions, which is not in a satisfactory state. That when two presumptions conflict, the stronger of the two prevails is certain, but how to ascertain which of two presumptions is the stronger in all cases is a difficult matter. Mr. Best (*f*) lays down four rules, which are useful, so far as they go: (i) Special presumptions take precedence of general; (ii) Presumptions derived from the course of nature are stronger than casual presumptions; (iii) Presumptions are favoured which give validity to acts; (iv) The presumption of innocence is favoured in law.

The law presumes innocence.—It is a *præsumptio juris* running through the whole law, that no person shall in the absence of proof be supposed to have done any act, which amounts to a violation of the criminal law, or which would subject him to any species of punishment, or would involve any penalty or forfeiture; and this is so, even where the act charged is only one of omission, and whether the guilt of the party comes in question directly or collaterally. Where any act is required to be done, so that the party neglecting to do it would be guilty of a criminal neglect of duty in not having done it, the law presumes the

(*e*) A presumption holds good until the contrary is established.
(*f*) Best on Evidence, 6th ed., p. 444.

affirmative, and throws the burden of proving the negative on the other side. Thus, where the plaintiff declared that the defendant, who had chartered his ship, put on board a combustible article by which loss was occasioned, *without due notice* to the captain, it was held that the plaintiff must prove his negative averment, because the law will not presume negligence which amounts to a criminal neglect of duty (*g*).

In bigamy the prosecution must prove that the first husband or wife was alive at the date of the second marriage (*h*). When the prisoner and her or his husband or wife have been living apart for seven years, the prosecution must prove the prisoner's knowledge of the existence of such husband or wife (*i*), and whether such husband or wife was alive at any time during the seven years is a question for the jury (*k*).

The rule under discussion also is subject to the qualification that if a negative averment be made by one party which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative (*l*). Thus, on an indictment for night poaching, it is unnecessary to prove want of leave and license; and it is enough to show that the prisoner was on the land; for the circumstances raise a presumption of illegality, and the jury may infer the want of license on the absence of proof thereof (*m*).

So under the Poaching Act, 1862 (*n*), proof that the defendants were found on the highway at six a.m. with a bag full of hares and rabbits, and with nets and stakes, or with nets that were wet, has been held to be

(*g*) *Per* Lord ELLENBOROUGH: *Williams* v. *East India Co.*, 3 East, 199.
(*h*) *R.* v. *Twining*, 2 B. & Ald. 386.
(*i*) *R.* v. *Curgerven*, L. R. 1 C. C. R. 1.
(*k*) *R.* v. *Lumley*, L. R. 1 C. C. R. 196.
(*l*) *Per* BAYLEY, J.: *R.* v. *Turner*, 5 M. & S. 211.
(*m*) *R.* v. *Wood*, 1 D. & B. 1. (*n*) 25 & 26 Vict. c. 114, s. 2.

sufficient for magistrates to convict them of having obtained the game by unlawfully being upon land in pursuit of game, or having used the nets for unlawfully taking game, without actual proof of the defendants being upon the land or using the nets (*o*); there being under the circumstances a reasonable presumption against the men, unless they could give some explanation of the appearances against them.

Under the first section of the Betting and Loans (Infants) Act, 1892 (*p*), if a circular or other specified document names or refers to a person as therein mentioned, such person is to be deemed to have sent or caused to be sent such document unless he proves innocence thereof. Section 2 contains a provision of an analogous character.

Section 1 of the Merchant Shipping Act, 1892 (*q*), goes further, and raises an irrebuttable presumption by enacting that, every ship so loaded as to submerge in salt water the centre of the disc placed thereon in pursuance of the Merchant Shipping Acts, 1876 to 1890, and the regulations made thereunder, shall be deemed to be "unsafe" within the meaning of the Merchant Shipping Act, 1876, and such submersion shall be reasonable and probable cause for the detention of the ship.

Odiosa et inhonesta non sunt in lege præsumenda.

Fraud is not in general presumed.—As a general rule the law will not presume fraud, which must be both pleaded and proved, or, at least, some *primâ facie* evidence of it given, when it will lie on the opposite party to disprove the allegation (*r*); and this doctrine

(*o*) *Brown* v. *Turner*, 13 C. B. (N.S.) 485; *Evans* v. *Botterell*, 3 B. & S. 787; *Jenkin* v. *King*, L. R. 7 Q. B. 468.
(*p*) 55 Vict. c. 4. See Appendix.
(*q*) 55 & 56 Vict. c. 37.
(*r*) *Mather* v. *Lord Maidstone*, 1 C. B. (N.S.) 273.

holds good even in the case of third parties, whose conduct comes in question collaterally (*s*). So equity will never presume a fraud upon a power of appointment (*t*). Equity, however, in deciding upon the validity of certain dispositions of property, will sometimes presume fraud. It is on this ground that when a person is trustee for sale, and sells the estate to himself, the transaction is absolutely and *ipso facto* void (*u*); as also it is if he sells to a person who is a trustee for him; and a person who employs the trustee to purchase the estate for him stands in no better position than the trustee himself (*x*). A landlord cannot himself become the purchaser of goods sold by him under a distress (*y*). So, also, when a reversionary interest is purchased, it was formerly incumbent on the purchaser to show that he gave a full and sufficient price for it, and if he failed to do so, the transaction would be set aside (*z*); but now, by 31 Vict. c. 4, s. 1, no *bonâ fide* purchase of a reversion, whether of real or personal estate, is to be reopened or set aside merely on the ground of undervalue. Although, however, a trustee for sale cannot purchase the trust property from himself, he may purchase from his *cestui que trust;* but a transaction of this kind is one of great nicety, for Equity will presume that the transaction was tainted with fraud, and throw upon the purchaser the *onus* of proving that he took no undue advantage of his position as trustee. This rule applies equally to solicitors, confidential agents (*a*), guardians, and all others invested with a fiduciary

(*s*) *Ross* v. *Hunter*, 4 T. R. 38.
(*t*) *Hamilton* v. *Kerwan*, 2 J. & L. 393; *Paris* v. *Paris*, 33 L. J. Ch. 215.
(*u*) *Per* Lord ROMILLY: *Denton* v. *Donner*, 23 Beav. 290.
(*x*) *Mookerjee* v. *Mookerjee*, L. R. 2 I. A. 18.
(*y*) *Moore, Nettlefold & Co.* v. *Singer Manufacturing Co.*, 72 L. J. K. B. 577. This decision has been affirmed on appeal.
(*z*) *Foster* v. *Roberts*, 29 Beav. 470.
(*a*) *Tate* v. *Williamson*, L. R. 1 Eq. 528.

character. In *Hunter* v. *Atkyns* (*b*), Lord BROUGHAM said:

"There are certain relations known to the law as attorney, guardian, trustee; if a person standing in these relations to client, ward, or *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, etc., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered is that the person standing in such relation must, before he can take a gift or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation."

The rule extends to cases of parent, solicitor, spiritual adviser and medical attendant, and, indeed, to every case in which two persons are so situated that one may obtain considerable influence over the other (*c*). When the fiduciary relation is once established, the presumption continues as long as the relation continues, or until it can be clearly inferred that the influence had come to an end (*d*). A gift to the wife of a solicitor by a client is on the same footing as a gift to the solicitor himself (*e*). Where a deed conferring a benefit on a father is executed by a child who is not emancipated from his father's control, the *onus* is on the father to show that the child had independent advice and executed the deed with a full knowledge of its contents (*f*). In the case of *Rhodes* v. *Bate* (*g*), TURNER, L.J., expressed an opinion that in cases of trifling benefits

(*b*) 3 M. & K. 135; *cf. Gibson* v. *Jeyes*, 6 Ves. 277.
(*c*) *Cook* v. *Lamotte*, 15 Beav. 239; *cf. Allcard* v. *Skinner*, 36 Ch. D. 145, and particularly the judgment of LINDLEY, L.J.; and *Wright* v. *Carter*, *ubi infra*.
(*d*) *Per* VAUGHAN WILLIAMS, L.J.: *Wright* v. *Carter*, [1903] 1 Ch. 27.
(*e*) *Liles* v. *Terry and Wife*, [1895] 2 Q. B. 679.
(*f*) *Bainbrigge* v. *Browne*, 18 Ch. D. 188.
(*g*) L. R. 1 Ch. 258.

the court would not interfere to set them aside upon the mere proof of influence derived from the existence of a confidential relationship, but would require proof of *mala fides*, or of undue or unfair exercise of the influence.

Presumption of intention to defraud creditors.—Neither at Common Law nor under the Statute of Ellzabeth could an intention to defraud creditors be presumed; but recent legislation with regard to bankruptcy proceeds on the basis that such a presumption exists in certain cases. The Bankruptcy Act, 1883 (*h*), s. 47, enacts that any settlement of property, not being an ante-nuptial settlement made in good faith for valuable consideration, or one made on or for the wife or children of the settlor of property accruing to the settlor *jure mariti*, is void if the settlor becomes bankrupt within two years of its date: and if the settlor becomes bankrupt within ten years of its date, such a settlement is void unless those claiming under it can show that he was at the time of making it able to pay all his debts without the property comprised therein. This provision only comes into operation if and when the bankruptcy takes place, and *bonâ fide* sales for value of the settled property anterior to that date hold good and cannot be avoided (*i*).

Presumptions in favour of marriage.—The law presumes strongly in favour of marriage (*k*); the maxim being "*semper præsumitur pro matrimonio*," and, as was said by Lord LYNDHURST in *Morris* v. *Davies* (*l*), and approved by Lord COTTENHAM in *Piers* v. *Piers* (*m*), this presumption of law is not lightly to be repelled, and the evidence for repelling it must be strong, distinct, satisfactory and conclusive.

(*h*) 46 & 47 Vict. c. 52.
(*i*) *Re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776.
(*k*) *Fox* v. *Bearblock*, 17 Ch. D. 499.
(*l*) 5 Cl. & Fin. 163. (*m*) 2 H. L. Cas. 362.

It is not to be broken in upon or shaken by a mere balance of probability. Long-continued cohabitation as man and wife is therefore presumptive evidence of marriage, except in the case of a prosecution for bigamy. Lord ELDON held that in cases of cohabitation the presumption is in favour of its legality (*n*), and this is particularly so after a long interval of time (*o*), and even where it commenced with a ceremony which was known by both parties to be invalid (*p*).

Presumptions as to legitimacy.—The law also presumes strongly in favour of the legitimacy of children. A child born after marriage, of which the wife was pregnant at the time of the marriage, is presumed to be the child of the husband, and so every child born subsequent to the marriage will be presumed to be the child of the husband; but these presumptions can be repelled by evidence, and also by the conduct of the parties, taking the whole of the *res gestæ*, raising a strong and irresistible conclusion that the child born was not the child of the husband, but the child of another (*q*). The evidence to repel the presumption must be strong, distinct, satisfactory and conclusive (*r*), for the presumption is one which is not lightly to be repelled (*s*). It is sometimes repelled by evidence from which non-access is inferred, and non-access will be presumed after the date of a divorce or of a decree for judicial separation, or of an order authorising cohabitation (*t*). Neither husband nor wife can give evidence of

(*n*) *Cunninghame* v. *Cunninghame*, 2 Dowl. 507; *Piers* v. *Piers*, 1 H. L. Cas. 337; *De Thoren* v. *Attorney-General*, 1 App. Cas. 686.
(*o*) *Campbell* v. *Campbell*, L. R. 1 Sc. App. 182.
(*p*) See *De Thoren* v. *Attorney-General*, *ubi supra*; and see *George* v. *Thyer*, [1904] 1 Ch. 456.
(*q*) *Per* Lord BLACKBURN, in *The Aylesford Peerage*, 11 App. Cas. 1.
(*r*) *Per* Lord LYNDHURST, in *Morris* v. *Davies*, 5 Cl. & F. 163.
(*s*) For cases in which the presumption was repelled, see *Hawes* v. *Draeger*, 23 Ch. D. 173; *Bosvile* v. *Attorney-General*, 12 P. D. 177; and *The Poulett Peerage*, [1903] A. C. 395.
(*t*) *Hetherington* v. *Hetherington*, 12 P. D. 112.

non-access during marriage for the purpose of bastardising a child (*u*).

If a bond be given by a man to a woman with whom he is cohabiting at the time, there is no presumption that it is given in consideration of future cohabitation (*v*).

The law presumes that every person intends the probable consequences of his acts.

Thus, in homicide, when the death is proved, malice is presumed; and it is for the prisoner to prove the extenuating circumstances which may reduce the act from murder to manslaughter, or to justifiable or excusable homicide (*x*); and where the death of another person is caused by a wanton act of the prisoner, he is guilty of murder, as if he purposely drove a carriage furiously amongst a number of people, or discharged a loaded gun in the middle of a crowd (*y*).

So a person carrying a child suffering from an infectious disease along a public highway, so as to endanger the health of passengers, was held to be guilty of a misdemeanour, without proof of an intent that any person should catch the disease (*z*); and, again, where a person had published a pamphlet with an indecent tendency, it was held to be no defence that he had done so with the *bonâ fide* purpose of exposing the errors of the Romish Church (*a*). Where a debtor knew that his departure from England would have the natural and necessary effect of defeating and delaying his creditors, he was held to have departed

(*u*) See as to evidence of non-access, *post*, ch. vii. rule 7.
(*v*) *Vallance* v. *Blagden*, 26 Ch. D. 353.
(*x*) *Per* Lord ELLENBOROUGH: *R.* v. *Dixon*, 3 M. & S. 15.
(*y*) 1 Hale P. C. 475.
(*z*) *R.* v. *Vantandillo*, 4 M. & S. 73.
(*a*) *R.* v. *Hicklin*, L. R. 3 Q. B. 360.

with that intent, and to have committed an act of bankruptcy (*b*).

In an action for libel, it was held that a judge was wrong in leaving it to a jury to say whether the defendant intended to injure the plaintiff, inasmuch as if the tendency of the libel was injurious to the plaintiff, the defendant must be taken to have intended the consequence of his own act (*c*).

Omnia præsumuntur ritè esse acta.

This maxim is an expression in a short form of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into question where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid, rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect (*d*).

As to persons acting in public capacity.—It is a general presumption of law that a person acting in a *public* capacity is duly authorised so to do, and there

(*b*) *Ex parte Goater*, 22 W. R. 935.
(*c*) *Haire* v. *Wilson*, 9 B. & C. 643. See also *Fisher* v. *Clement*, 10 B. & C. 472.
(*d*) *Per* LINDLEY, L.J., in *Harris* v. *Knight*, 15 P. D. 179.

is a similar presumption that a public officer acting in execution of a public trust will do his duty (*e*); and therefore it is presumed that all who act as justices of the peace, or as constables, have been duly appointed (*f*). On an indictment for having committed perjury before a surrogate of the Ecclesiastical Court, proof that the person who administered the oath acted as surrogate has been held sufficient *primâ facie* evidence that he had been duly appointed, and had authority to administer the oath (*g*). This presumption has been adopted by the legislature in the case of excise (*h*) and custom-house officers (*i*). The rule does not apply to *private* appointments, such as tithe collectors, or a town clerk (*k*), and in these cases the appointments must be proved.

Private documents, such as a deed, bill of exchange, or promissory note, are presumed to have been written at the time when they bear date (*l*), and this extends even to letters (*m*). Where indentures of a pauper's apprenticeship would have been invalid, if not executed in conformity with the rules of the Poor Law Commissioners, and there was no evidence to show that their regulations had been observed, it was held that, in the absence of contradictory evidence, it must be presumed that the regulations had been observed (*n*). So, generally, the orders of justices will be presumed to have been made according to all statutory formalities (*o*). Thus, when to prove a parish apprenticeship secondary

(*e*) *Per* Lord ELLENBOROUGH: *R.* v. *Verelst*, 3 Camp. 433; and *per* BLACKBURN, J.: *Waddington* v. *Roberts*, L. R. 3 Q. B. 579.
(*f*) *Berryman* v. *Wise*, 4 T. R. 366.
(*g*) *R.* v. *Verelst*, 3 Camp. 432.
(*h*) 7 & 8 Geo. 4, c. 53, s. 17. (*i*) 16 & 17 Vict. c. 107, s. 307.
(*k*) *R.* v. *Mayor of Stamford*, 6 Q. B. 433.
(*l*) *Malpas* v. *Clements*, 19 L. J. Q. B. 435.
(*m*) *Goodtitle* v. *Milburn*, 2 M. & W. 853; *Hunt* v. *Massey*, 5 B. & Ad. 992.
(*n*) *R.* v. *St. Mary Magdalen*, 2 E. & B. 809.
(*o*) *Williams* v. *Eyton*, 4 H. & N. 357.

evidence of a lost indenture was admitted, it was presumed that the indenture had been executed according to all the requisites of 56 Geo. 3, c. 139, because there was evidence that an arrangement for the apprenticeship had been made before magistrates, and that an apprenticeship had subsequently existed (*p*); but it seems that it would be otherwise where there is no such evidence (*q*). The rule in similar cases has been extended to the principle that that may be presumed which accounts reasonably for an existing state of things; and therefore the fact that a person served an apprenticeship raises a presumption that he was duly bound an apprentice, so as, the indenture having been sought for in vain, to create a settlement by apprenticeship (*r*). When a rate has been made, it will be presumed to have been duly made (*s*).

As to the fact of marriage.—The fact of a marriage having taken place before a registrar in a chapel raises the presumption that the chapel was properly registered, and the marriage legal (*t*); and, in support of a plea of coverture, a certificate of the defendant's marriage in a Roman Catholic chapel according to the rites of that Church, with evidence of subsequent cohabitation, was held to be *primâ facie* proof of a valid marriage under 6 & 7 Will. 4, c. 85, the same presumption arising as in the previous case (*u*). In short, wherever a marriage has been solemnized, the law strongly presumes that all legal requisites have been complied with (*x*); and the fact of the ceremony of marriage having been performed by a clergyman in a place where Divine Service has been performed raises the

(*p*) *R.* v. *Broadhempston*, 1 E. & B. 104.
(*q*) *R.* v. *Stonehouse*, 10 Q. B. 234.
(*r*) *R.* v. *Fordingbridge*, E. B. & E. 678.
(*s*) *R.* v. *Reynolds*, [1893] 2 Q. B. 75.
(*t*) *R.* v. *Manwaring*, 1 D. & B. 139.
(*u*) *Sichel* v. *Lambert*, 15 C. B. (N.S.) 781; *cf. De Thoren* v. *Attorney-General*, 1 App. Cas. 686.
(*x*) *Smith* v. *Huson*, 1 Phill. 294.

presumption that the place was duly licensed for marriages (*y*). A foreign marriage is presumed to have been celebrated with the due solemnities required by the law of the place where celebrated (*z*).

It will be seen from these cases that the rule has been extended from the acts of public servants to the purport of public and even some private instruments. Thus, public records are evidence of their own authenticity, and may now generally be proved by exemplifications or examined copies (*a*). It would also appear that it is from a restricted application of the same rule that deeds and wills are presumed to have been duly executed where thirty years have elapsed from the time of their execution (*b*), and they are produced from an unsuspected custody.

Valid livery of seisin will be presumed where necessary (*c*). When a deed more than thirty years old, which purported to exercise a power of appointment, was executed by attorney by the appointors, it was held that it could not be presumed that the attorney was properly appointed *ad hoc* (*d*). But this decision was based on the rule as to delegating discretionary powers, and is therefore, not one of general application.

The Statutes of Limitation, according to which simple contract debts cannot be recovered after six years; specialty debts after twenty years; and land after an undisturbed possession of twelve years (*e*); are all founded on the same legal presumption, that an omission to prosecute a legal claim for a certain number of years, amounts to an admission that no adverse claim exists, and must be treated as such by

(*y*) *R.* v. *Cresswell*, 1 Q. B. D. 446.
(*z*) *R.* v. *Brampton*, 10 East, 202.
(*a*) 14 & 15 Vict. c. 99, s. 14.
(*b*) *Doe* v. *Walley*, 8 B. & C. 22.
(*c*) *Ecclesiastical Commissioners* v. *Treemer*, [1893] 1 Ch. 172.
(*d*) *In re Airey*, 45 W. R. 286.
(*e*) *Nepean* v. *Doe*, 2 Sm. L. C. 396, notes.

the community. It is, therefore, presumed, under such circumstances, that the debts have been paid and the land duly conveyed: and no evidence of a different state of facts will be received.

Execution of deeds and wills.—The maxim *Omnia præsumuntur ritè esse acta* is applied by the courts to the execution both of deeds and of wills. Where all the witnesses are dead, and the handwriting of one of them is proved, the statement in the attestation clause will be presumed to be correct (*f*). A court of Probate goes further than this, and presumes that all formalities have been complied with in respect of a will when the attestation clause is in the usual form (*g*). When there is no attestation clause, or when it is not in the usual form, courts of law will, it seems, nevertheless presume compliance with all formalities in respect of a will (*h*), and the tendency of a court of Probate will be to give effect to the testator's intentions (*i*). Of course the evidence of the attesting witnesses may rebut the presumption of due execution (*k*); but when a will appears on the face of it to have been duly attested, and surrounding circumstances imply that this was so, the contrary evidence of one attesting witness will not rebut the presumption of due execution (*l*). Where the recollection of the attesting witnesses is imperfect, but the undisputed facts, the probabilities of the case, and the *evidentia rei*, are in favour of due execution, such execution will be presumed (*m*). Where probate of a will had been granted on the oaths of the two

(*f*) *Adam* v. *Kerr*, 1 B. & P. 360; *Andrews* v. *Mottley*, 12 C. B. (N.S.) 526.
(*g*) *Vinnicombe* v. *Butler*, 3 Sw. & Tr. 580.
(*h*) *Spilsbury* v. *Burdett*, 10 C. & F. 340.
(*i*) *In the Goods of Rees*, 34 L. J. P. M. & A. 56.
(*k*) *Croft* v. *Croft*, 34 L. J. P. M. & A. 44.
(*l*) *Wright* v. *Rogers*, 17 W. R. 833; *cf. In the Goods of Jane Thomas*, 1 Sw. & Tr. 255.
(*m*) *Wright* v. *Sanderson*, 9 P. D. 149; *Whiting* v. *Turner*, 89 L. T. 71.

attesting witnesses, the probate was confirmed notwithstanding the evidence against it of one witness which was held incredible, and in the absence of evidence by the other witness, which absence was satisfactorily explained (*n*). It may here be remarked that when a will is traced to the custody of the testator and is not forthcoming, then, in the absence of other evidence, it will be presumed that the testator destroyed it *animo revocandi* (*o*). This presumption may be rebutted by the facts, and will be more or less strong according to the character of the custody which the testator had over the will (*p*). But the court must be morally satisfied that it was not destroyed by the testator *animo revocandi* (*q*). Again, where signing and sealing are proved, the courts will presume the delivery of a deed (*r*). So it will be presumed that an instrument lost or not produced after notice was duly stamped (*s*); unless there is evidence that it remained without a stamp for some time after the execution, in which case the *onus* is shifted, and lies upon the party who relies on the document (*t*). If an instrument is produced bearing adhesive stamps, properly cancelled, it will be presumed they were affixed at the proper time (*u*).

Alterations in documents.—With regard to alterations in documents, the general rule is, that the party producing an altered document in evidence must explain the alteration; but in the case of deeds and all documents, which it is an offence to alter after completion, there is a presumption that alterations, if any,

(*n*) *Pilkington* v. *Gray*, [1899] A. C. 401.
(*o*) *Welch* v. *Phillips*, 1 Moo. P. C. 199.
(*p*) *Per* COCKBURN, C.J.: *Sugden* v. *Lord St. Leonards*, 1 P. D. 218 In that case the presumption was rebutted.
(*q*) *Allan* v. *Morrison*, [1900] A. C. 604.
(*r*) *Hall* v. *Bainbridge*, 12 Q. B. 699.
(*s*) *R.* v. *Long Buckley*, 7 East, 45.
(*t*) *Marine Insurance Co.* v. *Haviside*, L. R. 5 E. & I. 624.
(*u*) *Bradlaugh* v. *De Rin*, L. R. 3 C. P. 286.

were made before execution in the one case, and before completion in the other (*x*). In the case of a will the presumption is that an alteration was made after execution (*y*); but Lord PENZANCE has stated that there is a marked distinction between interlineations and alterations, and in a case of interlineations (*z*) he held that, having regard to the internal evidence of the document itself, he was not bound to presume they were made after execution. There is no presumption that blanks filled up in different ink were so filled up after execution (*a*). In the case of bills of exchange and promissory notes, s. 64 of the Bills of Exchange Act, 1882 (*b*), enacts as follows:

"(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers. Provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour. (2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

This section includes promissory notes; the word "apparent" in the section has been held (*c*) not to be limited to that which is apparent to all mankind, but includes those cases in which the party sought to be bound can at once discern, from some incongruity on the face of the bill or note, and point out to the holder, that it is not what it was, *i.e.*, that it has been materially altered. The *onus* of proving the time when an alteration was made lies on a person suing on

(*x*) *Doe* v. *Catomore*, 16 Q. B. 745.
(*y*) *Cooper* v. *Bockett*, 4 Moo. P. C. 419; *Doe* v. *Palmer*, 16 Q. B. 747.
(*z*) *In the Goods of Cadge*, L. R. 1 P. & D. 545.
(*a*) See *Greville* v. *Tylee*, 7 Moo. P. C. 327.
(*b*) 45 & 46 Vict. c. 61.
(*c*) *Leeds Bank* v. *Walker*, 11 Q. B. D. 84.

a bill of exchange where the time of alteration is material (*d*). An alteration in the number on a Bank of England note avoids the note (*e*).

Long possession.—In favour of a person who has been in long and peaceable possession, conveyances (*f*), royal grants (*g*), and Acts of Parliament will be presumed; but this rule in the case of Acts of Parliament appears to be restricted to private Acts, and not to apply against the Crown (*h*). Even against the Crown, however, the uninterrupted user of a road by the public for forty or fifty years raises a presumption of dedication as a highway (*i*). The enrolment of a tithe award has been presumed where the usage of paying tithes has been shown (*k*). It is a well-settled principle of English law that when there has been long-continued possession or assertion of a right, the right should be presumed to have had a legal origin, if such a legal origin was possible, and that the courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title (*l*). Therefore, on proof of long enjoyment of a pew, coupled with acts which would have been illegal unless there had been a faculty, a faculty was presumed (*m*). So, too, possession and user of a fishery as several, if continued for a sufficient period, justifies the presumption that it had its origin legally and not illegally, and at a period at which the law permitted it rightfully to originate (*n*).

(*d*) *Johnson* v. *Duke of Marlborough*, 2 Stark. 313.
(*e*) *Suffell* v. *Bank of England*, 9 Q. B. D. 955.
(*f*) *England* v. *Slade*, 4 T. R. 682; *Cooke* v. *Soltau*, 2 S. & S. 154.
(*g*) *Goodtitle* v. *Baldwin*, 11 East, 488.
(*h*) *Attorney-General* v. *Ewelme Hospital*, 17 Beav. 366. See *dicta* of Lord ABINGER in *Jewson* v. *Dyson*, 9 M. &. W. 555; and of Lord WYNFORD in *Macdougall* v. *Purrier*, 2 Dow. & Cl. 170.
(*i*) *R.* v. *East Mark*, 11 Q. B. 877.
(*k*) *Macdougall* v. *Purrier*, 2 Dow. & Cl. 135.
(*l*) *Per* Lord HERSCHELL, in *Phillips* v. *Halliday*, [1891] A. C. at p. 231. See also *Haig* v. *West*, [1893] 2 Q. B. 19.
(*m*) *Phillips* v. *Halliday*, [1891] A. C. 228.
(*n*) See *Neill* v. *Duke of Devonshire*, 8 App. Cas. 158.

Where there is evidence of a **long exclusive enjoyment of property**, and of an exercise of a distinct right referable to a legal origin, the court will presume such an origin, and also (in the absence of proof to the contrary) that it commenced before legal memory (*o*). Even where long and undisputed enjoyment is shown to have had *de facto* an invalid or illegal or insufficient origin, still the court will presume, if it can, that the illegality has been altered by something which has occurred in the course of time, and so clothe the enjoyment with legal right (*p*), unless, of course, the subsequent enjoyment is shown to be consistent with the right invalidly acquired rather than consistent with its having been made a legal right (*q*). Since the fusion of law and equity, the possibility of an equitable origin must be negatived as well as that of a legal origin (*r*).

The presumption of a lost grant is a presumption of fact, and therefore rebuttable. Where a case involving this presumption is tried by a judge without a jury, the judge ought to find the existence or non-existence of the lost grant as a fact; if it is tried with a jury, it is for the jury to find the fact; and evidence is, of course, admissible to prove that there was never in fact such a grant (*s*). A lost grant will not be presumed in contravention of an Act of Parliament (*t*).

It may be observed, while dealing with this head of presumptions, that by the Lunacy Act, 1890 (*u*), s. 329, it is enacted that when a question arises in proceedings under the Act whether a house is or is not a licensed house, or a registered hospital, it is to be presumed not

(*o*) *Johnson* v. *Barnes*, L. R. 8 C. P. 527.
(*p*) *Per* FRY, L.J.: *Halliday* v. *Phillips*, 23 Q. B. D. 56.
(*q*) See judgment of Lord HERSCHELL in *Halliday* v. *Phillips*, [1891] A. C. 236.
(*r*) *Per* BOWEN, J.: *Dalton* v. *Angus*, 6 App. Cas. at p. 783.
(*s*) *Per* BRETT, L.J.: *Angus* v. *Dalton*, 4 Q. B. D. 201.
(*t*) *Neaverson* v. *Peterborough, etc. Council*, [1902] 1 Ch. 557.
(*u*) 53 & 54 Vict. c. 5.

to be so licensed or registered unless the licence or certificate of registration is produced, or sufficient evidence is given that a licence or certificate of registration is in force.

Post Letters.

Post letters.—The following presumptions as to post letters also illustrate the maxim under consideration:

First.—If a letter be found to have been correctly addressed, posted, and not returned, it will be presumed to have arrived at its destination unless evidence is given sufficient to rebut the presumption (*x*). This presumption has been adopted by the legislature in many Acts of Parliament, but with this difference, that no rebutting evidence is admissible, and therefore the presumption is conclusive. Thus the 63rd section of the Companies Act, 1862, says:

"Any document to be served by post on the company shall be posted in such time as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the service thereof; and in proving service of such document it shall be sufficient to prove that such document was properly directed, and that it was put as a prepaid letter into the post office."

So by s. 142 of the Bankruptcy Act, 1883:

"All notices and other documents for the service of which no special mode is directed may be sent by prepaid post letter to the last-known address of the person to be served therewith."

Secondly.—A letter is presumed to have arrived at its destination at the time at which it would be delivered in the ordinary course of postal business, and the sender is never held answerable for any delay which occurs in its transmission through the post (*y*); so that, where

(*x*) *Warren* v. *Warren*, 1 C. M. & R. 250.
(*y*) *Stocken* v. *Collin*, 7 M. & W. 515.

any notice has to be given on a particular day, it is sufficient to post it so that it would in the ordinary course arrive at its destination on that day, and if it is delayed in the post the sender is not responsible for the delay (*z*). This is important in reference to notices to quit and notices of dishonour. Here may be alluded to the rule laid down by the House of Lords in *Dunlop* v. *Higgins* (*a*), that a contract to buy goods entered into by letter is complete when the letter of acceptance is posted; and the rule was held to be the same, in the case of a contract to take shares, by the Court of Appeal in Chancery in *Harris's Case* (*b*). It makes no difference if the letter is never received by the person to whom it is addressed, the contract being complete as soon as the letter of acceptance is delivered to the post office (*c*). Delivery to the post office is complete when a letter is deposited in the post office letter box or handed to an agent of the post office who is authorised to accept letters for the post, but not when handed to a person not so authorised (*d*), even though in the employment of the post office. These rules only apply when the circumstances of the case are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance (*e*). When a letter constitutes a breach of contract the breach is complete when the letter is posted, and this is so even when the letter is posted abroad (*f*). By s. 26

(*z*) *Ward* v. *Lord Londesborough*, 12 C. B. 252.
(*a*) 1 H. L. Cas. 381.
(*b*) L. R. 7 Ch. 587.
(*c*) *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216; *cf. Bruner* v. *Moore*, [1904] 1 Ch. 305. But a letter withdrawing an offer is not operative until it reaches the addressee (*Henthorn* v. *Fraser*, [1892] 2 Ch. 27).
(*d*) *Re London and Northern Bank*, [1900] 1 Ch. 220.
(*e*) *Henthorn* v. *Fraser*, [1892] 2 Ch. 27.
(*f*) *Holland* v. *Bennett*, [1902] 1 K. B. 867.

of the Interpretation Act, 1889 (*g*), it is enacted as follows:

"Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve,' or the expression 'give' or 'send,' or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Thirdly.—Where it is necessary to prove posting, it is in general sufficient to prove that the letter was delivered to the clerk whose duty it was, in the ordinary course of business in the office, to carry letters to the post; but this is not a conclusive presumption like the second, nor is it so strong as the first.

Fourthly.—Whenever a letter, whether sent by post or by hand, is proved to have been correctly addressed and delivered to the clerk or servant of the person to whom it was addressed, it will be presumed that it came into his hands, although this presumption can be rebutted (*h*).

Fifthly.—The post-mark on a letter, if decipherable, raises a presumption that the letter was in the post at the time and place specified in such post-mark; but this again is a rebuttable presumption (*i*).

It may be observed that by s. 329 of the Lunacy Act, 1890 (*k*), it is provided that:

"Where any person is proceeded against under this Act on a charge of omitting to transmit or send any copy, list, notice, statement, report or other document required to be transmitted or sent by such person, the burden of proof that the same was transmitted or sent within the time required shall lie upon such person; but if he proves by the testimony of one witness upon oath that the copy, list, notice, statement, report or document in

(*g*) 52 & 53 Vict. c. 63.
(*h*) *Macgregor v. Keily*, 3 Ex. 794.
(*i*) *R.* v. *Johnson*, 7 East, 65.
(*k*) 53 & 54 Vict. c. 5.

respect of which the proceeding is taken was properly addressed and put into the post in due time, or (in case of documents required to be sent to the commissioners or a clerk of the peace or a clerk to guardians) left at the office of the commissioners or of the clerk of the peace or clerk to guardians, such proof shall be a bar to all further proceedings in respect of such charge."

Omnia præsumuntur contra spoliatorem.

If a man, by his own wrongful act, withhold evidence by which the facts of the case would be manifested, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted (*l*). So, too, Courts of Justice look with the utmost suspicion on the conduct of parties who intentionally keep secret matters at a time when they might be explained, and divulge them when lapse of years may have made contradiction or explanation impossible (*m*). In *Armory* v. *Delamirie* (*n*), the plaintiff, a boy, had found a jewel, which he gave for inspection to the defendant, a jeweller; and in trover for it, it was held, that unless the defendant produced it, the jury must presume it to be of the first water, and make the value of the best jewel that would fit the socket the measure of their damages. But this presumption only arises where there is a suspicion of fraud: so that where a person refused to allow his former solicitor to give evidence of matters connected with the professional relation, it was held that there was no adverse presumption against him, Lord ST. LEONARDS saying that there was no analogy to the case of *Armory* v. *Delamirie* (*o*). Where the deficiency of evidence arises from negligence, the party who is accountable for it cannot be benefited by it. Thus, where a liquor merchant sued for goods sold and delivered, and the only evidence was that some hampers

(*l*) *Williamson* v. *Rover Cycle Co.*, Irish L. R. (1901), 2 Q. B. D. 619.
(*m*) *Cf. Campbell* v. *Campbell*, L. R. 1 Sc. App. 182.
(*n*) 1 Sm. L. C. 153.
(*o*) *Wentworth* v. *Lloyd*, 10 H. L. Cas. 589.

of full bottles had been delivered to the defendant, but there was no evidence of the contents of the bottles, Lord ELLENBOROUGH told the jury to presume that the bottles were filled with the cheapest liquor in which the plaintiff dealt (*p*). If a devisee under a first will destroys a subsequent will, it will be presumed as against him that the first will has been revoked (*q*). On this principle, in admitting evidence of a will proved to have been destroyed by the heir-at-law, the judge of the Irish Court of Probate said that he should be satisfied with evidence much less cogent than in the case of a lost will (*r*). The refusal, however, to produce documents on notice, is not ground for any inference as to their contents (*s*). Again, if an accounting party parts with or destroys his books, the strongest presumptions consistent with the rest of the case will be made against him (*t*). The principle of presuming against a spoliator is adopted in International Law when papers have been spoliated by a captured party (*u*).

Continuance of existing state of things.—Where there is proof of the existence of a state of things, and no evidence of the cessation of that state of things, the presumption is that the existing state of things continues; and therefore, where the question is as to the life or death of a person who has been once shown to be living, the proof of the fact lies on the party who asserts the death, and it was once considered that there was a presumption that a person continues alive until the contrary be shown (*x*); but it is now considered that whether a person is alive at a given date is a question for the jury, and that his

(*p*) *Clunnes* v. *Pezzey*, 1 Camp. 8.
(*q*) *Harwood* v. *Goodright*, Cowp. 86.
(*r*) *Mahood* v. *Mahood*, Ir. R. 8 Eq. 359.
(*s*) *Cooper* v. *Gibbons*, 3 Camp. 363.
(*t*) *Gray* v. *Haig*, 20 Beav. 231.
(*u*) *The Hunter*, 1 Dodson, 480.
(*x*) *Wilson* v. *Hodge*, 2 East, 313.

existence at an antecedent period may or may not afford a reasonable inference that he was living at a subsequent date (*y*).

Presumption of death.—Where it is proved that a person has not been heard of for seven years, a presumption arises that he is dead. But to raise this presumption there should have been an inquiry and search made for the man among those who, if he was alive, would be likely to hear of him (*z*). This presumption will not necessarily be made between vendor and purchaser (*a*). This presumption relates only to the fact of death; and the time of death, whenever it is material, must be a subject of distinct proof by the party interested in fixing the time; for there is no presumption as to when, during the seven years, the person in question died (*b*). The fact of letters of administration having been granted is not sufficient proof of death (*c*). In the Probate Division of the High Court death is not presumed in the case of disappearance, but the applicant for a grant has to obtain leave "to swear the death" (*d*), which leave will be given provided a proper case is made out. The applicant has to swear to his belief of the death, and to prove that he has made proper and ample inquiries (*e*). Death has been allowed to be sworn after three years' disappearance (*f*).

Death without issue.—It has been stated that the presumption is that an unmarried man who has not

(*y*) *Per* GIFFARD, L.J.: *In re Phene's Trusts*, L. R. 5 Ch. 139; *cf. R.* v. *Lumley*, L. R. 1 C. C. R. 196; and *In re Rhodes*, 36 Ch. D. 586.
(*z*) *Per* Lord BLACKBURN, in *Prudential Assurance Co.* v. *Edmonds*, 2 App. Cas. 509.
(*a*) Dart's Law of Vendors and Purchasers, 6th ed., p. 385.
(*b*) *In re Phene's Trusts, ubi supra; In re Lewes's Trusts*, L. R. 6 Ch. 357. See also *Re Benjamin*, [1902] 1 Ch. 723.
(*c*) *In re Beamish*, 9 W. R. 475.
(*d*) *In the Goods of Jackson*, 87 L. T. 475.
(*e*) *In the Goods of Clarke*, [1896] P. 287.
(*f*) *In the Goods of Matthews*, [1898] P. 17.

been heard of for seven years died without issue (*g*); and NORTH, J., is believed to have decided an unreported (*h*) case of *Re Harding*, in 1891, on such a presumption. But, on the other hand, it was laid down by COCKBURN, C.J., in *Greaves* v. *Greenwood* (*i*), that if it is proved that a man died many years ago, and there is nothing to show that he had or had not issue, there is no presumption that either he had or had not had issue. This statement of the learned Chief Justice may be, and probably is, accurate if taken literally, but the true view of the matter under consideration seems to be that where the question of the failure of issue of a given person arises for the decision of a court all that can be done is to prove facts which raise a presumption of want of issue (*k*), and then ask the court to presume such failure; and it has been presumed in cases where the given person had not been heard of for a considerable number of years—twenty-five years in two cases (*l*), and seventeen in another (*m*), and inquiries had been made which had failed to elicit any information.

Capacity for child-bearing.—There is no fixed time at which a woman, whether a spinster or a widow, will be presumed to be past child-bearing. It depends on the particular circumstances of each case whether the presumption arises or not. As a general rule it is, in the absence of special circumstances (*n*), considered as not arising until a woman is at least fifty-six years of

(*g*) Seton on Decrees, 5th ed., p. 1391.
(*h*) See Times Newspaper of May 28th, 1891.
(*i*) 2 Ex. D. 289.
(*k*) See Hubback on Evidence of Succession, 203.
(*l*) *Re Hankey*, 25 W. R. 427; and *Re Webb*, Ir. R. 5 Eq. 235.
(*m*) *Rawlinson* v. *Miller*, L. R. 1 Eq. 52.
(*n*) The circumstances to be considered are—whether a spinster or married: if married, how long, whether husband alive or dead, whether children or not, and when last child was born. See *In re Thornhill*, [1904] W. N. 112, and the cases referred to at the top of the next page.

age. But in *Re Sumner* (*o*), and also in *Re Millner* (*p*), a woman under fifty was, under the circumstances, presumed to be past child-bearing. In *Croxton* v. *May* (*q*), the presumption was held not to arise in the case of a woman just over fifty-four, but who had only been married three years. One of the latest cases in which the presumption was held to arise is *Re White* (*r*), where a woman was just over fifty-six. No analogous presumption of incapacity arises in the case of a man of any age.

Survivorship.—Where several persons have perished in the same calamity, the presumption was once said to be in favour of the survival of the stronger party (*s*); but in a case where it appeared that a husband, a wife, and their two children, were washed off from the deck of a ship by the same wave and drowned, the House of Lords held, that in the absence of further evidence it must be presumed that all died at the same moment (*t*). This rule was applied by the Court of Probate when husband and wife were both killed in a railway accident, and the bodies were found two hours afterwards (*u*), and administration was granted to the next of kin of each; so, also, where husband and wife were proved to have been on board a vessel which was a total loss at sea (*x*).

Bailees.—Where goods have been lost or damaged while in the custody of a bailee or his servants, it is presumed that the loss or damage arises from his negligence (*y*). This presumption appears to arise as much in the case of a gratuitous bailee as in that of a bailee for valuable consideration; but the liability

(*o*) 22 W. R. 639.
(*p*) L. R. 14 Eq. 245.
(*q*) 9 Ch. D. 388.
(*r*) [1901] 1 Ch. 570.
(*s*) *Sillick* v. *Booth*, 1 Y. & C. 117.
(*t*) *Wing* v. *Angrave*, 8 H. L. Cas. 183.
(*u*) *In the Goods of Wheeler*, 31 L. J. P. M. & A. 40.
(*x*) *In the Goods of Alston*, [1892] P. 144.
(*y*) *Carpue* v. *London and Brighton Rail. Co.*, 5 Q. B. 747; *Latch* v. *Rumner Rail. Co.*, 27 L. J. Ex. 155.

will be limited by the rules laid down in *Coggs* v. *Bernard* (*z*).

Partners.—A partner *primâ facie* has authority to bind the firm by any acts done in carrying on in the usual way business of the kind carried on by the firm. But this presumption may be rebutted by showing that such partner has not, in fact, authority in the particular matter, *and* the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner (*a*). A partner may be specially authorised to pledge the credit of the firm outside the firm's ordinary course of business (*b*).

Domicil.—Every person acquires a domicil of origin at birth, which is that of the father at that date in the case of a legitimate child, and that of the mother in the case of an illegitimate child; this domicil continues until it is abandoned and a new one chosen. The presumption is in favour of the continuance of the domicil of origin, and the burden of proof is on those who allege the acquisition of a new one. Mere residence, however long, in a country which is not that of the domicil of origin does not prove the abandonment of the old domicil and the acquisition of a new one, but it is an element to be taken into consideration (*c*). But long and continuous residence, coupled with other circumstances, may raise a strong presumption of an intention to renounce the domicil of origin and acquire a new one in a particular country (*d*). The question in all these cases is, had the person whose domicil is in dispute at the time of his death formed a deliberate and

(*z*) 2 Lord Raym. 918.
(*a*) See s. 5 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), in the Appendix.
(*b*) Sect. 7.
(*c*) *Per* COLLINS, M.R.: *Sourdis* v. *Keyser*, 18 T. L. R. 416.
(*d*) See *Attorney-General* v. *Winans*, 85 L. T. 508; reversed by the House of Lords on the facts, see Times, May 11th, 1904.

final intention of abandoning his domicil of origin and settling in another country.

Payment of incumbrances by persons having partial interests.—In Equity, if a person having a partial interest in a settled estate pays off an incumbrance, the presumption is that he intends to keep the charge alive for his own benefit (*e*). This presumption may be rebutted; and whenever there is any indication of intention, be it small or great, the court must decide whether a tenant for life intended to clear the inheritance or not (*f*). Where a husband pays off an incumbrance on his wife's separate estate he is, in the absence of evidence of an intention to clear the wife's estate, entitled to the benefit of the charge as against the estate (*g*).

Receipts.—It is a presumption that, if a tenant shows a receipt for rent, all previous rent has been paid by him to the landlord (*h*), and this presumption is one which requires strong evidence to rebut it. A similar presumption would doubtless apply to all cases of periodical payments. No receipt (except a receipt under seal), is, however, conclusive evidence against the maker, except in favour of any person who may have been induced by it to alter his condition (*i*).

Possession of documents.—The possession of a bill of exchange by the drawer (*k*), or of a note by the maker (*l*), is *primâ facie* evidence of payment; but the possession of a lease by the lessor with the seals

(*e*) *Morley* v. *Morley*, 5 De G. M. & G. 610.
(*f*) *Lindsay* v. *Earl of Wicklow*, Ir. R. 7 Eq. 205; *cf. Pitt* v. *Pitt*, 22 Beav. 294.
(*g*) *Outram* v. *Hyde*, 24 W. R. 268.
(*h*) This presumption has been adopted by the legislature in s. 3 (4), (5) of the Conveyancing Act, 1881.
(*i*) *Graves* v. *Key*, 3 B. & A. 318.
(*k*) *Gibbon* v. *Featherstonhaugh*, 1 Stark. 225.
(*l*) *Bembridge* v. *Osborne*, 1 Stark. 374.

cut off is no evidence of a surrender by written instrument according to the Statute of Frauds (*m*).

Boundaries.—When two parishes or properties are separated by a highway, the presumption is that the *medium filum viæ* is the actual boundary (*n*); when they are separated by a river the *medium filum aquæ* is presumed to be the actual boundary. But when there is an island in a river, so that the river is divided thereby into two streams, there is no presumption that the *medium filum* runs through the island (*o*). The soil of a public highway is presumed to belong to the owners of the adjacent lands *usque ad medium filum viæ* (*p*), and this applies to the case of a street in a town (*q*). It does not, however, apply in the case of ground which is intended to be used as a highway but has not been dedicated to the public (*r*). By International Law, where two states are bounded by a navigable river, the middle of the channel or Thalweg is presumed to be the boundary, with a common right of navigation to both; but when it can be proved that one bank of the river was occupied before the other, it will be presumed that the first occupant has an exclusive title to the river. The presumption, however, that the bed and soil of a stream belong to the riparian owners does not apply to a large non-tidal and navigable lake (*s*). Where there is a metalled road bordered by unmetalled margins, there is no presumption that the highway extends up to the fences (*t*).

(*m*) *Doe* v. *Thomas*, 9 B. & C. 288.
(*n*) *R.* v. *Strand Board of Works*, 4 B. & S. 526.
(*o*) *Great Torrington Commons Conservators* v. *Moore Stephens*, [1904] 1 Ch. 347.
(*p*) For a case in which the presumption was rebutted, see *Pryor* v. *Petrie*, [1894] 2 Ch. 11.
(*q*) *Re White's Charities*, [1898] 1 Ch. 659.
(*r*) *Leigh* v. *Jack*, 5 Ex. D. 264.
(*s*) *Johnston* v. *Bloomfield*, Ir. R. 8 C. L. 68.
(*t*) *Belmore* v. *Kent County Council*, [1901] 1 Ch. 873.

On the subject of boundaries, the words of an eminent judge may be quoted:

"The rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then, on the true construction of the instrument, half the bed of the river or half of the road passes, unless there is enough in the circumstances, or enough in the expressions of the instrument, to show that that is not the intention of the parties" (*u*).

Certain equitable presumptions.

Presumption against double portions.—Where a person, having contracted by his marriage settlement to provide for his wife or children, gives a legacy to her or them by will, then (*x*) if the legacy be of a sum as great as or greater than the portion or provision; if it be *ejusdem generis;* if it be equally certain with the latter and subject to no contingency not applicable to both; and if it be shown that it is not given for a different purpose; then it will be deemed a complete satisfaction. If the legacy be less in amount than the portion or provision, or if it be payable at a different period or periods, then, although there is some diversity of opinion upon the subject, the weight of authority is, that it may be or will be deemed a satisfaction *pro tanto*, or in full, according to the circumstances (*y*); the reason of these rules being that Equity presumes that the testator did not intend a double portion (*z*). This presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions, or by extrinsic evidence (*z*).

(*u*) *Per* COTTON, L.J.: *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. at p. 145.

(*x*) Story's Eq. Jur. 1109.

(*y*) *Thynne* v. *Earl of Glengall*, 2 H. L. Cas. 131; *sed cf. Coventry* v. *Chichester*, 2 Hem. & M. 149.

(*z*) *Weall* v. *Rice*, 2 R. & M. 267; *Tussaud* v. *Tussaud*, 19 Ch. D. 363.

Presumption of ademption.—When a parent (*a*), or other person *in loco parentis*, bequeaths a legacy to a child or grandchild, and afterwards in his lifetime gives a portion to, or makes a provision for, such child or grandchild, without expressing it to be in lieu of the legacy, in such a case, if the portion so received or the provision so made be equal to or exceed the amount of the legacy, if it be certain and not merely contingent, if no other distinct object be pointed out, and if it be *ejusdem generis*, then an intention will be presumed to adeem the legacy; if the portion or provision be less than the amount of the legacy, an ademption *pro tanto* will be at all events presumed (*b*). To raise such a presumption it has been said (*c*), that it is not incumbent on the person who alleges a satisfaction to show anything more than that the testator, having given a legacy of a certain amount, afterwards in his lifetime gave the legatee a sum of money, the nature of the two gifts not being so different as to rebut the presumption. In *Lacon* v. *Lacon* (*d*), which was a case where a testator in his lifetime gave two shares in a parternership business to one of his youngest sons, and by his will gave his shares in the same business to his three sons equally, it was held that the presumption of ademption was rebutted by the circumstances under which the two shares were given to the youngest son. Evidence may be gone into to rebut the presumption by showing that it was not in accordance with a testator's intentions, and counter evidence is also admissible (*e*). It has been held that if a legacy appears upon the face of a will to be bequeathed even to a stranger for a particular purpose, and a subsequent gift be made by the testator

(*a*) Story's Eq. Jur. 1111.
(*b*) *Pym* v. *Lockyer*, 5 M. & C. 29.
(*c*) *Per* HALL, V.-C.: *Leighton* v. *Leighton*, L. R. 18 Eq. 468.
(*d*) [1891] 2 Ch. 482.
(*e*) *Kirk* v. *Eddowes*, 3 Hare, 517.

for the very same purpose, a presumption is raised that the gift is an ademption (*f*).

Presumptions in case of legacies to creditors.—It is an established rule in Equity, that where a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt, it shall be presumed in the absence of any intimation of a contrary intention that the legacy was meant by the testator as a satisfaction of the debt. If, however, the debt is upon a negotiable security (*g*), or upon a current account (*h*), there is no such presumption.

Cumulation of legacies.—Another class of presumptions in Equity is with respect to the cumulation of legacies. In *Hurst* v. *Beach* (*i*), LEACH, M.R., said:

"Where a testator leaves two testamentary instruments, and in both has given a legacy *simpliciter* to the same person, the court, considering that he who has twice given must *primâ facie* be intended to mean two gifts, awards to the legatee both legacies; and it is indifferent whether the second legacy is of the same amount, or less, or larger than the first; but if in such two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and in both instruments the same motive is expressed, and the same sum is given, the court considers these two coincidences as raising a presumption that a testator did not by the second instrument mean a second gift, but meant only a repetition of the former gift."

The doctrine of resulting trusts arises from another presumption adopted in Equity. When a transfer is made of property without any consideration, express or implied, or any distinct trust stated, the transferee will be presumed to be intended to hold the property in trust for the transferor; and where a person purchases property with his own money in the name of another, it will be presumed that the property so bought is intended to be held in trust for him who pays the

(*f*) *In re Furness*, [1901] 2 Ch. 349.
(*g*) *Carr* v. *Eastabrooke*, 3 Ves. 561.
(*h*) *Rawlins* v. *Powel*, 1 P. Wms. 299.
(*i*) 5 Mad. 358. But see *Wilson* v. *O'Leary*, L. R. 7 Ch. 448.

purchase-money. But where one person stands in such relation to another that there is an obligation on that person to make a provision for the other, and a purchase or investment is made in the name of that other, or in the joint names of both, a presumption arises of an intention to discharge the obligation, and the purchase or investment in the absence of evidence to the contrary, is held to be a gift. Hence when a husband transfers stock into the joint names of himself and his wife, the stock is the absolute property of the wife if she is the survivor (*k*). So where a father purchases property in, or transfers property into, the name of a child, a gift is presumed (*l*), and the same rule has been applied in the case of an illegitimate child when there has been recognition and filial treatment (*m*), and of a grandchild whose father was dead (*n*). It is, in fact, applicable to all cases where the person purchasing or transferring stands *in loco parentis* (*o*) to the other, on account of the moral obligation of the former to make a provision for the latter. It was held by STUART, V.-C., in *Sayer* v. *Hughes* (*p*), that in the case of a widowed mother there was the same presumption as in the case of a father; but JESSEL, M.R., in *Bennet* v. *Bennet* (*q*), held that no presumption of gift arises in the case of a mother purchasing or investing in the name of a child, on the ground that there is no obligation on a mother to provide for her child such as a Court of Equity recognises. This decision, however, seems to be erroneous, seeing that the legislature has by s. 21 of the Married Women's Property Act, 1882, not only recognised an obligation on the part of the

(*k*) *Dummer* v. *Pitcher*, 2 M. & K. 262.
(*l*) See Lewin on Trusts, 10th ed., p. 182.
(*m*) *Kilpen* v. *Kilpen*, 1 M. & K. 520.
(*n*) *Ebrand* v. *Dancer*, 1 Coll. C. C. 265 n.
(*o*) As to what constitutes standing *in loco parentis*, see Lord COTTENHAM'S judgment in *Powys* v. *Mansfield*, 2 M. & C. 366.
(*p*) L. R. 5 Eq. 376. (*q*) 10 Ch. D. 474.

mother to maintain her children, but rendered it compulsory on her, under certain circumstances, so to do. In one case (*r*), KAY, J., held that certain small advances made by a widowed mother to her son, of which she did not in her lifetime claim repayment, were gifts on the ground that the mother had placed herself *in loco parentis*. The learned judge referred in his judgment to both *Sayer* v. *Hughes* and *Bennet* v. *Bennet*. Where a Hindu purchases property in India in the name of a child, the presumption is that it is the property of the father (*s*).

The declarations of the parent at the time of the transfer or purchase are admissible to rebut the presumption of advancement, but not his subsequent declarations (*t*). STUART, V.-C., once admitted the evidence of the transferor to rebut the presumption of advancement, by showing that he made the transfer under a mistake as to its legal consequences (*u*). When there is evidence to rebut the presumption of advancement, the court is in the same position as a jury would be (*x*).

(*r*) *Evans* v. *Maxwell*, 50 L. T. (N.S.) 51.
(*s*) *Gopi Kristo Gosain* v. *Gunga Persad*, 6 Moore, I. A. 53.
(*t*) *Williams* v. *Williams*, 32 Beav. 370; followed in *O'Brien* v. *Speil*, Ir. R. 7 Eq. 255, the judgment in which see.
(*u*) *Devoy* v. *Devoy*, 3 Sm. & G. 403.
(*x*) *Fowkes* v. *Pascoe*, 23 W. R. 538.

CHAPTER VI.

EVIDENCE IN MATTERS OF OPINION.

SINCE it is the province of either the judge or of the jury to draw all inferences from facts, it follows, as a general rule, to which, however, there are several exceptions, that—

A witness must only state facts: and his mere personal opinion is not evidence.

The object of this rule is to keep the witness, as much as possible, from trespassing on the functions of either judge or jury; and it is relaxed as often as the opinion of a witness can be regarded in the nature of a presumptive fact. Thus, in cases where the insanity of a person is in issue, a medical witness, whose knowledge of that person is derived solely from hearing the evidence in the case, cannot be asked whether he considers that the patient was insane, for that is the issue for the court and jury; but he may be asked whether certain symptoms are indications of insanity, and his answers are evidence for the guidance of the court and jury (*a*). Where, however, a medical witness has examined or attended such a person, he may give his opinion as to the state of mind of the person (*b*). Where the sanity of a testator was in issue, a letter purporting to be from the testator was proposed to be shown to a medical witness, and such witness asked whether the writer of such a letter could be of sound mind; MARTIN, B., held that this could not be done,

(*a*) *R.* v. *M'Naghten*, 10 Cl. & F. 200.
(*b*) *R.* v. *Richards*, 1 F. & F. 87.

but that when the letter had been proved to be in the testator's writing, the witness might be asked if it was a rational letter (*c*).

In the case of *R.* v. *Rowton* (*d*), which established that, in reply to evidence of a prisoner's good character, the prosecution may call witnesses to prove that his general character is bad; it was held, by the majority of the judges, that witnesses to character can only speak as to the prisoner's reputation, having reference to the nature of the charge, and may not give their own opinion on the subject.

In actions of slander, where it is important to prove an innuendo and that the obvious and natural meaning of a word was not that which the speaker intended to convey to the witness, the witness cannot be asked what he understood by the language; for the answer to such a question would be in the nature of an inference and a mere personal opinion; but questions may be put to him which tend to elicit all the surrounding facts and circumstances which led him to understand the words in a slanderous sense, and he may be asked whether there was irony in the speaker's tone at the time, and generally whether there was anything to prevent him from understanding the words in their ordinary sense (*e*). It has, however, been held that in an action for fraudulently representing a third person to be trustworthy, the defendant may call witnesses to give their opinion as to such person's trustworthiness (*f*).

In the leading case of *Carter* v. *Boehm* (*g*), it was a question whether a policy of insurance was vitiated by the concealment of facts which had not been communicated to the underwriters. A broker gave evidence of

(*c*) *Sharpe* v. *Macaulay*, Western Circuit, 1856, MS.
(*d*) L. & C. 520.
(*e*) *Baines* v. *Hartley*, 3 Exch. 200; *Barnett* v. *Allen*, 3 H. & N. 376.
(*f*) *Sheen* v. *Bumpstead*, 2 H. & C. 193.
(*g*) 3 Burr. 1905.

the materiality of the facts, and stated his opinion, that if they had been disclosed the policy would not have been underwritten; but the court held his statement to be inadmissible. Lord MANSFIELD said:

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

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

The general rule stated above is subject to the following exceptions:

1*st Exception.*—On questions of identification a witness is allowed to speak as to his opinion or belief (*i*).

This applies to any species of identification, whether of persons or of things, and especially to the identification of handwriting, as to which see *post*, Part II., Chap. IV.

2*nd Exception.*—A witness's opinion is receivable in evidence to prove the apparent condition or state of a person or thing.

Thus a witness may state that a person appeared to him confused or agitated, rich or poor, young or old, or

(*h*) See note to *Carter* v. *Boehm*, 1 Sm. L. C. 504.
(*i*) *Fryer* v. *Gathercole*, 13 Jur. 542.

that a building appeared decayed or stable, or that a document appeared to be in good or bad condition; and a witness may give his opinion as to the age of a child (*k*).

3rd Exception.—On the trial of an indictment for obtaining goods by false pretences the prosecutor may be asked what inference he drew from a document received from the defendant (*l*).

This evidence is admissible to prove the belief of the prosecutor that the false pretence was true, but not to prove that expressions in the document bore a particular meaning, or whether it was so meant by the prisoner.

4th Exception.—The opinions of skilled witnesses are admissible evidence on scientific, professional and trade matters on which they have special knowledge.

It must be noted that it is for the judge in all cases to decide upon the competency of an expert witness before his evidence can be admitted.

In *Campbell* v. *Rickards* (*m*), Lord DENMAN said, that witnesses conversant in a particular trade were allowed to speak to a prevailing practice in that trade; scientific persons might give their opinions on matters of science; but witnesses were not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced if the parties had acted in one way rather than another. In the case of *Carter* v. *Boehm*, a broker, who was called as a witness for the plaintiff, stated on cross-examination, that in his opinion certain letters ought to have been disclosed, and that if they

(*k*) *R.* v. *Cox*, [1898] 1 Q. B. 179.
(*l*) *R.* v. *King*, [1897] 1 Q. B. 214.
(*m*) 5 B. & Ad. 846.

had, the policy would not have been underwritten. The jury, however, found, against the witness's opinion, a verdict for the plaintiff. When his opinion was pressed as a ground for a new trial, Lord MANSFIELD, in the name of the whole court, declared that the jury ought not to pay the least regard to it, because it was mere opinion and not evidence. The same doctrine was laid down in a case of *Durrell* v. *Bederley*, by GIBBS, C.J., though he received the evidence on great pressure. He said:

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

It will appear from this judgment that the principles, as stated above, are generally recognised and acted on, and that the only practical difficulty in applying them exists in the question as to what is and what is not a subject of scientific inquiry. The inclination of modern authorities appears to be to enlarge the definition; and it is probable that if *Carter* v. *Boehm*, and *Campbell* v. *Rickards*, were to be decided again, it would be held that the nature of mercantile transactions, and the principles of insurance in particular, are sufficiently recondite to entitle them to the privilege which was disallowed in those cases (*n*). In *Greville* v. *Chapman* (*o*), which was an action for libel arising out of a racehorse transaction, it was held by Lord DENMAN, that a member of the Jockey Club might be asked as a witness, whether he did not consider a certain course of conduct to be

(*n*) 1 Sm. L. C. 286 a; *Rickards* v. *Murdoch*, 10 B. & C. 527.
(*o*) 5 Q. B. 731.

dishonourable. A skilled witness may not only say that he formed an opinion, but that he acted on that opinion, and his acting upon it is a strong corroboration of the truth (*p*).

Patent cases.—The evidence of experts is more frequently resorted to in patent cases than in any other class of cases, and is undoubtedly of great value and assistance to the court therein, but the courts now protest against expert evidence being given on matters which are for the court and not for any witness, *e.g.*, whether defendant's article is an infringement (*q*) and what is the construction to be placed on a Specification. On this SMITH, L.J., said (*r*):

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

Probability of deception.—In trade mark and "passing-off" cases it used to be a common practice for trade witnesses to state whether or not in their opinion what the defendant was doing was calculated to deceive, but it is now settled that such evidence is not admissible as usurping the functions of the court (*s*). Of course a witness may be asked if he would himself be deceived.

The evidence of experts must be received with caution, because they are apt to make themselves partisans, and thus diminish the value of their testimony. Lord CAMPBELL, indeed, once said of experts,

(*p*) *Stephenson* v. *River Tyne Commissioners*, 17 W. R. 590.
(*q*) *Per* Lord RUSSELL, C.J., in *Brooks* v. *Steele and Currie*, 14 R. P. C. 73; *cf. Seed* v. *Higgins*, 8 H. L. Cas. 527.
(*r*) In *Gadd* v. *Mayor of Manchester*, 9 R. P. C. 530.
(*s*) *Henessey* v. *Dompè*, 19 R. P. C. 339; *Lambert and Butler* v. *Goodbody*, 19 R. P. C. 377.

that they came with such a bias on their minds to support the cause in which they were embarked, that hardly any weight should be given to their evidence (*t*). It is also deserving of remark, that there is no English case in which a witness has been indicted for perjury in a mere matter of opinion; nor does it seem that an indictment would lie, unless the opinion given amounts to the assertion of a fact that is untrue, or suggests an inference that is obviously false.

Books, and, in particular, dictionaries (*u*), are admissible to show the sense in which words are used; and, especially in cases of libel, defendants have been permitted to refer largely to previous publications, and to read them as part of their defence, in order to show that certain forms of expression were not meant as matter of reproach or ridicule; and to explain whether they had been used in a metaphorical or literal sense. Books also may be used to show the opinions of their writers on their subjects; but such opinions cannot be made evidence of specific facts. But it is not competent in an action for not farming according to covenant, to refer to books for the purpose of showing what is the best way of farming; nor in an action on the warranty of a horse would it be allowable to refer to works of a veterinary surgeon to show what is unsoundness (*x*). So in an action for a libel charging the plaintiff with being a rebel and traitor, "because he was a Roman Catholic," the defendant was not allowed to justify by citing books of authority among Roman Catholics, which seemed to show that their doctrines were inimical to loyalty (*y*). In all such cases, as also in the proof of foreign law, the evidence is matter of science,

(*t*) 10 C. & F. 191. See also the views of JESSEL, M.R., as to expert evidence, in *Lord Abinger* v. *Ashton*, L. R. 17 Eq. 373.
(*u*) *Clementi* v. *Golding*, 2 Camp. 25.
(*x*) *Per* POLLOCK, C.B.: *Darby* v. *Ouseley*, 1 H. & N. at p. 12.
(*y*) *Darby* v. *Ouseley*, 1 H. & N. 1.

which must be given by experts or scientific witnesses in court. As to the use which can be made of foreign law books, see *post*, Chap. XIX.

Books are often only hearsay, of the most vague, inconsistent, and remote character. They are statements made by absent, perhaps anonymous, witnesses, who write without being under the fear of the spiritual or secular penalties of an oath, and without being subject to cross-examination. It is plain, therefore, on the first principles of evidence, that they are without any of the elements of legal credibility.

The general rule will not be construed to exclude from the consideration of a jury anything which would assist them in making up their minds upon the facts in dispute, but is intended simply to prevent the functions of the jury being usurped by the witness, which would be done were he allowed to lead their opinion by his own.

CHAPTER VII.

PRIVILEGE.

EXCEPT when some positive rule intervenes, a witness is compellable to answer any question that may be put to him (except questions tending to show that he has been guilty of adultery); but there are many questions which he will not be compellable, and some which he will not be permitted, *i.e.*, is not competent, to answer. So in documentary evidence every writing is admissible, except when it is excluded by some rule of law.

Wherever a witness is not compellable or not competent to answer any question, it is because some privilege intervenes, which privilege is sometimes that of the witness himself, sometimes that of another person, and sometimes that of the State, which asserts the right of excluding certain kinds of evidence on grounds of public policy. Where the privilege is that of the witness himself, he may waive it and answer the question; where the privilege is that of another person, such person may waive it and permit the witness to answer, but the waiver cannot proceed from the witness himself. Where, in reliance on privilege, a witness refuses to answer, or is not allowed to answer a question, no presumption arises that the evidence so withheld is unfavourable to any person.

The different kinds of privilege will be gathered from the following rules, viz.:

RULE 1.

A witness is not compellable to answer any question or to produce any document tending to criminate him.

On the principle *nemo tenetur seipsum prodere*, a witness, whether a party to a suit or not, cannot be

compelled to answer any question, whether put *vivâ voce* or in the form of a written interrogatory (*a*), the answer to which may expose, or tend to expose, him to a criminal charge, penalty (*b*), or forfeiture of any kind. This rule is recognised and expressed by the Law of Evidence Amendment Act, 1851, which, after making the parties to civil actions and suits competent and compellable witnesses on behalf of either party, enacts that nothing in the Act shall render any person compellable to answer any question tending to criminate himself or herself (*c*). This rule of protection is not confined to what may tend to subject a witness to penalties by the laws of England (*d*). On similar grounds the production of documents may be refused.

The protection must always be claimed on oath, *i.e.*, the party claiming it must pledge his oath that the answer to a question or the production of a document would tend to criminate him (*e*). Where discovery of documents is applied for the protection must be claimed in the affidavit, in compliance with the Order, and not on the application itself (*f*).

In *R.* v. *Garbett* (*g*), it was held that a witness is not compellable to answer a question if the court be of opinion that the answer might tend to criminate him. It was also held in the same case that the court may compel a witness to answer any such question; but that if the answer be subsequently used against the witness in a criminal proceeding, and a conviction obtained, judgment will be respited and the conviction

(*a*) *Martin* v. *Treacher*, 16 Q. B. D. 507.

(*b*) As to what is an action for a penalty, see *Saunders* v. *Wiel*, [1892] 2 Q. B. 321.

(*c*) 14 & 15 Vict. c. 99, s. 3.

(*d*) *U. S. A.* v. *Macrae*, L. R. 3 Ch. 79. But see *King of Two Sicilies* v. *Wilcox*, 1 Sim. (N.S.) 331.

(*e*) *Webb* v. *East*, 5 Ex. D. 108; and *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q. B. 124.

(*f*) *Spokes* v. *Grosvenor Hotel Co.*, *ubi supra*.

(*g*) 1 Den. 236.

reversed. In *R.* v. *Boyes* (*h*), COCKBURN, C.J., in delivering the judgment of the court, said:

"To entitle a party called as a witness to the privilege of silence the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question; there being no doubt, as observed by Baron ALDERSON in *Osborne* v. *London Dock Co.* (*i*), that a question which might appear at first sight a very innocent one might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation a judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril."

This statement of the law was approved and adopted by the Court of Appeal in the case of *Ex parte Reynolds* (*k*).

When and how the privilege is claimed.—It is settled that a witness cannot refuse to go into the box on the ground that a question will criminate him, and that he will refuse to answer it. The privilege can be claimed only by the witness himself after he has been sworn and the objectionable question put to him (*l*); and the witness must pledge his oath that he believes the answer will tend to criminate him. If he assigns a reason for not answering, which in the opinion of the court is insufficient, he will be compellable to answer. He can claim his privilege at any time, and does not waive it altogether by omitting to claim it at an earlier opportunity (*m*). A judge ought to caution a witness, where a privilege exists, that he is not bound to answer (*n*).

(*h*) 1 B. & S. 311.
(*i*) 10 Ex. 698.
(*k*) 20 Ch. D. 294.
(*l*) *Boyle* v. *Wiseman*, 10 Ex. 647.
(*m*) *R.* v. *Garbett*, 1 Den. 258.
(*n*) *Per* MAULE, J.: *Fisher* v. *Ronalds*, 12 C. B. 762; *cf. Paxton* v. *Douglas*, 16 Ves. 242.

As to a wife criminating her husband.—In *R.* v. *All Saints, Worcester* (*o*), Lord ELLENBOROUGH held that a wife was competent to answer questions criminating her husband, and that the answers were not excluded on the ground of public policy; but BAYLEY, J., was of opinion that a wife who threw herself upon the protection of the court would not be compelled to answer. There is no doubt that a wife cannot be compelled to answer any question which may expose her husband to a charge of felony (*p*).

Waiver by witness.—If the privilege is that of the witness he may waive it and answer at his peril (*q*).

Extent of privilege.—The privilege extends to cases in which an answer might subject the witness to penalties or forfeitures (*r*); but he cannot refuse to answer any question, relevant to the issue, on the ground that his answer would show that he owed a debt, or would otherwise expose him to a civil action (*s*).

Some difficulties arise in the application of the general rule in consequence of the special limitations that have been put on it by several statutes, which have enacted expressly that a witness cannot refuse to answer matters to which they refer, on the ground that the answers would criminate him; but that such answers shall not be used against him in a criminal proceeding arising out of the same transaction. By the Larceny Act, 1861 (*t*), s. 85, nothing in the previous provisions therein affecting fraudulent agents,

(*o*) 6 Man. & S. 194.
(*p*) *Cartwright* v. *Green*, 8 Ves. 410.
(*q*) *Paxton* v. *Douglas*, 16 Ves. 242.
(*r*) *Cates* v. *Hardacre*, 3 Taunt. 424; *cf. Pye* v. *Butterfield*, 5 B. & S. 829; and *Mexborough (Earl of)* v. *Whitwood Urban District Council*, [1894] 2 Q. B. 111, where, in an action to enforce a forfeiture of a lease, it was held that the plaintiff could not obtain discovery on the issue relating to forfeiture.
(*s*) 46 Geo. 3, c. 37. (*t*) 24 & 25 Vict. c. 96.

factors, bankers, attorneys, trustees, officers of companies, etc., is to entitle any such person to refuse to answer a bill in equity, or questions or interrogatories in any civil proceeding or bankruptcy investigation; and the Bankruptcy Act, 1890 (*u*), s. 27, provides that a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanors referred to in s. 85 of the Larceny Act. But a statement of affairs prepared by a debtor under s. 16 of the Bankruptcy Act, 1883 (*x*), is not within s. 27 of the Act of 1890, and can be used in evidence against him on subsequent criminal proceedings (*y*). By the Merchandise Marks Act, 1887 (*z*), s. 19 (2), nothing in the Act is to entitle any person to refuse to make a complete discovery or to answer any question or interrogatory in any action, but such discovery or answer is not to be admissible in evidence against such person in any prosecution for an offence against the Act. Again, by the Corrupt and Illegal Practices Prevention Act, 1883 (*a*), s. 59, no person called as a witness respecting an election before any election court is to be excused from answering questions relating to any offence at or connected with such election, on the ground that the answer might criminate or tend to criminate himself, or on the ground of privilege, provided that a witness who answers truly all questions which he is required to answer is to be entitled to a certificate of indemnity stating that he has so answered, and an answer to questions put by or before an election court is not to be admissible against the witness in

(*u*) 53 & 54 Vict. c. 71.
(*y*) *R.* v. *Pike*, [1902] 1 K. B. 552.
(*z*) 50 & 51 Vict. c. 28.
(*x*) 46 & 47 Vict. c. 52.
(*a*) 46 & 47 Vict. c. 51.

any civil or criminal proceeding, except for perjury in respect of such evidence. This provision applies also to the examination of witnesses before election commissioners. An analogous provision is contained in the Explosive Substances Act, 1883 (*b*), s. 6 (2).

A person charged with an offence and electing to give evidence for the defence under the Criminal Evidence Act, 1898 (*c*), by s. 1 (e) thereof "may be asked," and is, of course, compellable to answer, "any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged."

Under previous (as well as the present) Bankruptcy Acts a bankrupt was liable to be examined touching his trade, dealings, and estate, and questions arose how far his answers, if incriminatory, could be used against him in proceedings outside the bankruptcy proceedings. The chief cases in which these questions arose were cited in the fifth edition of this book, but it is now deemed sufficient to give the present law and practice on the subject. The Bankruptcy Act of 1883 (*d*) provides by s. 17:

"(1) Where the court makes a receiving order it shall hold a public sitting, on a day to be appointed by the court, for the examination of the debtor, and the debtor shall attend thereat, and shall be examined as to his conduct, dealings, and property. . . . (7) The court may put such questions to the debtor as it may think expedient. (8) The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the court may put or allow to be put to him. Such notes of the examination as the court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times."

The statements made by a debtor upon such examination are of course not admissible in evidence against

(*b*) 46 & 47 Vict. c. 3.
(*c*) 61 & 62 Vict. c. 36.
(*d*) 46 & 47 Vict. c. 52.

anyone except himself (*e*); but they are admissible against him, even if incriminatory, in any subsequent proceedings, whether under the Bankruptcy Acts or not (*f*), with the limitation enacted by s. 27 of the Bankruptcy Act, 1890 (*g*). The statements can be proved not only by the transcript of the notes of the examination, but by the parol evidence of anyone present at the examination, even though they have not been read over to or signed by the debtor (*h*).

As the debtor cannot refuse to answer any questions which the court may put or allow to be put to him, it is obviously the duty of the court to be careful not to allow questions to be put the answers to which might be incriminatory, unless such questions fairly relate to the "conduct, dealings, or property" of the debtor.

Degrading questions.—When the question is merely degrading to the witness, and its object is to discredit his testimony by showing him to be of a disreputable character, the authorities are conflicting as to the privilege of the witness in refusing to answer. Generally, it appears to be clear that such a question may be asked; but that where it is not material to the issue, and its object is merely to degrade the character of the witness, he is not compellable to answer it. Thus, on a charge of rape, or indecent assault, the prosecutrix cannot be compelled to say whether she has had connection with other men, or particular persons; nor can evidence of such connection be received, for if she has once denied it her answer is final (*i*). But she can be asked if she has had previous connection with the accused, and if she denies it her answer is not final,

(*e*) *Re Brünner*, 19 Q. B. D. 572; *New Prance and Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19.
(*f*) *In re a Solicitor*, 38 W. R. 507; see *R.* v. *Erdheim*, [1896] 2 Q. B. 260.
(*g*) See *ante*, p. 98.
(*h*) *R.* v. *Erdheim*, *ubi supra*.
(*i*) *R.* v. *Holmes*, L. R. 1 C. C. R. 334.

and witnesses can be called to prove such previous connection (*k*). So, in an action of seduction, the woman is not compellable to say whether she has had connection with other men previous to the alleged seduction; but the defendant may prove such previous connection in reduction of damages (*l*).

Equity has carried the general rule further than common law, for not only is a witness not compelled to answer any question which would subject him to a criminal charge, or to any pains or penalties, but he is not compelled to answer any question which would subject him to ecclesiastical censure, or to a forfeiture of interest; and the protection is said to be extended even to cases where the answer would prove the witness guilty of great moral turpitude, subjecting him to penal consequences (*m*).

Of course, when a person incurs no penalties, the alleged illegality of a transaction is no excuse (*n*).

RULE 2.

Counsel, solicitors, and their clerks are not permitted to disclose communications which have been made to them in professional confidence by their clients, without the consent of such clients; nor can a man be compelled to disclose any communication which he has made in professional confidence to his solicitor or his counsel.

When the relation of solicitor and client, or of counsel and client, has been established, then this rule operates, and neither the solicitor nor counsel can be compelled or will be permitted (*o*), without the consent of the

(*k*) *R.* v. *Riley*, 18 Q. B. D. 481.
(*l*) *Dodd* v. *Norris*, 3 Camp. 519.
(*m*) Wigram on Discovery, 81; Mitford on Pleading, 194.
(*n*) *Williams* v. *Trye*, 18 Beav. 366.
(*o*) *Wilson* v. *Rastall*, 4 T. R. 759.

client, to make any disclosure or admission which may be fairly presumed to have been communicated by the client, with reference to the matter in issue, under an implied promise of secrecy. This rule applies independently of the question whether there is litigation impending or existing or not. Although a solicitor cannot refuse to divulge the name of his client (*p*), he can refuse to divulge his client's address when communicated to him confidentially (*q*). The privilege does not terminate with the relationship, so when a solicitor has ceased to act for a client he will be restrained by injunction from divulging what he has learnt from his old client to any new one (*r*); and when a solicitor is personally defendant in an action he cannot be compelled to answer interrogatories so as to disclose facts and information which came to his knowledge as solicitor for a client in another action (*s*).

In the absence of the above-mentioned rule, no man would dare to consult a professional adviser with a view to his defence, or the enforcement of his rights (*t*). There is no doubt now that a client can withhold communications made to his solicitor, and that the privilege applies to any communications between solicitor and client, whether made before or during litigation, or without reference to any litigation, provided they are professional communications passing in a professional capacity (*u*). Where two persons are engaged in a joint adventure, communications made during its

(*p*) *Bursill* v. *Tanner*, 16 Q. B. D. 1.

(*q*) *Re Arnott*, 5 Morrell, 286.

(*r*) *Lewis* v. *Smith*, 1 M. & G. 417; see *Little* v. *Kingswood Collieries Co.*, 20 Ch. D. 733.

(*s*) *Proctor* v. *Smiles*, 55 L. J. Q. B. 467.

(*t*) *Per* Lord BROUGHAM: *Bolton* v. *Corporation of Liverpool*, 1 M. & K. 94.

(*u*) *Minet* v. *Morgan*, L. R. 8 Ch. 361. See also *Lowden* v. *Blakey*, 23 Q. B. D. 332, where an advertisement submitted to counsel was held privileged.

continuance by one to the solicitor of the other are privileged (*x*).

Letters containing mere statements of fact are not privileged unless they are of a professional and confidential character (*y*). Although a person cannot protect himself from disclosing what he knows about a matter by saying that he has told what he knows or has heard to his solicitor, a person cannot be compelled to divulge his knowledge, information, and belief on any matter of fact as to which he has no personal knowledge, but only a knowledge or information derived from privileged communications made to him by his solicitors or their agents (*z*). If, however, a person having obtained information from his solicitor verifies it for himself—as if being told by his solicitor that there is a tombstone in a particular place, he goes and looks at it—then his knowledge is no longer privileged; nor can a man claim privilege for a deed simply on the ground that his solicitor obtained it from him in the course of litigation (*a*).

The law on the subject now under consideration was thus stated by JESSEL, M.R., in *Wheeler* v. *Le Marchant* (*b*):

"The actual communication to the solicitor by the client is of course protected, and it is equally protected whether it is made by the client in person or is made by an agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction. Again, the evidence obtained by the solicitor or by his direction or at his instance, even if obtained by the client, is protected, if obtained after litigation has been commenced or threatened, or with a view to the defence or prosecution of such litigation. So, again, a communication with a solicitor for the purpose of obtaining legal advice is protected, though it relates

(*x*) *Rouchefoucald* v. *Boustead*, 74 L. T. 783.
(*y*) *Per* KAY, L.J., in *O'Shea* v. *Wood*, [1891] P. 286.
(*z*) *Lyell* v. *Kennedy*, 9 App. Cas. 81.
(*a*) *Per* Lord BLACKBURN: *Lyell* v. *Kennedy*, *ubi supra*.
(*b*) 17 Ch. D. 682.

to a dealing which is not the subject of litigation, provided it be a communication made to the solicitor in that character and for that purpose."

The passage just cited bears also upon the following further rules:

RULE 3.

All documents which come into existence for the purpose of being communicated to a solicitor with the object of obtaining his advice, or of enabling him to prosecute or defend some contemplated or threatened litigation, are privileged; and it is immaterial whether they are actually laid before the solicitor or not.

Therefore in an action (*c*) by a company against their former engineer to recover various sums of money alleged to have been wrongly debited against them, the following documents were held to be privileged: (1) A transcript of shorthand writer's notes of a conversation between a chimney sweep employed by the company and the company's engineer for the purpose of such engineer's obtaining information and reporting the same to the board of directors, to be furnished to the company's solicitor for his advice in relation to the intended action. *N.B.*—This transcript was not submitted to the solicitor. (2) Transcripts of shorthand writer's notes of interviews between the chairman of the company and the engineer and certain inspectors of the company, obtained with a view of submitting the same to their company's solicitor for advice in relation to the intended action. *N.B.*—These transcripts were afterwards handed to the solicitor. (3) A statement of facts drawn up by the chairman of the company to be submitted to the company's

(*c*) *Southwark Water Co.* v. *Quick*, 3 Q. B. D. 315.

solicitor for advice in relation to the intended action. *N.B.*—This statement was afterwards submitted to the solicitor.

If a copy of a document, which document would have been admissible in evidence against a litigant, is procured by him for the purpose of being laid before a solicitor, such copy will not ordinarily be privileged (*d*).

RULE 4.

The litigation which is contemplated or threatened must be some specific litigation, and not litigation generally (*e*). But it need not be litigation with the particular adversary against whom the privilege is raised, and a document which is privileged in one action will be privileged in any subsequent action, whether the parties and issues are the same or not.

Documentary and other information obtained from third persons by a solicitor to enable him to advise his client, but not with reference to any litigation contemplated or anticipated, is not privileged. Thus where a solicitor, having been consulted in a matter as to which no dispute had arisen, and being desirous of knowing some further facts before giving his advice, applied to a surveyor to tell him what was the state of a given property, it was held that the information was not privileged (*f*).

RULE 5.

All evidence and information obtained by a solicitor or by his direction, even if obtained

(*d*) *Cf. Chadwick* v. *Bowman*, 16 Q. B. D. 561; *Wright* v. *Vernon*, 32 L. J. Ch. 447.
(*e*) See *Westinghouse* v. *Midland Rail. Co.*, 48 L. T. (N.S.) 462.
(*f*) *Wheeler* v. *Le Marchant*, 17 Ch. D. 675.

by the client, is privileged, if obtained after litigation commenced or contemplated, and with a view to such litigation (*g*).

This proposition may also be put thus—no litigant has a right to see that which comes into existence as materials for his adversary's brief. But although a party is not entitled to see his opponent's evidence, he is entitled to know the facts on which he relies to establish his case (*h*). A copy of a document, which, if in the possession of a litigant, would not be privileged from production, is not privileged merely because it has been obtained by his solicitor for the purposes of defence to an action; but a collection of documents so obtained will be privileged, especially if the production would give a clue to the solicitor's opinion and advice to his client (*i*). Where in an action four anonymous letters had been received, two by the plaintiff and one each by her counsel and solicitor, the last two were held privileged (*k*); the ground being that they were information received by the counsel and solicitor for promoting their client's case, and that the letters were sent to them in compliance with a request implied by their position. Nothing turned on the letters being anonymous.

When a solicitor holds a document for his client he cannot, against the will of the client, be compelled to produce it by a person who has an equal interest in it with his client (*l*). But a solicitor cannot refuse to produce a document if the client himself could not refuse to do so (*m*). A solicitor may be asked whether he has papers of his client in court; and if by his

(*g*) *Wheeler* v. *Le Marchant*, 17 Ch. D. 675; and *cf.* judgment of COTTON, L.J.: *Lyell* v. *Kennedy*, 23 Ch. D. 404.
(*h*) *Cf. Ende* v. *Jacobs*, 3 Ex. D. 335.
(*i*) *Chadwick* v. *Bowman*, 16 Q.B.D. 561; *Lyell* v. *Kennedy*, 27 Ch. D. 1.
(*k*) *Young* v. *Holloway*, 12 P. D. 167.
(*l*) *Newton* v. *Chaplin*, 10 C. B. 356.
(*m*) *Bursill* v. *Tanner*, 16 Q. B. D. 1.

answer, which is compulsory, he admits the fact, secondary evidence of their contents may be given if the originals are not produced (*n*). If a solicitor be subpœnaed to produce a document which he holds for a client, he may, in his discretion, refuse to produce it, and to answer any question as to its contents; and the judge ought not to examine it to ascertain whether it ought to be withheld (*o*).

Where an attorney had been subpœnaed to produce a deed which, at the trial, he refused to produce by the express instruction of his client (*p*), the party by whom he was subpœnaed then called another witness to give secondary evidence of the deed, by means of a copy. The second witness stated that he had a copy of a deed, but that he did not know whether it was a copy of the deed in question unless he was suffered to look at the deed. It was then suggested that he should be allowed to look at the names of the parcels and the parties to the deed, in order to identify it. The first witness still objected, and it was also contended on the opposite side, that the first witness's client ought to have been called to show that he had given the prohibition, and that all sources of primary evidence had been exhausted. The judge, however, ordered that the second witness should be allowed to look at the indorsement of the deed; and when the latter had thus identified it, the judge received the copy as secondary evidence. An application for a new trial was made, on the ground that this evidence was improperly admitted; but the court upheld the ruling of the judge on both points. COLERIDGE, J., said (*q*):

"The second objection is, that the judge improperly overruled the privilege in the next step in the cause. There being some doubt, when the next witness was called, whether the draft which the witness was speaking of was a draft of the deed in question,

(*n*) *Dwyer* v. *Collins*, 7 Ex. 639.
(*o*) *Volent* v. *Soyer*, 13 C. B. 231.
(*p*) *Phelps* v. *Prew*, 3 E. & B. 430.
(*q*) 23 L. J. Q. B. 243.

the judge, in order to ascertain that, compelled the attorney to produce the document for the purpose of identification. It was contended that it was a breach of privilege to produce the deed in evidence for any purpose whatever; but whether it is a breach of the privilege or not must depend upon the circumstances of each case. I quite agree that sometimes, as in *Brand* v. *Akerman*, the process of identification will require a disclosure of the contents of the deed; and, if so, I think the inquiry must stop. But here I do not see that anything was done that had the effect of disclosing the contents of the deed, or violating any of the secrets which the attorney had intrusted to him by his client. The indorsement might disclose that the deed was an assignment; but of what property, and whether it was of the legal or equitable estate, it would not disclose. I think, therefore, the learned judge was right."

A solicitor who was a witness to a deed is bound to disclose what takes place at the time of its execution (*r*).

The rule of professional confidence is held to extend to all cases in which the solicitor or counsel has been confided in as such, but not to cases where the confidence was given before the relation was formed; or after it has ceased. In *Gainsford* v. *Grammar* (*s*), Lord ELLENBOROUGH said:

"I fully accede to the doctrine laid down in *Cobden* v. *Kendrick*, and *Wilson* v. *Rastall*, which is no more than this, that a communication by the party to the witness, whether prior or subsequent to the relation of client and attorney subsisting between them, is not privileged. But this relation may be formed before the commencement of any action. The solicitor may be retained and confided in as such in contemplation of an action; and shall it be said that he is bound to disclose whatever has been revealed to him previous to the suing out of, or the service of, the writ?" (*t*).

The privilege is also held to extend to the clerks of solicitors and barristers to whom communications have been made as such (*u*); and to an unprofessional agent employed by a solicitor's advice to obtain information for a client (*x*); but not to cases where the communi-

(*r*) *Robson* v. *Kent*, 5 Esp. 552.
(*s*) 2 Camp. 10.
(*t*) *Cf. Clark* v. *Clark*, 1 M. & R. 3.
(*u*) *Taylor* v. *Forster*, 2 C. & P. 195; *Foote* v. *Hayne*, R. & M. 165.
(*x*) *Lafone* v. *Falkland Islands Co.*, 4 K. & J. 39.

cation has been made to the solicitor (*y*), or his clerk (*z*), while they have not been acting in their professional character. It extends to communications to a solicitor who ultimately refuses a retainer (*a*), and to communications made to a solicitor under the mistaken impression that he had agreed to act in the matter (*b*). A person who is not a solicitor, in whom confidence has been placed under a mistaken idea that he is a solicitor, will not be compelled to disclose the communication (*c*); but a written opinion given by an ex-Lord Chancellor to a friend has been held not to be privileged (*d*).

Extent of the privilege.—The privilege has been extended to communications between a client in Scotland and a Scotch solicitor practising in London (*e*); and the opinion of a Dutch lawyer, obtained by the defendants in an action with reference to their defence, has been held privileged (*f*). The privilege extends to all knowledge obtained by the solicitor which he would not have obtained if he had not been consulted professionally by his client (*g*); but if a solicitor was aware of the fact from any other source before it was communicated to him by his client his knowledge is not privileged (*h*). It has been held, that when a solicitor writes letters to a third party for the purposes of a suit the answers are privileged (*i*); and letters passing between a country solicitor and his town agent are privileged (*k*). In an action by the payee of a

(*y*) *R.* v. *Brewer*, 6 C. & P. 363.
(*z*) *Doe* v. *Jauncy*, 8 C. & P. 99.
(*a*) *Cromack* v. *Heathcote*, 2 Brod. & B. 4.
(*b*) *Smith* v. *Fell*, 2 Curteis, 667.
(*c*) *Calley* v. *Richards*, 19 Beav. 401.
(*d*) *Smith* v. *Daniell*, L. R. 18 Eq. 649.
(*e*) *Lawrence* v. *Campbell*, 4 Drewry, 485.
(*f*) *Banbury* v. *Banbury*, 2 Beav. 177.
(*g*) *Greenhough* v. *Gaskell*, 9 Myl. & K. 101.
(*h*) *Cf. Lewis* v. *Pennington*, 29 L. J. Ch. 670.
(*i*) *Simpson* v. *Barnes*, 33 Beav. 483.
(*k*) *Catt* v. *Tourle*, 19 W. R. 56.

promissory note against the maker, it appeared that the plaintiff had acted as attorney to the defendant, and while holding that capacity had obtained documentary evidence from the defendant, which he stated was wanted to assist her in preparing a case for counsel; and on this he relied to take the note out of the Statute of Limitations. It was held that the evidence was inadmissible for the plaintiff, PLATT, B., observing that it would never have been in the hands of the attorney except for the purpose of his preparing a case for counsel; and MARTIN, B., added:

"The client might be in error in thinking the communication necessary to be laid before counsel, but if she communicated it *bonâ fide*, considering it necessary, the communication was privileged and could not be divulged" (*l*).

Restrictions on the doctrine.—A remarkable case, partially restricting this doctrine, was decided some years since. In an action for false imprisonment and malicious prosecution on a charge of felony, it became a material question whether an entry in a book, by which the plaintiff acknowledged the receipt of money which the defendant had charged him with embezzling, existed at the time when the plaintiff was examined before the magistrates, or had been made, as the defendant alleged, by the plaintiff between the examination and before the trial. The counsel who had been concerned for the plaintiff before the magistrates, but who was not concerned for him on the trial, happened to be in court on the latter occasion; and at the suggestion of JERVIS, C.J., after consulting CRESSWELL, J., he was called for the defendant, and asked whether the entry was in the book at the time of the examination before the magistrate. He gave evidence that it was not; and a verdict passed for the defendant. On a rule for a new trial on the ground

(*l*) *Cleave* v. *Jones*, 6 Ex. 573.

that this evidence was improperly admitted, the court held that it was properly admitted, because the witness was required only to disclose something which he had seen in court and not what he had been told in his position as counsel (*m*).

Where a communication between a solicitor and his client appears to be of an irrelevant or unprofessional character, the solicitor will be compelled to disclose it; and therefore a solicitor will be compelled to state what his client has said to him on the matter in which the latter was not asking for legal advice, but only for information as to a matter of fact, even though that fact involved a question of law. Thus, in *Bramwell* v. *Lucas* (*n*), an action by assignees to prove an act of bankruptcy, it was held that the solicitor to the bankrupt was not privileged from saying whether his client had asked his opinion, whether he (the client) could attend a meeting of his creditors without danger of being arrested. The court held that the communication was not privileged, and Lord TENTERDEN said:

"A question for legal advice may come within the description of a confidential communication, because it is part of the attorney's duty, as attorney, to give legal advice; but a question for information as to matter of fact, as to a communication the attorney has made to others, where the communication might have been made by any other person as well as the attorney, and where the character or office of attorney has not been called into action, has never been held within the protection, and is not within the principle upon which the privilege is founded. Was, then, this a question for legal advice put to Mr. Scott in his character of attorney? or was it not a question for information as to matter of fact, in which the professional character of Mr. Scott as attorney was not considered? It can hardly be supposed that a man could ask, as a matter of law, whether he would be free from arrest while attending a voluntary meeting of creditors, but he might well ask, as a matter of fact, whether any arrangement had been made with the creditors to prevent an arrest."

It will be observed that this case shows a tendency to confine the rule of privileged communication within a

(*m*) *Brown* v. *Foster*, 1 H. & N. 736. (*n*) 2 B. & C. 749.

strict limit; as, with great deference to the learned judge, it may be submitted that the question put by the bankrupt to his attorney seems to be rather one of law than of fact, and is precisely that sort of legal question which ignorant clients put constantly to their solicitors; but as the case was between third parties, perhaps a greater latitude may be presumed to have been allowed on that account (*o*). When a statement has been made by either plaintiff or defendant, in the presence of the solicitor of the opposite party, the solicitor may be called to prove it (*p*). No communication made to a solicitor by or on behalf of the other side can be confidential (*q*).

When a solicitor is a party with his client to a fraud, no privilege attaches to the communications with him upon the subject (*r*). This is because the rule protecting communications between solicitor and client does not apply to all such communications, but only those which pass in professional confidence, and the contriving of fraud forms no part of the professional occupation of a solicitor (*s*). This principle is not apparently restricted to fraud, but extends to any illegal purpose (*t*). But to displace the *primâ facie* privilege there must be a definite charge of some sufficient illegality established to the satisfaction of the court (*u*). It was once thought that both the client and solicitor must be parties to the illegal transaction for the principle to apply (*v*), but this is apparently not so. If the client's purpose

(*o*) *Cf. per* Lord COTTENHAM: *Desborough* v. *Rawlins*, 3 Myl. & Cr. 515.
(*p*) *Griffith* v. *Davies*, 5 B. & Ad. 502; *Desborough* v. *Rawlins*, *ubi supra*.
(*q*) *Per* COTTON, L.J.: *Lyell* v. *Kennedy*, 23 Ch. D. 405.
(*r*) *Russell* v. *Jackson*, 9 Hare, 392.
(*s*) *Per* Lord CRANWORTH: *Follett* v. *Jefferys*, 1 Sim. (N.S.) 17.
(*t*) *Russell* v. *Jackson*, *ubi supra*: *per* TURNER, V.-C.; cited in the judgment in *R.* v. *Cox*, 14 Q. B. D. 153.
(*u*) *Bullivant* v. *Attorney-General for Victoria*, [1901] A. C. 196.
(*v*) *Charlton* v. *Coombes*, 4 Giff. 372.

is dishonest and the solicitor is innocent the communication is not privileged (*x*). *A fortiori*, a communication made to a solicitor in furtherance of any criminal purpose does not come within the scope of professional employment, and therefore communications made to a solicitor by his client before the commission of a crime, for the purpose of being guided or helped to the commission of it, are not privileged, and this whether the solicitor was or was not aware of his client's intentions; if he was so aware, then the communication would not be in the course of any professional employment; if he was not aware, then there is no professional confidence. This was the *ratio decidendi* in *R.* v. *Cox* (*y*), which is a leading case on the subject. In delivering the judgment of the court (ten judges) in this case, STEPHEN, J., said:

"We are greatly pressed with the argument that, speaking practically, the admission of any such exception to the privilege of legal advisers, as that it is not to extend to communications made in furtherance of any criminal or fraudulent purpose, would greatly diminish the value of that privilege. The privilege must, it was argued, be violated in order to ascertain whether it exists. The secret must be told in order to see whether it ought to be kept. We were earnestly pressed to lay down some rules as to the manner in which this consequence should be avoided. The only thing which we feel authorised to say upon this matter is, that in each particular case the court must determine upon the facts actually given in evidence or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime, for the purpose of being guided or helped in committing it. We are far from saying that the question whether the advice was taken before or after the offence will always be decisive as to the admissibility of such evidence. Courts must in every instance judge for themselves on the special facts of each particular case, just as they must judge whether a witness deserves to be examined on the supposition that he is hostile, or whether a dying declaration was made in the immediate prospect of death. In this particular case the fact that there had been a partnership (which was proved on the trial of the interpleader issue), the assertion that it had been dissolved, the fact that

(*x*) See *Williams* v. *Quebrada Rail. Co.*, [1895] 2 Ch. 751.
(*y*) 14 Q. B. D. 153.

directly after the verdict a solicitor was consulted, and that the execution creditor was met by a bill of sale which purported to have been made by the defendant to the man who had been and was said to have ceased to be his partner, made it probable that the visit to the solicitor really was intended for the purpose for which, after he had given his evidence, it turned out to have been intended. If the interview had been for an innocent purpose the evidence given would have done the defendant good instead of harm. Of course, the power in question ought to be used with the greatest care not to hamper prisoners in making their defence, and not to enable unscrupulous persons to acquire knowledge to which they have no right, and every precaution should be taken against compelling unnecessary disclosures."

If a solicitor improperly hands a document to a third party, the latter may give it in evidence (*z*). Where the effect of an opinion of counsel was set out in a statement of claim, it was held that the plaintiff must produce it for the inspection of the defendant (*a*), or be precluded from giving it in evidence at the trial.

If an opinion of counsel, or, indeed, any other privileged document, is made an exhibit to an affidavit, anyone entitled to see the affidavit is also entitled to see such opinion or other document (*b*), unless it is a document which comes into existence solely for the information of the court (*c*).

The privilege is the privilege of the client, and may be waived by him, but no presumption adverse to him arises from his not waiving it (*d*). The death of the client does not terminate the privilege (*e*). No waiver arises from the client calling the solicitor as a witness unless he is examined in chief as to the privileged matter.

It was once held that where a person had absconded with two wards of court, his solicitor must produce the envelopes of the letters received from him, such

(*z*) *Per* PARKE, B.: *Cleave* v. *Jones*, 21 L. J. Ex. 106.
(*a*) *Mayor of Bristol* v. *Cox*, 26 Ch. D. 678.
(*b*) *In re Hinchcliffe*, [1895] 1 Ch. 117.
(*c*) *Sloane* v. *British Steamship Co.*, [1897] 1 Q. B. 185.
(*d*) *Wentworth* v. *Lloyd*, 10 H. L. Cas. 589.
(*e*) See *Bullivant* v. *Att.-Gen. for Victoria*, [1901] A. C., at p. 196.

envelopes not being privileged communications, and that, even if they were, a solicitor could not aid and abet in concealing from the Court of Chancery the residence of its wards (*f*).

Although letters written between co-defendants *simpliciter* are not privileged, yet a letter written by one co-defendant to another, with directions to send to the joint solicitor, is (*g*). Where two parties employ the same solicitor, a letter by one of them to him, containing an offer to be made to the other, may be given in evidence against the writer (*h*); but in such case the joint solicitor cannot disclose the title of either. Thus, where a borrower and lender employ the same solicitor, he cannot be called to prove the abstract of the borrower's title as against the borrower (*i*).

Secondary evidence of a privileged document may be given if the person claiming privilege refuses to produce it (*k*).

Confidential communications.—The rule of privileged communications has been confined strictly by the English law to the cases which have been mentioned. It does not extend to communications made confidentially to stewards (*l*), or medical men (*m*), or patents agents (*n*). When a secret is entrusted to a person confidentially employed, the court will restrain such person from making use of the secret, or divulging it to others (*o*). A pursuivant of the Heralds' College is not a legal adviser (*p*).

(*f*) *Ramsbotham* v. *Senior*, 17 W. R. 1057.
(*g*) *Jenkyns* v. *Bushby*, L. R. 2 Eq. 548.
(*h*) *Baugh* v. *Cradocke*, 1 M. & R. 182.
(*i*) *Doe* v. *Watkins*, 3 Bing. N. C. 421; *cf. R.* v. *Avery*, 8 C. & P. 596.
(*k*) *Calcraft* v. *Guest*, [1898] 1 Q. B. 759.
(*l*) *Earl of Falmouth* v. *Moss*, 11 Price, 455.
(*m*) *Duchess of Kingston's Case*, 20 How. St. Tr. 613; *R.* v. *Gibbons*, 1 C. & P. 97; *Lee* v. *Hamerton*, 12 W. R. 975.
(*n*) *Moseley* v. *Victoria Rubber Co.*, 55 L. T. 482.
(*o*) *Morrison* v. *Moat*, 9 Hare, 241.
(*p*) *Slade* v. *Tucker*, 14 Ch. D. 824.

Communications to clergymen.—Communications to clergymen are not privileged (*q*); but judges have shown an indisposition to receive communications which have been made to clergymen as such. BEST, C.J., is reported to have said on one occasion that he would never compel a clergyman, if he objected, to disclose such communications (*r*); and in a case (*s*) where a woman was indicted for the murder of her child, ALDERSON, B., objected to hear the chaplain of the prison as a witness to conversations which he had had with the prisoner in his spiritual capacity. The learned judge said:

"I think these conversations ought not to be given in evidence. The principle upon which an attorney is prevented from divulging what passes with his client is, because, without an unfettered means of communication, the client would not have proper legal assistance. The same principle applies to a person, deprived of whose advice the prisoner would not have proper spiritual assistance. I do not lay this down as an absolute rule, but I think such evidence ought not to be given."

The counsel for the prosecution said that after such an intimation he should not tender the evidence.

On this branch of the law, JESSEL, M.R., once said(*t*):

"The principle protecting confidential communications is of a very limited character. It does not protect all confidential communications which a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or of his honour, or of his fortune. There are many communications which, though absolutely necessary, because without them the ordinary business of life cannot be carried on, still are not privileged. The communications made to a medical man whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, and which must necessarily be made in order to enable the medical man to advise or to prescribe for the patient, are not protected. Communications made to a priest in the confessional, on matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected. Communications made to a friend with respect to matters of the most delicate nature, on which advice is sought with respect to a man's honour or reputation, are not protected. Therefore it must not be supposed that there is any

(*q*) *Normanshaw* v. *Normanshaw*, 69 L. T. (N.S.) 468.
(*r*) *Broad* v. *Pitt*, M. & M. 233.
(*s*) *R.* v. *Griffin*, 6 Cox C. C. 219.
(*t*) *Wheeler* v. *Le Marchant*, 17 Ch. D. 681.

principle which says that every confidential communication which it is necessary to make in order to carry on the business of life is protected. The protection is of a very limited character, and in this country is restricted to the obtaining the assistance of lawyers as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things necessary in the shape of communication to the legal advisers are protected from production or discovery in order that that legal advice may be obtained safely and sufficiently."

Bankers are bound not to disclose the state of a customer's accounts, except upon a reasonable and proper occasion, and what is a reasonable and proper occasion is a question for the jury (*u*). The banker of a contributory can be compelled to give evidence as to his account under s. 115 of the Companies Act, 1862 (25 & 26 Vict. c. 89) (*x*). In connection with this subject, it may conveniently be mentioned here that by the Bankers' Books Evidence Act, 1879 (*y*), it is provided that,

"Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *primâ facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded,"

and that

"On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An Order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs."

It has been held by the Court of Appeal that such an Order can be made *ex parte*, but that the judge ought to be careful about so doing. No evidence is absolutely necessary, but the judge must be satisfied that the entries in question are admissible in evidence in the action, and for this purpose evidence may be

(*u*) *Hardy* v. *Veasey*, L. R. 3 Ex. 107.
(*x*) *Forbes' Case*, 41 L. J. Ch. 467.
(*y*) 42 & 43 Vict. c. 11, ss. 3, 7.

necessary (*z*). An Order may be made in England to operate in Scotland or Ireland and *vice versâ* (*a*). The making of an Order at all is a matter of discretion with the court, and an Order was refused in an action of libel to defendants who pleaded justification (*b*).

This Act cannot be used to get behind an affidavit of documents. Therefore, where a plaintiff, on making such an affidavit, had sealed up part of her pass books, and sworn that the parts so sealed up were not relevant, an application to order the plaintiff's bankers to produce the entries in their books relating to the plaintiff's account for the inspection of the defendants, was refused (*c*). A banker is only exonerated by s. 6 of this Act from personal attendance in court when he craves the aid of and follows out the provisions of ss. 2—5 (*d*).

By the Revenue, Friendly Societies, and National Debt Act, 1882 (*e*), s. 11 (2), the privileges of the last-mentioned Act are extended to banking companies to which the provisions of the Companies Acts, 1862 to 1880, are applicable, provided they have complied with the requirements of the Act under notice.

The principle established by the above Acts applies to the accounts of persons other than the parties to the proceedings (*f*). But the court must be satisfied by the party asking for the Order that the entries are admissible as evidence in the action, and the person whose account is sought to be inspected must be brought before the court (*g*), before it will make an Order under s. 7 of the Act for inspection of the

(*z*) *Arnott* v. *Hayes*, L. R. 36 Ch. D. 731.
(*a*) *Kissam* v. *Link*, [1896] 1 Q. B. 574.
(*b*) *Emmott* v. *Star Newspaper Co.*, 62 L. J. Q. B. 77.
(*c*) *Parnell* v. *Wood*, [1892] P. 137; approved by Court of Appeal in *South Staffordshire Tramways Co.* v. *Ebbsmith*, [1895] 2 Q. B. 669.
(*d*) *Emmott* v. *Star Newspaper Co.*, 62 L. J. Q. B. 77.
(*e*) 45 & 46 Vict. c. 72 (see Appendix).
(*f*) *Howard* v. *Beall*, 23 Q. B. D. 1.
(*g*) *South Staffordshire Tramways Co.* v. *Ebbsmith*, [1895] 2 Q. B. 696.

accounts of a person not a party to the action. The Court of Appeal has laid down that where the account is the account of a person not a party to, and having no interest in the litigation, the court will take care that the section is not made a means of oppression, and will protect such person against a roving inspection of his account (*h*).

RULE 6.

As to Evidence excluded on Grounds of Public Interest.

A witness cannot be asked, and will not be allowed, to state facts, or to produce documents, the disclosure or production of which may be prejudicial to any public interest.

On Hardy's trial for high treason (*i*), a witness for the Crown was asked, on cross-examination by Mr. Erskine, whether the person to whom he had communicated a report of the proceedings of the society to which the prisoner belonged, was a magistrate of any species or description, from a justice of peace to a Secretary of State. It was held by EYRE, C.J., that he might say whether the communication was made to a magistrate or not. The witness said, "It was not to a magistrate." Mr. Erskine then asked, "Then to whom was it?" The Attorney-General objected to the question. EYRE, C.J., said:

"It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against the prisoner; but there is a rule, which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channels by means of which that detection is made, should not be unnecessarily disclosed; if it can be made to appear that really and truly it is necessary for the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me that it is within the ordinary course to do it, or that there is any necessity for it in this particular case."

(*h*) *Pollock* v. *Garle*, [1898] 1 Ch. 1. (*i*) 24 How. St. Tr. 815.

The point was subsequently discussed before the other judges, and the majority concurred with EYRE, C.J., who thus laid down the rule:

"My apprehension is that, among those questions which are not permitted to be asked, are all those questions which lead to the discovery of the channel by which the disclosure was made to the officers of justice; that it is upon the general principle of the convenience of public justice that they are not to be disclosed; that all persons in that situation are protected from the discovery; and that, if it is objected to, it is no more competent for the defendant to ask who the person was that advised him to make the disclosure, than it is to whom he made the disclosure in consequence of the advice—than it is to ask any other question respecting the channel of communication, or all that was done under it."

It was held by Lord ELLENBOROUGH (*k*), that a member of Parliament or the Speaker may be called on to give evidence of the fact of a member of Parliament having taken part or spoken in a particular debate; but that he cannot be asked what he then delivered in the course of the debate. It should be noticed that at the date of this decision the debates in Parliament were not allowed to be reported. It has also been held, that communications in official correspondence relating to matters of State cannot be produced as evidence in an action against a person holding an office, for an injury charged to have been done by him in exercise of the power given to him as such officer; not only because such communications are confidential, but because their disclosure might betray secrets of State policy (*l*). Where a minister of State, subpœnaed to produce public documents, objects to do so on the ground that their publication would be injurious to the public interest, the court ought not to compel their publication (*m*); and the question whether the production of such a document would be injurious to the public service must be determined by the head

(*k*) *Plunkett* v. *Cobbett*, 5 Esp. 136.
(*l*) *Anderson* v. *Hamilton*, 2 B. & B. 156 n.
(*m*) *Beatson* v. *Skene*, 5 H. & N. 838.

of the department having the custody of the paper and not by the judge (*n*). It has been said that this privilege is personal to the head and cannot be claimed by a subordinate (*o*); but in a suit against an admiral in the Royal Navy to recover damages for a collision caused by his flagship, Sir R. PHILLIMORE refused the plaintiffs permission to inspect reports of the collision made by the admiral to the Lords of the Admiralty, the secretary to the Admiralty having made an affidavit that their production would be prejudicial to the public service (*p*). For the purpose of discovery before trial it has been help that the privilege need not be claimed by the head of the department (*q*). It has been stated as a rule that if no objection is taken at a trial to produce such a document by the person in whose custody it is, it would be the duty of the judge to intervene and to refuse to allow it to be produced (*r*). It has also been held that communications between a governor of a province and his attorney-general are privileged (*s*). The rule under consideration was discussed in *Rajah of Coorg* v. *East India Co.* (*t*), where it was stated that the production of political documents depends not upon the question whether the person called on to produce them is a party to the suit or not, but upon the danger to the public interests which would result from their publication. Where an officer in the army sued a superior officer for defamation, the alleged libel being contained in evidence given by the latter before a military court of inquiry, the House of Lords held that such evidence was not only privileged from being the subject of an action for libel,

(*n*) *Beatson* v. *Skene*, 5 H. & N., at p. 853, *per* POLLOCK, C.B.
(*o*) *Dickson* v. *Lord Wilton*, 1 F. & F. 424.
(*p*) *The Bellerophon*, 44 L. J. Adm. 5.
(*q*) *Henessey* v. *Wright*, 21 Q. B. D. 509.
(*r*) *Per* SMITH, L.J., in *Chatterton* v. *Secretary of State for India*, [1895] 2 Q. B. 195.
(*s*) *Wyatt* v. *Gore*, Holt, 299.
(*t*) 28 Beav. 350.

but was wholly inadmissible, since the proceedings of the court, being delivered to the Commander-in-Chief, and held by him on behalf of the Sovereign, ought not to be produced except by her Majesty's command or permission (*u*). A communication by a justice of the peace to the Lords Commissioners of the Great Seal concerning another justice of the peace has been held to be protected (*x*). The Director of Public Prosecutions cannot be asked to disclose the name of his informant upon a criminal trial or any subsequent civil proceedings arising out of it. On a criminal trial, if the judge sees that the strict enforcement of the rule would be likely to cause a miscarriage of justice he may relax it *in favorem innocentiæ* (*y*).

The courts have occasionally shown a disposition to limit the rule. Thus, in an action (*z*) for penalties against a man upon the ground that he had acted as a parish committee-man, being at the same time a collector of the property-tax, a clerk to the commissioners of the property-tax was called, and directed to produce his books, to prove the defendant's appointment. The witness refused, on the ground that he had been sworn, on his own appointment, not to disclose anything he should hear in that capacity respecting the property-tax, except with the consent of the commissioners, or by force of an Act of Parliament; but Lord ELLENBOROUGH said:

"I clearly think the oath contains an implied exception of the evidence to be given in a court of justice, in obedience to a writ of subpœna. The witness must produce the book, and answer all questions respecting the collection of the tax, as if no such oath had been administered to him."

It appears also that a grand juror may be compelled, either in civil or criminal cases, to disclose what has

(*u*) *Dawkins* v. *Lord Rokeby*, L. R. 7 E. & I. 744.
(*x*) *Fitzgibbon* v. *Green*, Ir. R. 9 C. L. 225.
(*y*) See *per* BOWEN, L.J., in *Marks* v. *Beyfus*, 25 Q. B. D. 500.
(*z*) *Lee* v. *Birrell*, 3 Camp. 337.

passed before a grand jury. So Lord CAMPBELL (*a*) held that a witness cannot refuse to produce a letter which he holds from a Secretary of State, to whom it has been addressed in his public character, and who forbids its production. Where a document is privileged from production on the grounds of public policy, secondary evidence of its contents is inadmissible (*b*).

Documents in Lunacy.—Closely allied to the rule under consideration is that as to the inspection of documents under the control of the judges in Lunacy. It was thus stated by LINDLEY, L.J. (*c*):

"It is not the practice in lunacy to produce documents in the office to anyone who wants to see them. No one is allowed to see them without an order of one of the masters or of a judge in lunacy. (See *Re Silcock's Lunacy* and *In re Wood.*) A person who has no interest except curiosity to see such documents is not allowed to see them. On the other hand, anyone who can satisfy the master or judge that he desires to see such documents for any reasonable and proper purpose is allowed to see them, provided always, if the lunatic is living, that he is not prejudiced thereby. If the lunatic is dead, the cases of *In re Wood*, *In re Ferrior*, and *In re Smyth* show that, if the applicant wants to see documents in the custody of the court, in order to make good a claim to the lunatic's property, such a purpose is *primâ facie* sufficient to induce the court to allow inspection, even although the request is opposed by a rival litigant. Nor have I found any case in which an application by such a person, for such a purpose, has been made and refused. But it is obvious that there are some exceptions to this general rule. The court would not, under any circumstances, make an order for the inspection of the reports which are confidentially made to the court by its own medical advisers. But, with this exception, and possibly some others which do not occur to me at the moment, the general rule is to allow inspection by any person claiming an interest in the property of a deceased lunatic or alleged lunatic, who can satisfy the court that he wants inspection for some reasonable and proper purpose.

"The fact that the documents are of such a kind that a litigant who had them could not be compelled to produce them does not, as a matter of law, disentitle his opponents from seeing them. As a matter of law, as distinguished from a matter which the court ought to consider in the exercise of its discretion, privilege is no bar to inspection in such a case as I am now considering."

(*a*) *Sykes* v. *Dunbar*, 2 Selw. N. P. 105.
(*b*) *Horne* v. *Bentinck*, 2 B. & B. 130; *Stace* v. *Griffith*, 2 P. C. 420.
(*c*) *Re Strachan*, [1895] 1 Ch. 445.

RULE 7.

Once privileged always privileged (d).

This rule has two exceptions:

(1) In the case of privilege on the ground of non-crimination when the reason for the privilege ceases the privilege will cease also; and therefore, if a penalty or forfeiture would enure for the benefit of a plaintiff and he waives the same, or when the time for suing for a penalty has expired, a witness is compellable to answer, notwithstanding the consequences, as also he is if by contract he is bound to answer (*e*). So also a witness is compellable to answer if the only person entitled to sue for the penalty or enforce the forfeiture is dead (*f*); as also when the offence has been pardoned.

(2) When a document otherwise privileged is made public the privilege ceases, *e.g.*, if a document is used in court; but only if it is so used that it is effectually made public (*g*).

RULE 8.

As to Evidence excluded on ground of Indecency.

Evidence may be excluded on the ground of indecency; but this rule only holds in civil cases. Thus, it is an established rule that parties shall not be permitted after marriage to say that they have had no connection during the marriage (*h*), and this is not altered by the Evidence Further Amendment Act, 1869, except in regard to proceedings instituted in consequence of adultery (*i*). But although a wife can-

(*d*) See *Bullock* v. *Corrie*, 3 Q. B. D., at p. 358; *Calcraft* v. *Guest*, [1898] 1 Q. B. 759.
(*e*) Wigram on Discovery, 83.
(*f*) *Anon.*, 1 Vern. 60.
(*g*) See *Goldstone* v. *Williams, Deacon & Co.*, [1899] 1 Ch. 47.
(*h*) *R.* v. *Sourton*, 5 A. & E. 180.
(*i*) See *ante*, p. 27.

not prove non-access in order to bastardize her issue (*k*), yet it appears that if that fact is proved by other evidence, she may be examined as to collateral facts, such as the name of an adulterer, or the time of a birth (*l*); and, although a father cannot be heard to say that a child born of his wife after marriage is illegitimate (*m*), yet a man reputed to be married can be heard to say he was not married when a question arises as to the pedigree of a child (*n*). In criminal cases no objection can be taken to evidence on the ground of indecency; and in civil cases the rule is restricted to such as involve considerations of domestic morality; or cases in which the admission of such evidence would only tend to outrage conventional propriety. Although neither wife nor husband can give evidence of non-access after marriage, yet a husband can give evidence of non-access before marriage (*o*). And although neither husband nor wife can give evidence of non-access during marriage, yet to rebut the presumption of the legitimacy of a child born during separation, evidence of the conduct of the husband and wife is admissible, and as part of such evidence letters written by the husband or wife are admissible (*p*).

(*k*) *Atchley* v. *Sprigg*, 33 L. J. Ch. 345.
(*l*) *R.* v. *Luffe*, 8 East, 193; *Legge* v. *Edmunds*, 25 L. J. Ch. 125.
(*m*) *Burnaby* v. *Baillie*, 42 Ch. D. 294.
(*n*) *Murray* v. *Milner*, 12 Ch. D. 845.
(*o*) *The Poulett Peerage*, [1903] A. C. 395.
(*p*) *The Aylesford Peerage Case*, 11 App. Cas. 11.

CHAPTER VIII.

HEARSAY OR SECOND-HAND EVIDENCE.

THE term "hearsay" or second-hand evidence is by some writers extended to cover all evidence which is reported, whether by a witness or any other medium, to the court, and this is probably scientifically accurate. In a treatise of this nature it is, however, preferable to confine the term to its ordinary application, *i.e.*, to the oral or written statement of a person who is not produced in court, conveyed to the court either by a witness or by the instrumentality of a document. Hence, what a witness himself says is original evidence, but when he repeats what another person has said this is hearsay. It is a well-settled general rule that—

Hearsay or second-hand evidence is inadmissible.

The ground for the rejection of hearsay or second-hand evidence lies in the fundamental principle that evidence has no claim to credibility unless it be given on oath, or what is equivalent to an oath, and unless the party to be affected by it has an opportunity of cross-examining the witness. The distinction between original and hearsay evidence is of the widest possible kind, when they are considered as elements of, and guides to, moral certainty. When a witness states something, which he himself has either seen or heard, directly affecting the parties to a proceeding, such a statement contains clearly the requisite principles of presumptive truth: but when he states something which he has heard from another person, the statement affords no satisfactory or reasonable information. A multitude of probable contingencies diminish its

value. Thus, the witness may have misunderstood or imperfectly remembered, or even may be wilfully misrepresenting the words of the third person; or the latter may have spoken hastily, inaccurately, or even falsely.

In the *Berkeley Peerage Case* (*a*), it was said by MANSFIELD, C.J.:

"By the general rule of law, nothing that is said by any person can be used as evidence between contending parties, unless it is delivered upon oath in the presence of those parties. . . . Some inconvenience no doubt arises from such rigour. If material witnesses happen to die before the trial the person whose cause they would have established may fail in the suit; but although all the bishops on the bench should be ready to swear to what they heard those witnesses declare, and add their own implicit belief of the truth of the declarations, the evidence would not be received."

Where the object of evidence is to satisfy the court on matters which are for the court and not for a jury, hearsay evidence is unobjectionable, even where the court is discharging the function of a jury. Thus, in order to show that reasonable search has been made for a lost indenture, a witness may be asked whether he has inquired of persons who were likely to know about it, and what answers were given to his inquiries (*b*).

The general doctrine is illustrated in *Spargo* v. *Brown* (*c*), which was an action for excessive distress; and the question was, Whether the plaintiff was tenant to the defendant Hugh Brown, or to his brother John Brown? The plaintiff had paid rent to John; but the defendant, to show that the money had been paid to John as his (the defendant's) agent, offered in evidence accounts tendered to him by John Brown, in which John described himself as the agent of the defendant. It was objected that John Brown, not

(*a*) 4 Camp. 414.
(*b*) *R.* v. *Braintree*, 1 E. & E. 51.
(*c*) 9 B. & C. 935.

being dead, ought to have been called as a witness. The judge rejected the evidence on this ground, and the full court upheld his ruling. LITTLEDALE, J., said:

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

And BAYLEY, J., said:

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

Evidence of the acts of a person is often as completely hearsay as the evidence of the words of the same person might have been. Thus it is equally hearsay to prove that a witness not before the court treated an individual as sane, as it is to show that in an oral or written statement he called him sane. This was to a great extent the ground of the judgment in *Wright* v. *Doe* (*d*), in which case the judges in the Exchequer Chamber held, on an issue of *devisavit vel non* (and the judgment was affirmed on appeal by the House of Lords), that letters written to the testator by different persons since deceased, and who had been well acquainted with the testator, could not be received in evidence on a question of sanity. The court held that the letters were not receivable as mere declarations of deceased witnesses, or as proof of treatment; but, assuming that the letters were connected with any act of the testator relating to them by which intelligence was indicated, as, for example, if he had

(*d*) 7 A. & E. 313.

answered them, they were receivable. PARKE, B., said:

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

In *Beavan* v. *M'Donnell* (*e*), which was an action to recover a sum of money paid by the plaintiff for the purchase of an estate, on the ground that he was a lunatic, and therefore incompetent to contract, evidence was received of his conduct before and after the transaction, to show that the lunacy was of such a character as would be apparent to the defendant when dealing with him.

That which is apparently hearsay or second-hand evidence is in many cases treated by the law as original evidence, and admissible as such. Thus, (1) evidence is original and not hearsay, which is given to prove, in corroboration of a witness's testimony, that he affirmed the same thing on previous occasions (*f*).

(2) The oral or written statements of persons not before the court are admitted where they can be regarded as part of the *res gestæ*, or gist of the matter

(*e*) 10 Ex. 184. (*f*) *Holliday* v. *Sweeting*, Bull. N. P. 294.

in issue. Thus, in an action for false imprisonment, the defendant justified on the ground that he had given the plaintiff in custody for forging a bill of exchange, which had therefore been dishonoured on presentment to the drawee. A witness stated that he had accompanied the defendant to the drawee, who refused to pay. He was then asked what the drawee had said at the time of the refusal. The question was objected to, but the court held that the evidence ought not to be excluded. There were peculiar circumstances in the case, but TINDAL, C.J., said:

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

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

"Hearsay evidence is admissible when it is part of a transaction; and in this way the exclamations of a crowd may be received as evidence. But there is, generally speaking, this distinction between what is said and what is done: in order to admit the former it is necessary that the authority of the speaker should be shown, in order to affect the parties; but if it be something done that is to be proved, no authority is required, because there is no

(*g*) *Perkins* v. *Vaughan*, 4 M. & G. 988.
(*h*) *R.* v. *Hunt*, 3 B. & Ald. 574.

danger of being misled; and I regard a placard or proclamation on a wall rather as something done. In a case before me at Guildford, where the plaintiff sought to recover the expenses of an election, I would not allow orders given by third parties by word of mouth to be admitted in evidence against the defendant, but I admitted inscriptions on coaches" (*i*).

In a case where the question was in what capacity a person signed a contract, statements as to what he said as to capacity at the time of signing the contract were held admissible (*k*). To prove an act of bankruptcy by the bankrupt beginning to keep his house, it is allowable to prove that the bankrupt was denied to his creditors by a servant at his house; but it is not enough to prove that the bankrupt directed that he should be denied unless the direction be followed up by an actual denial (*l*). In trover by the assignees of a bankrupt for goods, the property of the bankrupt, letters written by him during his absence from home, stating that he was absent to avoid two writs that were out against him, have been held admissible evidence for the plaintiffs of an act of bankruptcy, without proof that there was in fact any writ issued, or any pressure of creditors. It was held in the same case, also, that, in order to make a declaration of a bankrupt admissible evidence of an act of bankruptcy, it is not essential that the declaration and the act should be contemporaneous (*m*). In this case Lord DENMAN concurred in a previous decision of PARKE, B., that it is impossible to tie down to time the rule as to declarations, that may be made part of the *res gestæ* in cases of bankruptcy; and his lordship added, that "if there be connecting circumstances, a declaration may, even at a month's interval, form part of the whole *res gestæ*." In the case of *R.* v. *Foster* (*n*), where a

(*i*) *Bruce* v. *Nicolupolo*, 3 W. R. 483.
(*k*) *Young* v. *Schuler*, 11 Q. B. D. 651.
(*l*) *Per* Lord TENTERDEN: *Fisher* v. *Boucher*, 19 B. & C. 710.
(*m*) *Rouch* v. *Great Western Rail. Co.*, 1 Q. B. 51. See also *Rawson* v. *Haigh*, 2 Bing. 99.
(*n*) 6 C. & P. 325.

person was charged with manslaughter, three judges concurred in admitting the evidence of a witness as to a statement made by the deceased, in the absence of the prisoner, at the time of the accident through which the death ensued. GURNEY, B., said: "What the deceased said at the instant, as to the cause of the accident, is clearly admissible." When a transaction is complete no subsequent statement is admissible as part of the *res gestæ*. It was on this principle that COCKBURN, C.J., rejected the statement of a deceased person in the much discussed case of *R.* v. *Bedingfield* (*o*). It is rather difficult at first sight to reconcile this case with *R.* v. *Foster*, but the true view seems to be that, in that case, the judges considered that the transaction was not complete when the statement was made, whereas in *R.* v. *Bedingfield*, COCKBURN, C.J., considered that it was.

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

Notwithstanding the rule that a parent cannot bastardise his issue, on an issue as to the legitimacy of the plaintiff, a witness was allowed to state the declaration and conduct of the deceased mother, when questioned about her child's parentage (*r*). And the letters of a living mother were admitted as part of the *res gestæ* on a question of legitimacy of the child; evidence of her acts and conduct being admissible on this question, although, of course, she could not have been put into the witness box (*s*). Although on a prosecution for rape and other kindred offences any

(*o*) 14 Cox, 341.
(*p*) *Parrott* v. *Watts*, 47 L. J. C. P. 79.
(*q*) *Howe* v. *Malkin*, 27 W. R. 340.
(*r*) *Hargrave* v. *Hargrave*, 2 C. & K. 701.
(*s*) *The Aylesford Peerage*, 11 App. Cas. 1.

complaint made by a prosecutrix is not evidence as being part of the *res gestæ*, nevertheless, the fact that a complaint was made by a prosecutrix at the time of the alleged offence, and the details of such complaint, can and ought to be laid before the jury as evidence of her conduct being consistent with her story in the witness-box negativing any consent on her part (*t*). Where consent is immaterial (as in the case of an assault on a child), it would seem that evidence of complaint is not admissible (*u*).

In an action for misrepresentation of solvency evidence may be adduced that at the time the credit was given the plaintiff said that it was so given in consequence of the representations made to him (*x*).

(3) When it is material to prove the bodily or mental feelings of an individual, evidence of statements of such individual, at the time in question, relative to such feelings, is original and not hearsay. Thus, in *Aveson* v. *Lord Kinnaird* (*y*), the action was on a policy of insurance, secured on the life of the plaintiff's wife, and the defendants offered evidence that, a few days after it was made, the deceased, who had previously represented herself to the defendants as being in good health, had given a totally different account of her health to a witness. It was held that the witness might relate her conversation with the deceased, and that the statements of the latter, as so related, were evidence in the same way as the answers of patients to the inquiries of their medical attendants are evidence as to the state of health, although letters to a medical man from his patient detailing the symptoms of his malady are not admissible (*z*). On the same principle, in actions for crim. con., what the husband and wife

(*t*) *R.* v. *Lillyman*, [1896] 2 Q. B. 167. The principle of this case is not of general application (*Beatty* v. *Cullingworth*, 60 J. P. 740).
(*u*) *R.* v. *Kingham*, 66 J. P. 393.
(*x*) *Fellowes* v. *Williamson*, M. & M. 306.
(*y*) 6 East, 188. (*z*) *Witt* v. *Klindworth*, 3 S. & T. 143.

had said to each other, or letters written by either party to the other, when there was no ground to suspect collusion, were admissible evidence to show the terms on which they lived (*a*); and the same rule applies to proceedings in the Divorce Court.

(4) Evidence of general reputation, general character, and general notoriety is original evidence, and not hearsay. Thus, general reputation is admissible to prove marriage (*b*), except in prosecutions for bigamy, and petitions for damages for adultery under the Divorce Act, in which the marriage must be strictly proved. Whenever the witness is shown to have derived his information from some assignable individual, it is excluded as hearsay (*c*). Following the principle laid down by Mr. Fraser (*d*), Lord REDESDALE, in a case, in the House of Lords (*e*), held, that repute to raise presumption of marriage must be founded on general, not singular, opinion; a divided repute is on such a subject no evidence at all. Here his lordship was speaking probably of Scotch marriages only; for, in the subsequent case of *Lyle* v. *Elwood* (*f*), HALL, V.-C., said: "It cannot be contended that wherever there is evidence of repute on one side and the other a marriage cannot be established"; and the marriage was held proved although the repute was divided.

When it is proposed to infer a marriage from repute, it is necessary to weigh the evidence cautiously—first, with respect to the degree in which the opinion prevails; next, with respect to its causes; and, lastly, with respect to the inference to be drawn from it (*g*).

In trespass for destroying a picture, when the plea was not guilty, and the defence that the picture was a libel on the defendant's sister and brother-in-law, and

(*a*) *Trelawney* v. *Coleman*, 1 B. & Ald. 90; *cf. Willis* v. *Bernard*, 8 Bing. 376.
(*b*) *Doe* v. *Fleming*, 4 Bing. 266; *Fox* v. *Bearblock*, 17 Ch. D. 429.
(*c*) *Shedden* v. *Att.-Gen.*, 2 S. & T. 170.
(*d*) "Fraser on the Personal and Domestic Relations," Vol. I., p. 207.
(*e*) *Cunninghame* v. *Cunninghame*, 2 Dow. 511.
(*f*) L. R. 19 Eq. 98. (*g*) Fraser, Vol. I., p. 206.

that he had therefore destroyed it, Lord ELLENBOROUGH held, that the declarations of the spectators while they looked at the picture in the exhibition room were evidence to show that the pictures portrayed were meant to represent the defendant's sister and brother-in-law (*h*). So under a devise of lands in a certain parish evidence is admissible that a part not comprised in the parish was reported to be in it, and was intended to be included in the devise (*i*). But evidence of a rumour is not admissible to justify a slander (*k*).

(5) Where several persons are proved to be engaged in one general conspiracy, all the transactions of that conspiracy by the different parties may and ought to be given in evidence; and it is enough if the party accused can be proved to be privy to the general conspiracy; for if that is proved everything that is done by the different parties concerned in it must also be imputed to him as a part of the conspiracy (*l*). Thus, in Hardy's trial for high treason, letters written by one conspirator to another were held to be evidence against the prisoner after his complicity had been established. So, if several defendants in trespass be proved to be co-trespassers by other competent evidence, the declaration of one as to the motives and circumstances of the trespass will be evidence against all who are proved to have combined together for the common object (*m*). But on a charge of effecting a conspiracy, although statements made by any conspirator for the purpose of carrying the conspiracy into effect are admissible in evidence against the others, statements by one not made in pursuance of the conspiracy are not admissible against the others, nor are statements made after the conspiracy is effected (*n*).

(*h*) *Du Bost* v. *Beresford*, 2 Camp. 511.
(*i*) *Anstee* v. *Nelms*, 1 H. & N. 225.
(*k*) *Lockhart* v. *Jelly*, 19 L. T. (N.S.) 659.
(*l*) *Per* EYRE, C.J., : *Re Hardy*, 24 How. St. Tr. 451.
(*m*) *Per* Lord ELLENBOROUGH : *R.* v. *Hardwicke*, 11 East, 585.
(*n*) *R.* v. *Blake*, 6 Q. B. 137.

(6) Where either of the parties to the record appears to be merely a trustee for a third party, his declaration or admissions may be given in evidence to defeat the claim of such third party (*o*). In an action against a sheriff for a false return, the statements of his deputy to the plaintiff's attorney, as to the cause of the omission to make an arrest, have been held to be evidence against the defendant (*p*).

A similar rule holds in cases of partnership and agency, *i.e.*, that the acts or parol arrangements of a partner or agent, made in the ordinary course of business, bind a co-partner or principal respectively, and may therefore be given in evidence for or against him (*q*).

The general rule stated at the commencement of this chapter has several important exceptions, which are discussed in the following chapters.

It must also be noticed that under r. 7 of O. XXX. of the R. S. C. (for which see Appendix), on the hearing of a summons for directions the court or a judge has now power to make an order that evidence of any particular fact shall be given by statement on oath of information and belief, and thus to dispense *pro tanto* with the general rule as to hearsay evidence. Rule 7 is made under the provisions of s. 3 of the Judicature Act, 1894 (*r*), upon which the power to dispense with strict evidence depends (*s*). On interlocutory motions affidavits may contain statements as to the deponent's belief, with the grounds thereof.

(*o*) *Bauerman* v. *Radenius*, 7 T. R. 663.
(*p*) *North* v. *Miles*, 1 Camp. 389.
(*q*) *Sandilands* v. *Marsh*, 2 B. & Ald. 673; *Doe* v. *Hawkins*, 2 Q. B. 212.
(*r*) 57 & 58 Vict. c. 16.
(*s*) *Baerlein* v. *Chartered Mercantile Bank*, [1895] 2 Ch. 488.

CHAPTER IX.

HEARSAY IN MATTERS OF PUBLIC AND GENERAL INTEREST.

WHEN an issue involves a question of public or general interest, the rule that hearsay or second-hand evidence is inadmissible does not apply: and generally—

In matters of public or general interest, popular reputation or opinion, or the declarations of deceased witnesses of competent knowledge, if made *ante litam motam* (*i.e.*, before the litigated point has become the subject of controversy), and without reasonable suspicion of undue partiality or collusion, will be received as competent and credible evidence.

The ground for its reception lies in the supposition that the universality and notoriety of the interests concerned remove the temptation and the ability to misrepresent, which would arise if such evidence were received in matters of merely private and personal concerns. Accordingly, it is rejected wherever the point at issue appears to partake more of the nature of a private than of a public interest. Thus a map attached to an old enclosure award, although admissible to prove that a particular road was a public highway, was held inadmissible to prove the boundaries of such highway in favour of a defendant charged with obstructing the same (*a*).

(*a*) *R.* v. *Berger*, [1894] 1 Q. B. 823.

In *Wright* v. *Doe* (*b*), COLTMAN, J., said:

"The true line (says BULLER, J., in *R.* v. *Eriswell*) for courts to adhere to, is that wherever evidence not on oath has been repeatedly received and sanctioned by judicial determination, it shall be allowed; but, beyond that, the rule that no evidence shall be admitted, but what is on oath, shall be observed. . . . Evidence of opinion is admitted in some cases without oath, as, for instance, where reputation is given in evidence to prove a public right. . . . The principle upon which I conceive the exception to rest is this, that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject; and such concurrence is presumptive evidence of the existence of an ancient right, of which, in most cases, direct proof can no longer be given, and ought not to be expected; a restriction now generally admitted as limiting the exception is this, that the right claimed must be of a public nature affecting a considerable number of persons."

And in the same case in the Exchequer Chamber (*c*), ALDERSON, B., said:

"The general interest which belongs to the subject would lead to immediate contradiction from others, unless the statement proved were true; and the public nature of the right excludes the probability of individual bias, and makes the sanction of an oath less necessary."

In ejectment by the lessee of a tenant in tail against the devisee in fee of a previous remainderman, the question was whether the land in dispute was part of the estate which had been originally devised by a testator between fifty and sixty years previously. Evidence of reputation had been received that the land had been purchased by the original testator; but it was held that, notwithstanding some special circumstances in the case, the question was merely one of private ownership, and that therefore the evidence should have been rejected (*d*).

In *Weeks* v. *Sparke* (*e*), to trespass on the plaintiff's close, the defendant pleaded a prescriptive right of

(*b*) 7 A. E. 360.
(*c*) 4 Bing. N. C. 528.
(*d*) *Doe* v. *Thomas*, 14 East, 323.
(*e*) 1 M. & S. 679; *sed. cf. Earl of Dunraven* v. *Llewellyn*, 15 Q. B. 791, *post*, p. 144.

common for his cattle, and the plaintiff replied, traversing the plea, and prescribing for a right to use the *locus in quo* for growing corn until harvest time. It was held that witnesses might prove the statement of a deceased neighbour as to the nature of the enjoyment of the respective rights; but that a foundation for its reception must first be laid by proof of the actual enjoyment of the rights. LE BLANC, J., said:

"How is the right to be proved? First, it is to be proved by acts of enjoyment within the period of living memory; and when this foundation is laid, then, inasmuch as there cannot be any witnesses to speak to acts of enjoyment beyond the time of living memory, evidence is to be admitted from old persons (not any old persons, but persons who have been conversant with the neighbourhood where the waste lies, over which the particular right of common is claimed) of what they have heard other persons, of the same neighbourhood, who are deceased, say respecting the right. Thus far it is evidence as applicable to this prescriptive right, it being a prescription in which others are concerned, as well as the person claiming it; because a right of common is, to a certain extent, a public right. And the only evidence of reputation which was received was that from persons connected with the district. In the same manner, in questions of pedigree, although they are not of a public nature, the evidence of what persons connected with the family have been heard to say, is received as to the state of that family. In like manner also, upon questions of boundary, though the evidence of perambulations may be considered to a certain degree as evidence of an exercise of the right, yet it has been usual to go further, and admit the evidence of what old persons who are deceased have been heard to say on those occasions. The rule generally adopted, upon questions either of prescription or custom, is this, that after a foundation is once laid of the right by proving acts of ownership, then the evidence of reputation becomes admissible, such evidence being confined to what old persons, who were in a situation to know what those rights were, have been heard to say concerning them."

There was, however, formerly considerable conflict of opinion among the judges, as to the admissibility of reputation and the declarations of deceased persons to prove or disprove a claim of prescriptive right. In *Morewood* v. *Wood* (*f*), where to trespass the defendant pleaded a prescriptive right, Lord KENYON and

(*f*) 14 East, 327 n.

ASHURST, J., held the question to be one of a private nature, and that evidence of reputation should therefore be rejected; but BULLER, J., and GROSE, J., appear to have thought the issue to be sufficiently of a public nature to let in the evidence. In the case of *Weeks* v. *Sparke* (*g*), Lord ELLENBOROUGH laid down the principle that when the right claimed does not curtail the general rights of others, being merely the claim of an individual against an individual, such evidence is not admissible. Traditionary reputation has been received as evidence of the boundaries between two parishes and two manors, but not of the boundaries between two estates (*h*).

In *Rex* v. *Sutton* (*i*), the defendant was indicted for the non-repair of a bridge, and, to disprove her liability, offered a presentment of a jury in the reign of Edward III., by which it was found that they did not know who was liable to repair; and this was held to be evidence of reputation for the defendant.

Reputation has been received in support of an immemorial right of common, *pur cause de vicinage* so pleaded (*j*). In *Duke of Newcastle* v. *Hundred of Broxtowe* (*k*), the question was, whether Nottingham Castle was within the hundred: and it was held that Orders made at the County Sessions between 1654 and 1660, in which the castle was described as being within the hundred, were admissible, as the justices must be presumed to have had sufficient acquaintance with the subject to which their declarations related; and that, although contrary evidence that the castle was excepted from the hundred was given from Domesday-Book and an old charter of Henry VI., the judge was right in telling the jury to act on the evidence of a more modern and continuous reputation. But when the question

(*g*) 1 M. & S. 679.
(*h*) 14 East, 331 n.
(*i*) 8 Ad. & El. 516.
(*j*) *Pritchard* v. *Powell*, 10 Q. B. 589.
(*k*) 4 B. & Ad. 273.

was as to the rights of the county of the city of Chester, as between that city and the County Palatine of Chester, a decree by a Lord Treasurer and other persons who were not a competent tribunal, and who had no personal knowledge of the facts, except such as they derived from an irregular judicial proceeding, was held inadmissible evidence of reputation (*l*). So an extra-judicial report by a government surveyor, appointed by Queen Elizabeth, as to the boundaries of a manor, has been rejected as evidence of such boundaries. Lord DENMAN said:

> "The surveyor does not appear to have had any authority to institute the inquiry; and, stripped of his authority, he has not merely no right to make any kind of return, but the presumption that he did make it falls to the ground. The paper may have been written by any clerk idling in the office, from his own imagination, or compelled, possibly by some interested person in furtherance of a sinister object of his own" (*m*).

An old survey of landed property, taken under the directions of a former proprietor, is no evidence that he was entitled to it (*n*).

In a case in the Exchequer Chamber (*o*), on a question in replevin whether goods were taken in Norfolk or Suffolk, a map of Suffolk purporting to have been republished in 1766, *with corrections and additions*, by the sons of J. K., from a map published in 1736 by J. K., who then took an accurate survey of the whole country, was tendered to show that the *locus in quo* was not in Suffolk. It was produced by a magistrate of both Norfolk and Suffolk, who had purchased it twelve or fourteen years previously, and before any dispute as to the boundaries had arisen. The court rejected the evidence chiefly on the ground that the new editors did not appear to have had any personal

(*l*) *Rogers* v. *Wood*, 2 B. & Ad. 245.
(*m*) *Evans* v. *Taylor*, 7 B. & A. 617.
(*n*) *Daniel* v. *Wilkin*, 7 Ex. 429.
(*o*) *Hammond* v. *Bradstreet*, 10 Ex. 390.

knowledge of the subject, nor to be in any way connected with the district, so as to make it probable that they had such knowledge. This case illustrates the important principle, that, before ancient documents can be received as evidence of reputation, it must be proved that they have come from the custody of a person who is presumptively connected sufficiently by knowledge with the matter in dispute, so as to render him an authority. They must also bear the plain marks of authenticity. Thus, in the above case it was held, that the fact of the map being in the possession of the county magistrate did not vouch for its accuracy, and that it was unlike the case of a deed of conveyance found in the custody of a party who, if it were genuine, would be entitled to it. So, too, in *Bidder* v. *Bridges* (*p*), which was an action to enforce commonable rights, a note-book, called Bracton's Note-Book, from the British Museum, and a document forming part of the Cottonian MSS. in the same Museum, and purporting to be a Register of Merton Priory, were rejected by KAY, J., on the ground that there was no evidence of their ever having been in such custody as would entitle a court to treat them as authentic. In the same case, the same judge admitted in evidence for what it was worth an entry in the Church Book of the parish of Beddington, made in 1678, of a note of an action in 1240, in which the parson of Beddington was one of the defendants, as an entry of an historical fact in which the parish was interested. In the same case, the same judge refused to admit in evidence, on the question of boundary, the Ordnance map and certain maps from the British Museum, on the ground that they were only the opinions of map makers upon such information as they had at the time. The case went to the Court of Appeal, which agreed with KAY, J., as to the

(*p*) 54 L. T. 529.

non-admissibility of a copy of the Register of Merton Priory, but did not express any opinion on the other matters above mentioned.

The hearsay, especially where it is documentary, must contain a clear and unambiguous declaration concerning the disputed issue. In one case, to prove a public right of way over a manor, a map of the manor, which had been made by a deceased steward of the manor, was given in evidence. The map showed lines made by the deceased witness which indicated clearly some kind of way over the *locus in quo*, but contained nothing to show whether the way was a public one, or only one of several occupation ways such as existed on the manor. If the way had been an occupation way it would have been of a private nature, and it was admitted could not be proved by the evidence which had been given; and, there being nothing on the face of the map to show that it was a public way, and the map having been used only to settle the boundaries of the copyholds of the manor, it was held to be inadmissible (*q*). A map of the manor produced from the manor house where it was usually kept, made by a surveyor conversant with the *locus in quo* and recognised by parish authorities for rating purposes, was in one case held admissible on a question of general right to the waste of the manor. The tithe map was also admitted in this case (*r*).

The conversations of former tenants of a manor, and of other persons interested in it, have been held good evidence as to the boundaries of the manor (*s*). A document purporting to be a survey of a manor, while it was part of the possessions of the Duchy of Cornwall, and coming out of proper custody, was admitted by Lord ROMILLY (*t*) as evidence of the boundaries and

(*q*) *Pipe* v. *Fulcher*, 1 El. & El. 111.
(*r*) *Smith* v. *Lister*, 64 L. J. (N.S.) Q. B. 154.
(*s*) *Doe* v. *Sleeman*, 9 Q. B. 298.
(*t*) *Smith* v. *Earl Brownlow*, L. R. 9 Eq. 241.

customs of the manor; although a survey of a manor belonging to Oliver Cromwell, and taken by commissioners appointed by him, containing also a presentment by a jury that certain dues were payable to the lord, was held inadmissible as a public document, or as reputation to prove such dues (*u*). More recently a survey made in 1816 under an Act of Parliament on the occasion of a sale of Crown lands, was admitted as a public document and coming out of proper custody (*x*). In this case, the case of *Earl of Dunraven* v. *Llewellyn* (*y*) in the Exchequer Chamber was cited. There the question in trespass was, as to the property in a plot of ground which lay between the waste of the plaintiff and the estate of the defendant. The plaintiff offered evidence of statements made before any controversy arose, by his deceased tenants, who as such had exercised commonable rights over the waste adjoining the *locus in quo*, and other statements made by deceased persons, who, although not tenants, were resident in the manor, and well acquainted with it. No evidence was given of an actual enjoyment of the right on the close by the tenants. PARKE, B., said:

"If the question had been one in which all the inhabitants of the manor, or all the tenants of it or of a particular district of it, had been interested, reputation from any deceased inhabitant or tenant, or even deceased residents in the manor, would have been admissible, such residents having presumably a knowledge of such local customs; and, if there had been a common law right for every tenant of the manor to have common on the wastes of a manor, reputation from any deceased tenant as to the extent of those wastes, and therefore as to any particular land being waste of the manor, would have been admissible. . . . This case is precisely in the same situation as if evidence had been offered that there were many persons, tenants of the manor, who had separate prescriptive rights over the lord's wastes; and reputation is not admissible in the case of such separate right, each being private and depending on each separate prescription, unless the proposition can be supported, that, because there are many such rights, the rights have a public

(*u*) *Duke of Beaufort* v. *Smith*, 4 Ex. 450.
(*x*) *Evans* v. *Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241.
(*y*) 15 Q. B. 791.

character, and the evidence, therefore, becomes admissible. We think this position cannot be maintained. . . . We are of opinion, therefore, that the evidence of reputation offered in this case was, according to the well-established rule in the modern cases, inadmissible, as it is in reality in support of a mere private prescription; and the number of these private rights does not make them to be of a public nature."

The Court of Appeal in the case last mentioned, said that the question whether a piece of land was part of a common over which any one in certain parishes had a right of common, was a question of such general interest in the locality as to let in evidence of reputation, and they held that the *Earl of Dunraven* v. *Llewellyn* was no authority to the contrary, as the issue in that case was simply whether a piece of land was the plaintiff's or defendant's. LINDLEY, M.R., also said that *Warrich* v. *Queen's College, Oxford* (*z*), shows that the *Earl of Dunraven* v. *Llewellyn* does not go so far as is sometimes supposed.

On an issue whether or not certain land, in a district repairing it own roads, was a common highway, it has been held admissible, but slight, evidence that, before the point was litigated, the inhabitants held a public meeting to consider the repair of the way, and that several of them, since dead, signed a paper on the occasion, stating that the land was not a public highway (*a*). So the verdict or presentment of a jury summoned by a court of competent jurisdiction to determine the boundaries of two manors is admissible evidence of reputation, in an issue as to the boundary of a third manor, which is conterminous with one of the former (*b*). Some of the remarks of the learned judges, in this last case, may appear to be at variance with the later case of *Earl of Dunraven* v. *Llewellyn*. Thus, COLERIDGE, J., states: "On the question of

(*z*) L. R. 6 Ch. 716.
(*a*) *Barraclough* v. *Johnson*, 8 A. & E. 99.
(*b*) *Brisco* v. *Lomax*, 8 A. & E. 198.

boundary between two owners, no doubt reputation is admissible"; but this observation must be limited by the circumstances of the case, which seem to have been regarded as converting an apparently personal question into one of a public nature. An award, being in the nature of a private transaction, is not evidence of reputation (*c*).

The general doctrine was discussed elaborately in the case of *R.* v. *Bedfordshire* (*d*). There, on an indictment against a county for not repairing a public bridge, the defendants pleaded that A. was liable to repair a portion, *ratione tenuræ* of the manor of O.; G. a certain other portion, *ratione tenuræ* of the manor of H.; and T. the residue, *ratione tenuræ* of the manor of C. Evidence of reputation was tendered by the defendants to show that, by immemorial custom, the respective parties mentioned in this plea had repaired the respective portions. The evidence was rejected at the trial, apparently on the ground that the interests were of a private nature; but the court held that the evidence ought to have been received. Lord CAMPBELL, after recognising the general principle, "that public reports ought not to be held admissible so as to affect the rights of private persons," proceeded to say:

"Upon the question here raised, all the inhabitants of the county, who have property liable to be assessed to the county rate, have an interest whether this bridge was to be repaired in part by the owners of certain lands, *ratione tenuræ*; such persons would be affected by the verdict of the jury; and then there are others whom it would also affect; viz., those who require the use of the bridge, and to them it is of importance upon whom the liability rests to repair the bridge. If a prosecution arises, heavy expenses are sure to be incurred, and therefore such questions are certain to be discussed, and a true reputation is very likely to exist. . . . Certainly, the question objected to in this case touches the rights of individuals; but then it also affects that of the county and the ratepayers. For these reasons, we think that evidence of reputation was improperly rejected."

(*c*) *Evans* v. *Rees*, 10 A. & E. 151; *Lady Wenman* v. *Mackenzie*, 5 E. & B. 447.
(*d*) 4 E. & B. 535.

Whether the public are entitled to fish in a tidal river is a question of public interest on which evidence of reputation is admissible (*e*).

In questions concerning the admissibility of reputation, distinctions have been drawn between cases in which a public interest, and others in which merely a local interest, is concerned; but reputation appears to be equally receivable in both instances, although its value will depend essentially on the vicinity of the witness to the *locus in quo*, and his personal knowledge of the surrounding circumstances.

"In a matter in which all are concerned, reputation from any one appears to be receivable; but of course it would be almost worthless, unless it came from persons who were shown to have some means of knowledge, as by living in the neighbourhood" (*f*).

The next important restriction on the rule under consideration, is contained in the principle that—

The declarations of deceased persons are not admissible as reputation, unless they have been made *ante litem motam*, *i.e.*, before the issue has become, or appeared likely to become, a subject of judicial controversy.

In *R.* v. *Cotton* (*g*), DAMPIER, J., said:

"The reason why the declarations of deceased persons [are admitted] upon public rights, made *ante litem motam* when there was no existing dispute respecting them, is that these declarations are considered as disinterested, dispassionate, and made without any intention to serve a cause or mislead posterity; but the case is entirely altered *post litem motam*, when a controversy has arisen respecting the point to which the declarations apply. Declarations then made are so likely to be produced by interest, prejudice, or passion, that no reliance can safely be placed upon them, and they would more frequently impose upon the understanding than conduce to the elucidation of the truth. It has, therefore, been wisely decided that evidence of reputation arising *post litem motam* shall not be admitted."

(*e*) *Neill* v. *Duke of Devonshire*, 8 App. Cas. 35.
(*f*) *Per* PARKE, B.: *Crease* v. *Barrett*, 1 C. M. & R. 928.
(*g*) 3 Camp. 446.

Thus, the presentment of a homage, sworn to determine boundaries, has been rejected, because there was no jurisdiction, and because it amounted to a declaration *post litem motam* (*h*); but in an action by a copyholder against his lord, where the question was as to the amount of fine payable to the latter, the incidental depositions of witnesses, in an action by a former claimant against a former lord, have been admitted as evidence for the lord, as depositions of persons called on behalf of a person standing *in pari jure* with the plaintiff, and because the same custom was not in controversy (*i*).

It seems to be settled that the *lis mota* dates not from the commencement of an action or suit, nor even from the commencement of actual litigation, but from the time when the question began to attract public attention as a controversy, The line of distinction is the origin of the controversy, and not the commencement of the suit. After the controversy has originated, all declarations are to be excluded, whether the controversy was or was not known to the declarant (*k*). Declarations however, will not be excluded on account of their having been made with the express view of preventing disputes (*l*) or in direct support of the declarant's title (*m*), or from the declarant being in the same situation, touching the matter in contest, with the party relying on the declaration (*n*).

(*h*) *Basset* v. *Richards*, 10 B. & C. 657.
(*i*) *Freeman* v. *Phillipps*, 4 M. & S. 497.
(*k*) *Per* MANSFIELD, C.J.: *Berkeley Peerage Case*, 4 Camp. 417.
(*l*) *Berkeley Peerage Case*, 4 Camp. 401.
(*m*) *Doe* v. *Davies*, 10 Q. B. 325.
(*n*) *Monkton* v. *Attorney-General*, 2 Russ. & M. 160.

CHAPTER X.

EVIDENCE OF ANCIENT POSSESSION.

ALTHOUGH. as has been previously stated, hearsay or second-hand evidence is not generally admissible in questions concerning merely private and personal rights, yet it is received, in some cases, where a controversy refers to a time so remote that it is unreasonable to expect a higher species of evidence; but in such cases the surrounding circumstances must be free from reasonable suspicion, and it must appear that the deeds or other documents, in which the hearsay is contained, are ancient, *i.e.*, more than thirty years old; that they come from the custody in which they would presumably be found, if authentic; and that they have been regarded and treated as authentic by the guardians of them. It is therefore a rule that—

Ancient documents purporting to be a part of the transactions to which they relate, and not a mere narrative of them, are receivable in evidence that those transactions actually occurred, provided they be produced from proper custody.

In *Roe* v. *Rawlings* (*a*), a paper was received which purported to be a statement by a confidential agent, to a former tenant for life, of rent reserved in 1728, and as such had been indorsed by the latter. This was held to be evidence in 1806 of the fact for the plaintiff, a tenant in tail, to whom it had been handed down with other muniments of title, to show that the rent

(*a*) 7 East, 279.

reserved by a tenant for life, who had immediately preceded the plaintiff, was less than the rent originally reserved. Lord ELLENBOROUGH said:

"Ancient deeds, proved to have been found amongst deeds and evidences of land, may be given in evidence, although the execution of them cannot be proved; and the reason given is, 'that it is hard to prove ancient things, and the finding them in such a place is a presumption they were fairly and honestly obtained, and reserved for use, and are free from suspicion of dishonesty.' This paper, therefore, having been found amongst the muniments of the family . . . accredited . . . and preserved . . . we think that it was evidence to be left to the jury of the amount of the ancient rent at the time it bears date."

So the counterparts of old leases from the repository of the lord of a manor, have been received in evidence of the demise of premises, even without proof of enjoyment (*b*); and in the same case, which was tried in 1782, several leases, dated between 1680 and 1702, were received as undoubtedly ancient; but a lease dated in 1730 was rejected as too recent. In *Malcolmson* v. *O'Dea* (*c*), it was laid down that the true ground for admitting a lease is that of its showing an act or acts of ownership. So, to prove a personal prescriptive right of fishery, as appurtenant to a manor, old licences on the court rolls, granted by the lords of the manor, are admissible (*d*). Old rent rolls or court rolls are received to prove rights to which they refer. Entries in old parish rate-books are admissible as evidence to prove who were the owners or occupiers of the property at a previous time (*e*).

In ejectment, where both plaintiff and defendant claimed through E., it was held that an ancient entry made by E.'s steward in his rent-book, was evidence as to the identity of the property (*f*). So, ancient

(*b*) *Clarkson* v. *Woodhouse*, 3 Doug. 189.
(*c*) 10 H. L. Cas. 593.
(*d*) *Rogers* v. *Allen*, 1 Camp. 301; *Malcolmson* v. *O'Dea*, 10 H. L. Cas. 593.
(*e*) *Smith* v. *Andrews*, [1891] 2 Ch. 632.
(*f*) *Doe* v. *Seaton*, 2 A. & E. 171.

terriers are received to prove the amount of vicarial tithes (*g*). In *Bishop of Meath* v. *Marquis of Winchester* (*h*), in the House of Lords, the general doctrine, more particularly as regards the next point to be considered, viz., the custody of the document, was fully considered. The main questions were, whether an ancient deed, and also a case concerning the right of presentation to a living, stated for the opinion of counsel by a former Bishop of Meath in 1695, and found among the family papers of his descendants, were evidence touching the right of presentation as against the plaintiff in error. Both documents were held to be clearly admissible.

Proper custody.—Ancient documents, to be receivable as such, must be proved to have come from the custody in which it was reasonable that they should be found. This doctrine has been applied to family Bibles. A New Testament containing entries of the births, deaths, and marriages of a family, produced by a member thereof, and proved to have been in the possession of the family for a long time, is admissible in evidence without proof of handwriting (*i*).

In the case of *Bishop of Meath* v. *Marquis of Winchester* (*j*), TINDAL, C.J., said:

"The result of the evidence, upon the bill of exceptions, we think is this—that these documents were found in a place in which, and under the care of persons with whom, papers of Bishop Dopping might naturally and reasonably be expected to be found, and that is precisely the custody which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper place of deposit. If documents continued in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than the proper place of deposit, that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the

(*g*) *Pearson* v. *Beck*, 8 Ex. 452.
(*h*) 3 Bing. N. C. 198.
(*i*) *Hubbard* v. *Lees*, 4 H. & C. 418.
(*j*) 3 Bing. N. C., at p. 200.

place where they are actually found; for it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable, though differing in degree, some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction, that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases. On the one hand, old grants to abbeys have been rejected as evidence of private rights, where the possession of them has appeared altogether unconnected with the persons who had any interest in the estate. Thus, a manuscript found in the Herald's Office, enumerating the possessions of the dissolved monastery of Tutbury, a manuscript found in the Bodleian Library, Oxford, and a grant to a priory brought from the Cottonian MSS. in the British Museum, were all held to be inadmissible, the possession of the documents being unconnected with the interests in the property. On the other hand, an old chartulary of the dissolved abbey of Glastonbury was held to be admissible because found in the possession of the owner of part of the abbey lands, though not of the principal proprietor. This was not the proper custody, which, as Lord REDESDALE observed, would have been the Augmentation Office; and, as between the different proprietors of the abbey lands, it might have been more reasonably expected to have been deposited with the largest; but it was, as the court argued, a place of custody where it might be reasonably expected to be found."

It appears from this case, that it is not necessary that the custody should be that which is strictly proper: it is sufficient if it be one which may be reasonably and naturally explained (*k*), and one which affords reasonable assurance of the authenticity of the document (*l*). It is not, however, sufficient to produce the documents without calling a witness to prove the custody from which they come (*m*).

It has been doubted whether it is not necessary to show some act of recognition or enjoyment, done with reference to the documents. Thus, in *Doe* v. *Pulman* (*n*),

(*k*) *Doe* v. *Sumpter*, 8 A. & E. 154.
(*l*) *Per* COLERIDGE, J.: *Doe* v. *Phillips*, 8 Q. B. 158; *cf. Bidder* v. *Bridges*, 34 W. R. 514.
(*m*) *Evans* v. *Rees*, 10 A. & E. 154.
(*n*) 3 Q. B. 623; *sed cf. Malcolmson* v. *O'Dea*, 10 H. L. Cas. 593.

which was an action of ejectment, to prove that an ancient ancestor had been seised of the *locus in quo*, the lessor of the plaintiff produced from her muniment room the counterpart of an old lease, purporting to be granted by the ancestor, but executed only by the lessee, and it was held admissible, without proof that the lessee had actually enjoyed under it.

It is said to be an established principle, that nothing said or done by a person, having at the time an interest in the subject-matter, shall be evidence either for him or persons claiming under him (*o*); and therefore in a settlement case (*p*), an old entry in a parochial book was held not to be evidence of the terms under which a pauper resided in the parish. So, entries made by a deceased person, through whom the defendant claims, acknowledging the receipt of rent for the premises in question, are not evidence of title for the defendant (*q*).

(*o*) *Per* ABBOTT, C.J.: *R.* v. *Debenham*, 2 B. & Ald. 115.
(*p*) *Ibid.* (*q*) *Outram* v. *Morewood*, 5 T. R. 123.

CHAPTER XI.

EVIDENCE IN QUESTIONS OF PEDIGREE.

In questions of pedigree, or inquiries concerning relationship or descent the rule by which hearsay or second-hand evidence is excluded is waived, and it is well settled that—

The statements of deceased persons, who were connected by blood or marriage with the family in question, made *ante litem motam*, are admissible to prove pedigree.

It is for the judge to decide, as a question precedent to the admission of the evidence, whether the declarant has been sufficiently proved to have been connected by consanguinity or affinity to the family in question; and it makes no difference that the legitimacy of the declarant happens to be also the only question in issue (*a*). As to the danger of placing too great reliance on this species of evidence, see the judgment of Lord Romilly in *Crouch* v. *Hooper* (*b*).

It has been held that the declarations must have been from persons having such a connection with the family that it is likely, from their domestic habits, that they were speaking the truth, and could not be mistaken (*c*). The declarations of persons other than blood relations, and husbands and wives, are not admissible. Thus, the declarations of deceased servants and intimate acquaintances are rejected (*d*), even

(*a*) *Doe* v. *Davies*, 10 Q. B. 314.
(*b*) 16 Beav. 182.
(*c*) *Whitelocke* v. *Baker*, 13 Ves. 511.
(*d*) *Johnson* v. *Lawson*, 9 Moore, 183.

though coming under the head of dying declarations (*e*); nor are the declarations of illegitimate relations received (*f*).

"The law resorts to hearsay of relations upon the principle of interest in the person from whom the descent is to be made out; and it is not necessary that evidence of consanguinity should have the correctness required as to other facts. If a person says another is his relative or next-of-kin, it is not necessary to state how the consanguinity exists. It is sufficient that he says A. is his relation, without stating the particular degree, which perhaps he could not tell if asked; but it is evidence, from the interest of the person in knowing the connections of the family; therefore the opinion of the neighbourhood of what passed among the acquaintances will not do" (*g*).

It was accordingly held that the declarations by a deceased husband as to his wife's legitimacy are admissible, as well as those of her blood relations. Again, in *Doe* v. *Randall* (*h*), it was held that the declaration of a deceased woman of statements made by her former husband that his estate would go to J. F., and then to J. F.'s heir, were admissible to show the relationship of the lessor of the plaintiff to J. F. BEST, C.J., said:

"Consanguinity, or affinity by blood, therefore, is not necessary, and for this obvious reason, that a party by marriage is more likely to be informed of the state of the family of which he is to become a member, than a relation who is only distantly connected by blood; as, by frequent conversations, the former may hear the particulars and characters of branches of the family long since dead. . . . The declarations of deceased persons must be taken with all their imperfections, and if they appear to have been made honestly and fairly, they are receivable. If, however, they are made *post litem motam*, they are not admissible, as the party making them must be presumed to have an interest, and not to have expressed an unprejudiced or unbiassed opinion."

The statement of a wife as to her husband's family, and that of a husband as to his wife's family, stand upon the same footing (*i*).

(*e*) *Doe* v. *Ridgway*, 4 B. & Ald. 53.
(*f*) *Doe* v. *Barton*, 2 M. & R. 28.
(*g*) *Per* Lord ERSKINE: *Vowles* v. *Young*, 13 Ves. 147.
(*h*) 2 M. & P. 20.
(*i*) See *Shrewsbury Peerage Case*, 7 H. L. Cas. 23.

It has been said, on the authority of an old case:

"Hearsay is good evidence to prove who is my grandfather, when he married, and what children he had, etc., of which it is not reasonable to presume I have better evidence. So, to prove my father, mother, cousin, or other relation, beyond the sea, dead; and the common reputation and belief of it in the family gives credit to such evidence" (*k*).

Hence arises the doctrine, that the declaration need not be one which has been made immediately by the deceased, as of his own knowledge or belief, to the witness; but it may be, as a learned judge has expressed it, "two deep," or infinitely more remote in degree. It is sufficient to show that a general belief has prevailed in a family. Thus, evidence that a person went abroad when a young man, and, according to the repute of the family, had afterwards died in the West Indies, and that the family had never heard of his being married, is strictly admissible to show that he died unmarried (*l*).

On this ground, not merely oral declarations of deceased persons connected with the family, but old family documents, genealogies, entries in family Bibles (*m*), inscriptions on tombstones, or walls, or rings, if sufficiently authenticated as genuine, and as having been recognised as such by the family, will be received. The admissibility of genealogies was discussed in *Davies* v. *Lowndes* (*n*), in the Exchequer Chamber. A paper purporting to be an old genealogy having been offered as evidence of pedigree, Lord DENMAN said:

"A pedigree, whether in the shape of a genealogical tree, or map, or contained in a book, or mural or monumental inscription, if recognised by a deceased member of the same family, is admissible, however early the period from which it purports to have

(*k*) Bull. N. P. 294, cited in note 15 East, 294.
(*l*) *Doe* v. *Griffin*, 1 East, 293.
(*m*) *Cf. Hubbard* v. *Lees*, 4 H. & C. 418.
(*n*) 6 M. & G. 525.

been deduced. . . . The reason why a pedigree, when made or recognised by a member of the family is admissible, may be that it is presumably made or recognised by him in consequence of his personal knowledge of the individuals therein stated to be relations, or of information received by him from some deceased members, of what the latter knew or heard from other members who lived before his time. And, if so, it may well be contended that if the facts rebut that presumption, and show that no part of the pedigree was derived from proper sources of information, then the whole of it ought to be rejected; and so also, if there be some, but an uncertain and undefined, part derived from reference to improper sources. But where the framer speaks of individuals whom he describes as living, we think the reasonable presumption is that he knew them, and spoke of his own personal knowledge, and not from registers, wills, monumental inscriptions, and family records or history: and consequently to that extent the statements in the pedigree are derived from a proper source, and are good evidence of the relationship of those persons."

In the *Berkeley Peerage Case* (*o*), on an issue as to the legitimacy of the petitioner, the three questions referred by the House of Lords to the judges were substantially--

(1) Whether the depositions made by A.'s reputed father, in a suit by A. against B., were evidence of pedigree for A., in a suit by A. against C. (2) Whether, in a similar case, entries made by A.'s reputed father in a Bible, that A. was his son, born in wedlock on a certain day, were inadmissible. (3) Whether such entries were inadmissible, if made with the express purpose of establishing A.'s legitimacy in case it should ever be called in question.

The point in the first question involved the question whether hearsay declarations of pedigree, made after a judicial controversy has arisen, are admissible. The point in the second question was, whether an entry in a book made by a deceased relation is evidence; and in the third, whether such an entry, if otherwise admissible, continues to be so when made with an express purpose of providing against a contemplated or impending

(*o*) 4 Camp. 401.

controversy. It was held that the evidence in the first case was inadmissible, as having been made after an actual, though not as yet a judicial, controversy had arisen; that in the second it was strictly admissible, whether the entry was made in a Bible or any other book, or on any other piece of paper; and that in the third case it was also admissible, but with strong objections to its credibility, on account of the particularity, and perhaps the professed view with which it was made.

Another important case on this subject is the *Sussex Peerage Case*(*p*). There an entry made in her prayer-book, by Lady Augusta Murray, of her marriage at Rome to the Duke of Sussex, was received not as conclusive proof, but as a declaration made by one of the parties. In the same case, evidence of declarations by a deceased clergyman that he had celebrated the marriage was rejected.

In *Lyell* v. *Kennedy* (*q*), the House of Lords held that certain proceedings in which one James Martin was a defendant were admissible to prove that in those proceedings James Martin by his defence admitted that one Elspeth Duncan was his mother. Lord SELBORNE, in that case, said:

"With respect to the proceedings in 1766 in the Sheriff's Court of Perthshire (which were produced from the proper custody), I consider them also admissible on the same principle on which answers and decrees in Chancery have been admitted by this House in peerage cases, as to matters of pedigree where the facts of the pedigree were not in dispute, but only incidentally stated."

In accordance with the rules recognised in the preceding cases, a cancelled will of an ancestor, found among family papers, has been received as a declaration concerning the relations of the family (*r*); and so has an unexecuted will in the handwriting of the intending

(*p*) 11 C. & F. 85. (*q*) 14 App. Cas. 437.
(*r*) *Doe* v. *Earl of Pembroke*, 11 East, 504.

testator, which was treated as a statement, and not as only an intended statement (*s*). Pedigrees hung up in family mansions (*t*); a marriage certificate kept by the family (*u*); a genealogy made by a deceased member of a family, even though purporting to be founded partly on hearsay (*v*); engravings on rings (*w*); coffin-plates, and monumental inscriptions generally: are regarded as admissible, but not always as credible evidence (*x*). BACON, V.-C., once said of inscriptions on tombstones:

"In the case of tombstones, no doubt the publicity of the inscription gives a sort of authenticity to it, and if it remains uncontradicted for a great many years, it would, in the absence of every other fact in the case, be taken to be true; but you cannot put it higher than that" (*y*).

Conduct treated as evidence.—Not only hearsay declarations of deceased relatives, but also proof of the manner in which a person has been brought up and treated by his family, will be evidence. In the *Berkeley Peerage Case*, MANSFIELD, C.J., said:

"If the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached, and indeed it amounts to a daily assertion that the son is legitimate" (*z*).

In *Sturla* v. *Freccia* (*a*), Lord BLACKBURN, speaking of the statements of deceased members of a family being evidence to prove pedigree, said:

"Such statements by deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted on them, or assented to them, or did anything that amounted to showing that they recognised them."

(*s*) *Re Lambert*, 56 L. J. Ch. 122.
(*t*) *Goodright* v. *Moss*, Cowp. 591.
(*u*) *Doe* v. *Davies*, 10 Q. B. 314.
(*v*) *Monkton* v. *Attorney-General*, 2 R. & M. 147.
(*w*) *Vowles* v. *Young*, 13 Ves. 144.
(*x*) *Davies* v. *Lowndes*, 6 M. & G. 527.
(*y*) *Haslam* v. *Crow*, 19 W. R. 969.
(*z*) 4 Camp. 416; *cf. Khajah Hidayut Oollah* v. *Rai Jan Khanum*, 3 Moo. I. A. 295.
(*a*) 5 App. Cas. 641.

"Pedigree"—what it includes.—This term embraces not only general questions of descent and relationship, but also the particular facts of birth, marriage and death, and the times when, either absolutely or relatively, those events happened. All these facts, therefore, may be proved from hearsay derived from relatives. It has been doubted whether specific dates can be so proved; but the preponderance of authority appears to be in favour of permitting them to be so proved. The written memorandum of a father as to the time when his child was born, has been received to prove when the infant would come of age (*b*); but in a settlement case the declaration of a father as to the place of his child's birth has been rejected, it not being strictly a question of pedigree (*c*). So, an order of removal was quashed, for being founded merely on the pauper's own evidence as to the time and place of her birth, because the statement was held to be one which she could not make of her own knowledge (*d*); but in *Shields* v. *Boucher* (*e*), KNIGHT BRUCE, V.-C., was of opinion that declarations of a person deceased as to what place his father came from would be admissible.

Relationship must be established. — Before the declarations of deceased relations can be received as such, it must be proved *aliunde*, *i.e.*, by extrinsic and independent sources of evidence, that the declarants were related to the family (*f*). But *primâ facie* evidence is sufficient if unrebutted (*g*). The declaration must not be in the declarant's own interest. Thus, a statement by a deceased person, who had been married twice, tending to invalidate his first, and thus

(*b*) *Per* Lord ELLENBOROUGH: *Roe* v. *Rawlings*, 7 East, 290.
(*c*) *R.* v. *Erith*, 8 East, 539.
(*d*) *R.* v. *Rishworth*, 2 Q. B. 487.
(*e*) 1 De G. & Sm. 40.
(*f*) *Per* Lord ELDON: *Berkeley Peerage Case*, 4 Camp. 419.
(*g*) See *Lyell* v. *Kennedy*, 14 App. Cas. 451.

establish his second, marriage, was rejected (*h*). It is no objection that the declarant was *in pari casu* with the party tendering the evidence (*i*).

Does not apply to questions of age.—It should be observed that the principle now under consideration applies only where questions of pedigree are involved, and therefore it does not apply to cases in which only the age of a person is material to be proved. Thus, where in an action for goods sold and delivered a defendant pleaded infancy, and it was sought to prove the plea by a statement contained in an affidavit made by the defendant's deceased father in a chancery suit to which the plaintiff was not a party, it was held that, there being no question of pedigree in the action, the evidence was not admissible (*k*).

Must be ante litem motam.—The rule which has been mentioned in the preceding chapter, that the hearsay declarations of deceased witnesses to be admissible must have been made *ante litem motam*, is observed in cases of pedigree. On this head it is only necessary to refer to the declaration which has been already quoted, of MANSFIELD, C.J., in the *Berkeley Peerage Case*, that the *lis mota*, or beginning of the litigation, dates from the origin of the controversy, and not from the commencement of the trial. When a question of pedigree has assumed such a degree of conflicting interest, that the declarant must be reasonably presumed to be under the influence of undue partiality or prejudice, the disposition of the courts is either to reject his evidence altogether, or to receive it only with the strict limitations as to credibility which are laid down by the judges in their answer to the third question in the *Berkeley Peerage Case*. In a

(*h*) *Plant* v. *Taylor*, 7 H. & N. 211.
(*i*) *Monkton* v. *Attorney-General*, 2 R. & M. 159.
(*k*) *Haines* v. *Guthrie*, 13 Q. B. D. 818.

case of disputed descent from a lunatic, one of the claimants was allowed to give in evidence a deposition, made by a deceased relation of the lunatic before a master in chancery on an injunction, to discover who was entitled by consanguinity to become committee. It was urged that the deposition was inadmissible as being made *post litem motam;* but the court held that it was admissible (*l*). In a petition for a declaration of legitimacy it was proved that A., the petitioner's grandfather (whose legitimacy was in issue), had claimed some property in the possession of his reputed maternal uncle, but the latter said that he should defend any action which A. might bring, and communicated the circumstances to A.'s maternal uncle, and A. replied by letter that he wished to establish his legitimacy, but took no further proceedings. Sir J. HANNEN held that there was proof of the commencement of a controversy, so as to exclude subsequent declarations by any member of the family as to the marriage of A.'s father and mother (*m*).

Entries in public documents.—Finally, it must be observed that an entry in a public document made by a public officer for the information of the public is presumed to be true, and is admissible in all cases, including those in which pedigree is in issue (*n*); therefore, in *Lyell* v. *Kennedy* (*o*), entries in Scotch Parochial Registers (produced from proper custody) were held admissible on a question of pedigree.

(*l*) *Gee* v. *Good*, 29 L. T. 123.
(*m*) *Frederick* v. *Attorney-General*, L. R. 3 P. & D. 196.
(*n*) See *Sturla* v. *Freccia*, 5 App. Cas. 623.
(*o*) 14 App. Cas. 437.

CHAPTER XII.

DYING DECLARATIONS.

THE principle that evidence is inadmissible, unless given on oath, and when the party who is to be affected by it can have the benefit of cross-examination, is limited by an exception in cases of homicide, where the deceased, under the impression of immediate or impending dissolution, has made a statement concerning the identity of the assailant, and the circumstances of the attack. It is presumed that the sense of approaching death in the declarant is calculated to produce in him a sentiment of responsibility, equal to that which a religious and conscientious man feels when required to make a statement on oath (*a*). Where the sense or conviction of approaching death is deficient or uncertain, dying declarations will not be received. Even when they are received, their value and credibility will vary infinitely, according to the circumstances. In all cases a strong objection to their full credibility arises from the fact that they are usually given in evidence against one who has had no opportunity of cross-examining the declarant, and thus of refuting out of his own mouth the errors, omissions, contradictions, and possibly wilful misstatements, which the latter may have committed. It often happens, also, that the declaration is made on great pressure, when the declarant is suffering from physical exhaustion or mental alienation, and when he is partially, or even wholly, unconscious of the full purport of his declaration. These considerations, combined

(*a*) "*Nemo moriturus præsumitur mentiri.*"

with the strong objection of the English law to condemn any man on the testimony of an absent, or even a deceased, witness, induce courts to regard this species of evidence with great watchfulness and suspicion. The judge, therefore, whose duty it is to inquire into the circumstances under which the declaration has been made, as a condition precedent to its admission, will generally exclude it if there appear to be any reasonable doubt as to the veracity, sanity, consciousness, or sense of religious responsibility and impending dissolution in the mind of the declarant at the time of the statement. Subject to these remarks it is held to be a rule that—

In murder, or homicide, the declarations of the deceased, concerning the cause and circumstances of his mortal wound, if made with a full consciousness of approaching death, are admissible in evidence for or against the prisoner who is charged with the crime (*b*).

In *R.* v. *Woodcock* (*c*), EYRE, C.J., said:

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

In this case it was held that a statement made by the deceased to a magistrate, who administered an oath to her extra-judicially, could not be received; but that a statement made by her when her dissolution was fast approaching, and when she must have known the fact,

(*b*) Dying declarations are inadmissible in civil cases (*Stobart* v. *Dryden*, 1 M. & W. 626.

(*c*) 1 Leach, C. C. 502

although she said nothing that indicated such a knowledge, was receivable. The judge there left it to the jury to say whether the statement was made under the apprehension of death; but the modern practice is for the judge himself to decide this question. It will be observed that, in this case, although the statement was inadmissible as a statement on oath, in a situation where an oath was improperly administered, there was no objection to it on the ground that the statement was made in answer to a formal and solemn enquiry. Accordingly, it is held not to be necessary that the statement should be voluntary or spontaneous; and answers *in articulo mortis* to questions put by a surgeon, for the purpose of ascertaining whether he ought to call in a magistrate, have been received (*d*). A statement taken down in writing by another person and signed by the declarant is admissible (*e*).

It was said by Lord DENMAN (*f*), that, with regard to declarations made by persons *in extremis*, supposing all necessary matters concurred, such as actual danger, death following it, and a full apprehension at the time of the danger and of death, such declarations can be received in evidence; but all these things must concur to render such declarations admissible. The expectation of death must be settled and hopeless; but "I'm dying" repeated more than once was held not sufficient to indicate such an expectation (*g*).

The declaration must be made when the declarant is in actual danger.—This proposition is commonly stated more broadly, that the declaration must be made *in extremis* (*h*); but there appears to be no definite limitation of the time, before death, within

(*d*) *R.* v. *Fagent*, 7 C. & P. 238.
(*e*) *R.* v. *Whitmarsh*, 62 J. P. 680.
(*f*) *Sussex Peerage Case*, 11 C. & F. 112.
(*g*) *R.* v. *Abbott*, 67 J. P. 151.
(*h*) *R.* v. *Van Butchell*, 3 C. & P. 629.

which the declaration must be made; and recent cases support the doctrine, that declarations made under apprehension of death, if otherwise admissible, will not be rejected because a considerable time elapses between the declaration and the death. Thus, in *R.* v. *Mozley* (*i*), the declarations were held by all the judges to have been rightly received, although the deceased did not die until eleven days after making them, and although the surgeon held out slight hopes of recovery to him until a few hours before his death. Here, however, the deceased had frequently expressed a belief, prior to the statement, that he should never get better.

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

Hope of recovery.—It appears also that the doctrine which has been laid down, that the declarations are admitted only if they are made under an impression of almost immediate dissolution, is by no means literally correct. It is true, as stated by TINDAL, C.J., in *R.* v. *Hayward* (*l*), that any hope of recovery, however slight, existing in the mind of the deceased at the time of the declarations made, will undoubtedly render the evidence of such declarations inadmissible; and accordingly it has been held (*m*), that in the absence of expressions or conduct to show that the deceased was under the impression of approaching death, his statements are inadmissible.

(*i*) 1 Moo. C. C. 97; *cf. R.* v. *Smith*, L. & C. 607.
(*k*) 11 Cox C. C. 316.
(*l*) 6 C. & P. 157.
(*m*) *Per* WIGHTMAN, J.: *R.* v. *Qualter*, 6 Cox C. C. 357; *cf. R.* v. *Harvey*, 23 L. T. 258.

In one case, the deceased made a declaration, stating at the time that he believed he should not recover. His spine was then broken in such a way that death must have followed soon. Shortly before he had made the declaration, he had said to a witness: "The surgeon has given me some little hope that I am better; but I do not myself think that I shall ultimately recover." The declaration was held to be admissible (*n*). Where, however, a woman made a statement to the magistrate's clerk, who added to it the words, "I have made the above statement with the fear of death before me, and with no hope of my recovery," and then read it over to her and asked her if it was correct, and afterwards at her request interlined the words "at present" after the word "hope," it was held that the words inserted qualified the force of her statement sufficiently to make it inadmissible in evidence as a dying declaration, because there was not that absolute and hopeless expectation of death which is required to give such declarations validity (*o*). It may be laid down as now settled that given the conditions rendering it admissible at the time of making, a statement is not rendered inadmissible by the fact that after making it the deceased entertained a hope of recovery (*p*).

Evidence of this description is only admissible where the death of the deceased is the subject of the charge, and where the circumstances of the death are the subject of the dying declaration.—Accordingly, where the defendant had been indicted by the deceased for perjury, and after conviction had shot the prosecutor, it was held that a dying declaration by the latter as to the circumstances of the perjury was inadmissible on an application by the defendant for a new trial (*q*). So,

(*n*) *R.* v. *Reaney*, D. & B. 151.
(*o*) *R.* v. *Jenkins*, L. R. 1 C. C. R. 187.
(*p*) *R.* v. *Hubbard*, 14 Cox C. C. 565.
(*q*) *Per* ABBOTT, C.J.: *R.* v. *Mead*, 2 B. & C. 605.

where the prisoner was indicted for administering savin to a pregnant woman, but not quick with child, with a view to procure abortion, BAYLEY, J., rejected evidence of her dying declaration concerning the cause of her death, because the death was not the subject of the pending inquiry (*r*).

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

Accomplice.—The dying declarations of an accomplice are receivable (*x*), as well as dying declarations made in favour of the person accused (*y*).

(*r*) *R.* v. *Hutchinson*, 2 B. & C. 608 n.; *cf. R.* v. *Lloyd*, 4 C. & P. 233; *R.* v. *Hind*, 29 L. J. M. C. 147, 253.
(*s*) *R.* v. *Baker*, 2 Moo. & R. 53.
(*t*) *Ubi supra.*
(*u*) 2 B. & C. 605.
(*x*) *R.* v. *Tinkler*, 1 East, P. C. 354.
(*y*) *R.* v. *Scaife*, 1 Moo. & R. 551.

CHAPTER XIII.

DECLARATIONS AGAINST INTEREST.

WHEN a deceased person, whose veracity in other respects is unimpeached, has, during his lifetime, made a statement concerning the matter in issue, which statement was at the time he made it opposed to his pecuniary or proprietary interest, the legal presumption is that the statement is true, or that it contains at least some elements of credibility; for in all the exceptions to the general rule by which hearsay is excluded, it must be remembered that credibility is by no means a necessary consequence of admissibility. English law, although frequently arbitrary, and perhaps unreasonable, in its dogmatic distinctions between credibility and incredibility, refuses to reject any evidence which it considers to contain any ingredients, however minute, of presumptive truth; but, while admitting it, the judge will often intimate to a jury that they ought to give it little credit.

The rule which is now to be considered is the following:

A declaration by a deceased person, who had a competent knowledge of a fact, which declaration was against the pecuniary or proprietary interest of the declarant at the time when it was made (*a*), is evidence between third parties, and is evidence of everything stated in the declaration (*b*).

In the leading case of *Higham* v. *Ridgway* (*c*), to prove

(*a*) It is not sufficient that it may or may not turn out at some subsequent time to be against his interest (*Ex parte Edwards*, 14 Q. B. D. 415).

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

(*c*) 10 East, 109; *cf. Gleadow* v. *Atkin*, 1 C. & M. 410.

the time of birth, evidence was given that the man-midwife, who attended the birth, was dead; and the books of the latter, who had kept them regularly, were offered in evidence. They contained an entry in the handwriting of the deceased of the circumstances of the birth, and the date. There was also a charge for attendance, against which the word "paid" was marked. It was held, that the entry was evidence of the time of the birth. Lord ELLENBOROUGH said:

"The entry made by the party was to his own immediate prejudice, when he had not only no interest to make it, if it was not true, but he had an interest the other way, not to discharge a claim, which it appears from other evidence that he had."

BAYLEY, J., added:

"All the cases agree, that a written entry by which a man discharges another of a claim which he had against him, or charges himself with a debt to another, is evidence of the fact which he so admits against himself; there being no interest of his own to advance by such entry. . . . The principle to be drawn from all the cases is, that if a person have peculiar means of knowing a fact, and make a declaration of that fact which is against his interest, it is clearly evidence after his death, if he could have been examined as to it in his lifetime."

So, in a later case (*d*), the same learned judges received evidence of entries of charges made by a deceased attorney, who had prepared a lease, to show that the lease was executed at a time later than its apparent date. In this case the charges for preparing the lease seem to have been paid, but this did not appear upon the face of the entries. In the case of *In the Goods of Thomas* (*e*), Lord PENZANCE admitted as evidence of the execution of a will an entry made by a deceased solicitor in his ledger admitting payment of his charges for drawing it and attending its execution.

Must be against pecuniary or proprietary interest.—The declaration must be against either the pecuniary

(*d*) *Doe* v. *Robson*, 15 East, 32. (*e*) 41 L. J. P. & M. 32.

or the proprietary (*f*) interest of the declarant; no other interest will suffice. This doctrine may be considered as finally settled by the *Sussex Peerage Case* (*g*), where declarations as to the marriage of Lady Augusta Murray with the Duke of Sussex, made by the deceased clergyman who performed the ceremony, were tendered on the ground that they were declarations of a person who knew the facts, who was not interested in misrepresenting them, and who had an interest in being silent concerning them, because the unlawful celebration of the marriage might have subjected him to a prosecution. All the judges concurred in holding, that the declaration must be adverse to some pecuniary interest in the declarant, and that even the fear of a prosecution was not a sufficient interest to let in a declaration as contrary to it. Lord CAMPBELL said:

"As to the point of interest, I have always understood the rule to be, that the declaration, to be admissible, must have been one which was contrary to the interests of the party making it in a pecuniary point of view. I think it would lead to most inconvenient consequences, both to individuals and the public, if we were to say that the apprehension of a criminal prosecution was an interest which ought to let in such declarations in evidence" (*h*).

It is sufficient if the declaration is *primâ facie* against such interest. But that it was so need not be proved by independent testimony (*i*).

The value of the declaration as evidence may be destroyed by proving *aliunde* that although *primâ facie* against the interest of the declarant it is really for his interest, or that it was made with an interest to pervert the facts (*k*).

Is evidence of the facts stated in it.—It is also settled law that the declaration, or written statement, is evidence of all the facts which it contains, and that

(*f*) *Per* COCKBURN, C.J.: *R.* v. *Birmingham*, 1 B. & S. 768.
(*g*) 11 C. & F. 85.
(*h*) See also *Smith* v. *Blakey*, L. R. 2 Q. B. 326; *Massey* v. *Allen*, 13 Ch. D. 558.
(*i*) *Taylor* v. *Witham*, 3 Ch. D. 605.
(*k*) *Taylor* v. *Witham*, *ubi supra*.

in such cases the difference between oral and written statements is not one of admissibility, but only of weight (*l*). According to PARKE, B., the entry in *Higham* v. *Ridgway* was evidence not only of the payment of the man-midwife's charges, but also of *partus cum forcipe* (*m*). So the statement of a deceased person that he occupied a house at £20 a year was admitted to prove not only the tenancy, but also his acquirement of a settlement of the annual value of £10. Again, where, in order to establish a settlement, it was proved that the pauper's grandfather had occupied a house for four years in the appellant parish, and a book containing certain entries of payment of rent which were proved to be in his handwriting was produced, these entries were admitted in proof of the grandfather's settlement by renting a tenement, on the ground that, the four years' occupation being by itself *primâ facie* evidence of a seisin in fee, the proof of payment of rent would cut down the interest to a tenancy, and that therefore the evidence was against proprietary interest (*n*).

In *Davies* v. *Humphreys* (*o*), which was an action for contribution by one of several makers of a promissory note against a co-surety, the plaintiff, to establish the suretyship, relied on a receipt indorsed on the note by the deceased payee acknowledging a part payment of £280 of the principal sum of £300; and adding, "the £300 having originally been advanced to E. H." (the defendant). This was held to be evidence of the defendant's liability. PARKE, B., in delivering the judgment of the court, said:

"That the receipt was evidence of the fact of payment, which is admitted, in every case in which the proof of payment would be relevant, was not disputed; but it was denied that the whole

(*l*) *R.* v. *Birmingham*, 1 B. & S. 763; *Bewley* v. *Atkinson*, 13 Ch. D. 283.
(*m*) *Percival* v. *Nanson*, 7 Ex. 3.
(*n*) *R.* v. *Birmingham*, 1 B. & S. 763; *R.* v. *Exeter*, 10 B. & S. 433.
(*o*) 6 M. & W. 153.

entry would be admissible to show that the £300 was advanced to E. H. . . . but the entry of a payment against the interest of the party making it has been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it."

His lordship, after referring to *Higham* v. *Ridgway*, and *Doe* v. *Robson* (*p*), added:

"Without overruling these cases (and we do not feel ourselves authorised to do so), we could not hold the memorandum in question not to be admissible evidence of the truth of the whole statement in it, and consequently to be evidence not merely that £280 was paid by the plaintiff to the payee, as for a debt due from E. H. as principal, but also of the fact that the debt was due from E. H. to him."

Thus, also, where a paper purported to be an entry, by a deceased receiver, of rents received from T. H., as one of three proprietors, it was held to be evidence that two other proprietors were equally interested with T. H. POLLOCK, C.B., drew an important distinction between entries made against interest, and entries made in the course of business:

"If the entry is admitted as being against the interest of the party making it, it carries with it the whole statement; but if the entry is made merely in the course of a man's duty, then it does not go beyond those matters which it was his duty to enter" (*q*).

When there are entries in an account book which are admissible as being against interest, if there are other items in the book which are closely connected with such admissible entries, then not only may such entries be looked at, but the whole account of which they form an integral and essential part (*r*).

It is no objection that the declaration is founded on hearsay.—It is held, that declarations against interest are admissible against third parties, even though the

(*p*) 15 East, 33.
(*q*) *Percival* v. *Nanson*, 7 Ex. 3.
(*r*) *Hudson* v. *Owners of Barge Swiftsure*, 82 L. T. 389.

declarant himself received the facts on hearsay (*s*). Thus, in *Percival* v. *Nanson* (*t*), ALDERSON, B., said:

"An entry in an attorney's bill of a service of notice on A. B. would be evidence of a service, although, such notice being generally served by an attorney's clerk, the attorney probably had no personal knowledge of such service."

POLLOCK, C.B., also said:

"If an accoucheur puts down in his book the name of a lady whom he had delivered, and debits himself with the payment, such entry would be evidence of the name, although he may have known nothing of her name except from the information of others."

The declarant must be deceased at the time when the evidence is offered. Thus, in assumpsit on a promissory note by an indorsee against the maker, the defendant, to prove fraud and the plaintiff's cognizance of it, tendered declarations of the first indorsee, who was alive, but was not called. They were rejected on the ground that it is clear that declarations of third persons alive, in the absence of any community of interest, are not to be received to affect the title or interests of other persons, merely because they are against the interest of those who make them (*u*). Here there was held to be no community or privity of interest between the plaintiff and the absent witness; but if that had existed, the evidence would have been admitted according to the principle already quoted, as laid down by BAYLEY, J., in *Spargo* v. *Brown* (*x*). So it has been held that the entries of a person against his interest are not evidence between third parties, if the declarant be alive, although it appears that he has absconded on a criminal charge, and that it was quite impossible to produce him as a witness (*y*).

(*s*) *Crease* v. *Barrett*, 1 C. M. & R. 919.
(*t*) 7 Ex. 1.
(*u*) *Phillips* v. *Cole*, 10 A. & E. 111.
(*x*) 9 B. & C. 938, and *supra*, p. 127.
(*y*) *Stephen* v. *Gwenap*, 1 M. & R. 120.

An entry by a deceased person against interest will be good evidence, although it appears that persons are living, and not called, who are acquainted with the fact. Thus, entries by a deceased collector charging himself with the receipt of taxes, were received as evidence against a surety that the money had been paid, although the persons who paid it were living, and might have been called. An attempt was made in this case to exclude his evidence, because the entries were contained in a private note-book, and not a public account-book; but the distinction was overruled (*z*)

After the expiration of a long term the death of the declarant will be presumed (*a*), although in other cases it must be proved.

The status of the party making the entry or declaration must sometimes be established before the entry is read, unless it be made by a person in a public character, in which case due appointment will be presumed (*b*). Thus agency must be proved, where the declaration was by an agent; and accounts of rents signed by a person styling himself clerk to a steward, but not proved *aliunde* to have been so employed, although they were found among family muniments, were rejected, because there was no other evidence given to show that the accounts affected the declarant in a pecuniary character (*c*). Proof of handwriting, and other extrinsic evidence of authenticity, will be unnecessary when entries have been made thirty years previously, and are produced from proper custody (*d*). It has been said that in the case of an entry against interest "proof of the handwriting of the party and his death is enough to authorise its reception; at

(*z*) *Middleton* v. *Melton*, 10 B. & C. 317.
(*a*) *Doe* v. *Michael*, 17 Q. B. 276.
(*b*) *Davies* v. *Morgan*, 1 C. & J. 587.
(*c*) *De Rutzen* v. *Farr*, 4 A. & E. 53.
(*d*) *Wynne* v. *Tyrwhitt*, 4 B. & Ald. 376.

whatever time it was made, it is admissible" (*e*). The first part of this *dictum* applies of course only to entries made within thirty years prior to the time when they are tendered.

As miscellaneous instances of cases in which declarations against interest have been admitted as evidence, the following may be mentioned. Where a deceased tenant, by a written instrument, acknowledged L. as his landlord, this was held to be evidence of L.'s title as against subsequent tenants who did not claim through the declarant (*f*). In ejectment by A., the declaration by deed of a deceased receiver of rents and profits, that he held under A.'s ancestor, is evidence against third parties of A.'s title (*g*). A declaration by a deceased occupant, that he managed an estate for a claimant, is evidence for the latter (*h*). In an action for specific performance of an agreement to take a lease, an entry of a deceased landlord in his own handwriting in his rent-book of a promise to grant a lease to a tenant was held admissible in evidence against the tenant as being against the landlord's proprietary interest (*i*).

In an action by the Corporation of Exeter for port duties, documents more than thirty years old, which purported to be the receipt of such duties by ancient receivers, but which were unsigned and in the third person, were admitted (*k*). So, the receipts of an ancient receiver of rents, brought from the muniment chest of the family, are unobjectionable evidence (*l*).

Wherever there is privity of interest between the declarant and a party to the proceedings, the declaration will be received; and it will be admissible, even though

(*e*) *Per* PARKE, B.: *Doe* v. *Turford*, 3 B. & Ad. 898.
(*f*) *Doe* v. *Edwards*, 5 A. & E. 95.
(*g*) *Doe* v. *Coulthard*, 7 A. & E. 235.
(*h*) *Baron de Bode's Case*, 8 Q. B. 208.
(*i*) *Connor* v. *Fitzgerald*, 11 Ir. L. R. 106.
(*k*) *Mayor of Exeter* v. *Warren*, 5 Q. B. 773.
(*l*) *Musgrave* v. *Emerson*, 10 Q. B. 326.

the declarant is alive (*m*); but neither the acts nor the declarations of deceased tenants, although against their interest, are any evidence against the reversioner; for a tenant cannot derogate from the title of his landlord; and, therefore, in a disputed right of common, the plaintiff was not allowed to give evidence of declarations made concerning it by a deceased former tenant of the farm, in respect of which the plaintiff claimed the right (*n*).

The declarations of a person in possession of property are admissible, after his decease, to cut down his title, not only as against those claiming under him, but also against strangers (*o*); but declarations of what he heard other persons say are not admissible (*p*). The same document may be proof of possession, and also admissible as a declaration against interest (*q*). The acceptance of an allotment under an award made by commissioners under an Inclosure Act by a person against his interest is evidence that the land allotted was waste of the manor (*r*).

It will be observed that, in all the preceding cases where entries have been tendered, great stress has been laid on the circumstances of the custody from which they are produced. The declarations under consideration are also subject to the remarks which have been made on the declarations discussed in the two preceding chapters, as to the necessity that they must be made *ante litem motem.*

(*m*) *Woolway* v. *Rowe*, 1 A. & E. 114.
(*n*) *Papendick* v. *Bridgwater*, 5 E. & B. 166.
(*o*) *Sly* v. *Dredge*, 2 P. D. 91.
(*p*) *Lord Trimleston* v. *Kemmis*, 9 C. & F. 780.
(*q*) *La Toucke* v. *Hutton*, Ir. R. 9 Eq. 171.
(*r*) *Gery* v. *Redman*, 1 Q. B. D. 161.

CHAPTER XIV.

DECLARATIONS MADE IN THE COURSE OF BUSINESS OR PROFESSIONAL DUTY.

It has long been a settled principle that—

Declarations made by a person, strictly in the course of a trade or professional duty, and without any apparent interest to misrepresent the truth, if contemporaneous with the fact, are evidence, after his death, against third persons, of the essential subject-matter, but not of its surrounding circumstances.

Price v. *Torrington* is generally cited as the leading case on this rule (*a*). The short report of it in Salkeld is as follows: The plaintiff, being a brewer, brought an action against the Earl of Torrington for beer sold and delivered; and the evidence given to charge the defendant was, that the usual course of the plaintiff's dealing was, that the draymen came every night to the clerk of the brewhouse and gave an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names; that the drayman was dead, but that this was his hand set to the book; and this was held good evidence of a delivery, but otherwise of the shop-book itself singly, without more. On the same principle, in *Pritt* v. *Fairclough* (*b*), after evidence had been given that it was the course of business in the plaintiff's office for a deceased clerk to copy all letters, a letter-book containing a letter, which purported to be the

(*a*) Salk. 285.

(*b*) 3 Camp. 305.

copy by the deceased of a letter which the defendant refused to produce, was held good secondary evidence. So, where it was material to show that a licence had been sent to A. by the plaintiff, evidence was given, that it was the course of business in the plaintiff's office that such licences should be copied in the letter-book and noted before they were sent, and the copy and noted memorandum, in the handwriting of a deceased clerk, that the licence had been sent, were then received (*c*). Declarations by a deceased rector have also been admitted as evidence as to the custom of electing churchwardens in his parish (*d*).

In an action (*e*) of ejectment, the lessor of the plaintiff had instructed A. to serve the defendant with notice to quit. A. entrusted the commission to his partner B., who had not served such notices before. B. prepared three notices to quit (two of them being for service on other persons) and as many duplicates. He then went out, and on his return delivered to A. three duplicate notices (one of which was a duplicate of the notice to the defendant), indorsed by B. It was proved that the two other notices had been served on the persons for whom they were intended, that the defendant had subsequently requested A. that he might not be compelled to leave, and that it was the invariable practice for A. and B.'s clerks, who usually served the notices to quit, to indorse, on a duplicate of such notice, a memorandum of the fact and time of service. It was held, on these facts, that the third duplicate was admissible to prove that the notice had been served on the defendant. PARKE, B., said:

"It was proved to be the ordinary course of this office, that when notices to quit were served, indorsements like that in question were made; and it is to be presumed that the principal observed the rule of the office as well as the clerks."

(*c*) *Hagedon* v. *Reed*, 3 Camp. 379.
(*d*) *Bremner* v. *Hull*, H. & R. 800.
(*e*) *Doe* v. *Turford*, 3 B. & Ad. 890.

The doctrine was also discussed in *Poole* v. *Dicas* (*f*), where it was held that an entry made in a bill-book, in the course of business, by a notary's clerk, since deceased, of the dishonour of a bill which he had been instructed to present for payment, was evidence of the dishonour.

The entry must be contemporaneous.—In all the above cases great importance was attached to the fact that the entries were immediately subsequent to, and virtually contemporaneous with, the transaction. In *Doe* v. *Turford* (*g*), PARKE, B., said:

"It is to be observed, that in the case of an entry against interest, proof of the handwriting of the party, and his death, is enough to authorise its reception; at whatever time it is made, it is admissible; but in the other case [in declarations in the course of business], it is essential to prove that it was made at the time it purports to bear date: it must be a contemporaneous entry."

So, in *Poole* v. *Dicas*, TINDAL, C.J., said:

"If there were any doubt whether the entry were made at the time of the transaction, the case ought to go down to trial again."

It seems, however, to be sufficient if the entry be made on the same day, or even on the following morning. But if not made until two days after the event it is not contemporaneous (*h*).

The entry must be of matters which it is the duty of the writer to do and to record.—The entry must be an entry of a particular thing which it was the duty of the person making the entry to do, and it must be also his duty to record it (*i*). The existence of the duty must be proved *aliunde* (*k*). This is in accordance

(*f*) 1 Bing. N. C. 649. (*g*) 3 B. & Ad. 890.
(*h*) *The Henry Coxon*, 3 P. D. 156.
(*i*) *Smith* v. *Blakey*, L. R. 2 Q. B. 326; *Trotter* v. *Maclean*, 13 Ch. D. 574.
(*k*) *Bright* v. *Legerton*, 2 De G. F. & J. 614.

with the dicta of the judges in *Doe* v. *Turford* (*l*) and *Percival* v. *Nanson* (*m*), to the effect that an entry in the course of business, unlike an entry against interest, is evidence only of the facts which it was the duty as well as the custom of the deceased declarant to enter, and the same principle was laid down in *Chambers* v. *Bernasconi*, which was argued first in the Exchequer and then in the Exchequer Chamber (*n*).

Personal custom is not equivalent to a duty.— Therefore entries in the books of a deceased solicitor or bills of costs delivered by him are not admissible on the ground that it was his duty to keep proper books, or that they were made out in the course of his duty. The contrary was once held by Lord ROMILLY (*o*), but his decision cannot be relied upon after what has been said by the judges in subsequent cases (*p*). Nevertheless, the books and bills of costs of a deceased solicitor may be admissible in evidence for reasons other than the rule under discussion in this chapter, *e.g.*, as declarations against interest (*q*), or on special grounds against particular people (*r*). In short, whenever the entry or declaration does not appear to have been in the course of such a duty as previously mentioned, but only of a personal custom, not creating responsibility in the declarant, it is inadmissible. On this principle, the account books of deceased tradesmen, made by themselves, are not evidence for their executors to charge a debtor. So in Ireland, entries in registers kept in Roman Catholic chapels have been held inadmissible (*s*). An entry in a deceased stockbroker's

(*l*) 3 B. & Ad. 898.
(*m*) 7 Ex. 3.
(*n*) Tyr. 395.
(*o*) *Rawlins* v. *Richards*, 28 Bea. 370.
(*p*) *Bright* v. *Legerton*, 2 De G. F. & J. 617; *Hope* v. *Hope*, W. N. (1893) 21; *Ecroyd* v. *Coulthard*, W. N. (1897) 25.
(*q*) *Ante*, p. 170.
(*r*) *Bright* v. *Legerton*, 2 De G. F. & J. 606; *cf. Bradshaw* v *Widdrington*, [1902] 2 Ch. 430.
(*s*) *Ennis* v. *Carrol*, 17 W. R. 344.

day-book was held inadmissible to prove that certain shares were purchased for the client, it not being the duty of the stockbroker, as between himself and his client, to keep the book (*t*).

The entry must not be made on hearsay.—It has long been settled that, when the entry has been made on hearsay, it will not be received. In an action for goods sold, where the only evidence of delivery was an entry made by a witness, by the direction of a deceased foreman, who was not present when the goods were delivered, but who, in the course of business, had himself been informed of the delivery by the person whose duty it was to deliver the goods, and who was also dead, the entry was rejected (*u*). In the case of *The Henry Coxon* (*x*), Sir ROBERT PHILLIMORE said:

"It seems to me that the authorities point to this, that entries in a document made by a deceased person can only be admitted as evidence when it is clearly shown that the entries relate to an act or acts done by the deceased person, and not by third parties."

Verbal and written declarations made in the course of a duty, stand on the same footing, so far as regards their admissibility.—But oral evidence will not be received to contradict, nor even to explain, a written entry which has been made in the course of business. Thus, in *Stapylton* v. *Clough* (*y*), to prove service of a notice to quit, a duplicate notice, indorsed with the day of service, and signed in the course of duty by a deceased agent, was tendered; but it was also sought to explain and vary the particulars of the indorsement, by evidence of subsequent oral declarations made by the deceased. It was held, that the indorsement must be received as it stood; and Lord CAMPBELL said,

"I agree with what I am reported to have said in the *Sussex Peerage Case* that there is no distinction between verbal and

(*t*) *Massey* v. *Allen*, 13 Ch. D. 558.
(*u*) *Brain* v. *Price*, 11 M. & W. 773.
(*x*) 3 P. D. 158; *cf. Ryan* v. *King*, 25 L. R. (Ir.) Ch. 184.
(*y*) 2 El. & Bl. 933.

written declarations made in the course of a duty, so far as regards their admissibility; but to deduce from this doctrine that whatever is said subsequently to the time of making the entry respecting the transaction may be admitted in evidence, would lead to the greatest injustice."

Declarations in the course of duty are inadmissible while the declarant is alive (*z*); but although entries by a witness who is alive are not evidence *per se*, they may be used by him for the purpose of refreshing his memory (*a*).

In connection with this subject it may be observed that Order XXXIII., Rule 3, of the R. S. C., 1883, provides that, where an account is directed to be taken, the court may direct that, in taking the account, the books of account in which the accounts required to be taken have been kept, shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised. This is a similar power to that conferred on the Court of Chancery by 15 & 16 Vict. c. 86, s. 54 (*b*). The same principle is adopted for proceedings in county courts by Rule 8 of Order XXIV. of the County Court Rules, 1903.

(*z*) *Digby* v. *Steadman*, 1 Esp. 328.
(*a*) *R.* v. *Worth*, 4 Q. B. 139.
(*b*) The power was exercised in *Banks* v. *Cartwright*, 15 W. R. 417, in the case of books of account kept by trustees to which the beneficiaries had access.

CHAPTER XV.

STATEMENTS BY DECEASED OR ABSENT WITNESSES.

On the general principle by which hearsay or second-hand evidence is inadmissible, the statements of witnesses at former trials would not be received, but for the rule that—

> In a matter between the same parties, the statements of a witness at a former trial may be used on a subsequent trial, if the witness be dead or has become insane; or if he is out of the jurisdiction, or has been diligently sought for and cannot be found; or if he has been subpœnaed, but is too ill to attend (*a*).

The matter in issue must be substantially the same, and the statements, which must have been made on oath in a judicial proceeding, cannot be given in evidence against any person who was not party or privy (*b*) to the proceeding (*c*); because the person against whom this evidence is tendered, or some one to whom he is privy, must have had an opportunity to cross-examine the witness (*d*). The statements must be such that they are admissible against the party tendering them as well as against the opposite party (*e*).

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

(*b*) "Privy" for this purpose means "claiming under," and does not include privity in blood. See *Morgan* v. *Nicholl*, L. R. 2 C. P. 117.

(*c*) *Lady Llanover* v. *Homfray*, L. R. 19 Ch. D. 224; *cf. Morgan* v. *Nicholl*, *ubi supra*.

(*d*) *Attorney-General* v. *Davison*, M'Clel. & Y. 169; *cf. Nevil* v. *Johnson*, 2 Vern. 447.

(*e*) See *Morgan* v. *Nicholl*, *ubi supra*.

The rule applies in criminal cases except that the former evidence of a witness who is out of the jurisdiction, or cannot be found, is inadmissible (*f*). If a witness has been kept away by the contrivance of one of two prisoners, his former evidence is admissible against the contriving prisoner, but not against the other (*g*). Of course, the same principle would apply equally in civil cases.

The rule applies if a witness be kept away by collusion, or other improper means. Thus, in an old case where a witness was sworn in a trial in the C. B., and was subpœnaed by the defendant to appear at a subsequent trial in the K. B. but did not appear, persons were allowed to prove what his evidence was at the first trial, because the court thought there was reason to presume that he was kept away by the petitioner (*h*). It cannot, however, be said that every species of mere subsequent incapacity to appear will let in evidence that has been given at a former trial (*i*).

If one party gives evidence from a former trial to show that a verdict was improperly obtained, the other party may rebut it by proof of other evidence given at the first trial, although the second trial is not between the same parties nor as to the same rights (*k*).

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

> "What a witness, since dead, has sworn upon a trial between the same parties may be given in evidence, either from the judge's notes or from notes that have been taken by any other person who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given."

This remains true except that there is a doubt as to the admissibility of the judge's notes. In *Conradi* v.

(*f*) *R.* v. *Scaife*, 17 Q. B. 242.
(*g*) *R.* v. *Scaife*, *ubi supra*.
(*h*) *Green* v. *Gatewick*, Bull. N. P. 242 b.
(*i*) *R.* v. *Eriswell*, 3 T. R. 707.
(*k*) *Doe* v. *Parsingham*, 2 C. & P. 440.
(*l*) *Mayor of Doncaster* v. *Day*, 3 Taunt. 362.

Conradi (*m*), Lord PENZANCE said that he knew of no authority or practice by which the judge's notes in a former trial were admissible in evidence in another suit if objected to; but he did not decide the point. It appears to be open to the parties to enter into an agreement that the judge's or shorthand writer's notes at the first trial shall be received as evidence in the second; and after such consent neither party can dispute its validity (*n*). The court will, however, require distinct evidence of such an agreement (*o*). In the absence of agreement or consent, it would appear the judge's notes cannot be received to prove the former evidence of a witness, and their reception would be open to very serious objections.

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

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

However, in a trial for perjury, under a commital by a county court judge, BYLES, J., held that the judge ought to have been called to prove the perjury from his notes; and that the rule prohibiting the calling of

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

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

Order LVIII., Rule 11, of the R. S. C., 1883, provides that when any question of fact is involved in an appeal, the evidence given orally in the court below shall be brought before the Court of Appeal by the production of a copy of the judge's notes, or such other materials as the court may deem expedient. Where it is the duty of a judge to take notes, his notes are admissible in the Court of Appeal. But where he takes notes merely as private memoranda for his own assistance, they are not admissible (*s*).

"Other materials" include shorthand writer's notes, which may be used by special leave to supplement the judge's notes. Where the parties have agreed in the court below, with the consent of the judge, that shorthand notes should be taken, these notes may be used on appeal. But if the judge has himself taken notes in addition, the Court of Appeal can always refer to such notes (*t*).

It is sufficient that evidence of what occurred at a former trial, when admissible, should be substantially, without being literally, correct, except where actual words are the gist of the issue. Thus, on an indictment for perjury, evidence of the words spoken, coupled with a confident conviction on the part of the witness that

(*q*) *R.* v. *Harvey*, 8 Cox C. C. 99.
(*r*) *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 E. & I. 418.
(*s*) *Baudains* v. *Liquidators of Jersey Banking Co.*, 13 App. Cas. 832.
(*t*) *Yorkshire Laundries* v. *Pickles*, [1901] W. N. 28.

they were all that was material to the pending inquiry, and that they were not qualified by other expressions, has been held to be sufficient (*u*).

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

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

Rule 3 of Order XXXVII. of the R. S. C., 1883, provides that :

"An Order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the court or a judge, to be obtained at the time of making any such applica-

(*u*) *R.* v. *Rowley*, 1 Moo. 111.
(*x*) *Nevil* v. *Johnson*, 2 Vern. 447.
(*y*) 3 Bro. P. C., ed. Toml. 602.
(*z*) 4 Drew. 472.

tion, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence."

This rule is only intended to dispense with the necessity of obtaining an Order, and does not make evidence in another cause admissible unless the issue be the same and the parties the same as stated at p. 184 (*a*).

Section 136 of the Bankruptcy Act, 1883 (*b*), provides that:

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

But the answers of a bankrupt on his public examination are not evidence against persons other than himself (*c*).

As to reading at a trial depositions taken at a previous stage of the proceedings, see *post*, Part III., Chapter VI.

(*a*) *Printing Telegraph, etc. Co.* v. *Drucker*, [1894] 2 Q. B. 801.
(*b*) 46 & 47 Vict. c. 52.
(*c*) *In re Brunner, Ex parte the Board of Trade*, 19 Q. B. D. 572.

CHAPTER XVI.

ADMISSIONS.

When a party to an action or suit has, either expressly, or by necessary implication, admitted the case, or part of the case, of an opposite party, the latter is not required to prove what is so admitted.

ADMISSIONS, properly so called, can be made only in civil, and are not allowed in criminal, proceedings. They are regarded as being a waiver of proof on the part of their makers, rather than as evidence against them. They are *potius ab onere probandi relevatio, quam proprie probatio.* They are not conclusive unless they assume the form of estoppels. Admissions need not be pleaded as such (*a*).

In *Heane* v. *Rogers* (*b*), BAYLEY, J., said:

"There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence—and strong evidence—against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and that he is not estopped or concluded by them, unless another person has been induced by them to alter his condition: in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction; but as to third persons he is not bound."

Estoppels bind parties and privies, not strangers.—This rule, it may be observed, applies to all admissions, and not to estoppels only. There are three classes of privies, viz., privies in blood (*c*) (*e.g.*, heir to ancestor),

(*a*) *Steuart* v. *Gladstone*, 10 Ch. D. 644.
(*b*) 9 B. & C. 586.
(*c*) 3 & 4 Will. 4, c. 106, does not affect tracing a privy in blood (*Weeks* v. *Birch*, 69 L. T. 759).

privies by law (executor to testator, husband to wife), and privies by estate or interest (purchaser to vendor, donee to donor) (*d*). The estate or interest in the last case may be either legal or equitable; and therefore the admissions of a party to the record are receivable to defeat the interest of a third person, although the person is only a nominal party and trustee for the latter, for the court will not look on any party to the record as a cipher (*e*). It is doubtful, however, how far the admission of a *cestui que trust* can be received to defeat the claim of the trustee on the record (*f*). There is no privity between a landlord and his tenant, and, as the tenant cannot derogate from his landlord's title, the admission of a tenant is no evidence against his landlord. Hence, a declaration by a tenant that he was not entitled to a right of common in respect of his farm, has been held to be no evidence that such right did not belong to the reversioner (*g*).

"An estoppel," it has been said, "is an admission, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature,—so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it, though he may show that the person relying on it is estopped from setting it up, since that is not to deny its conclusive effect as to himself, but to incapacitate the other from taking advantage of it. Such being the general nature of an estoppel, it matters not what is the fact thereby admitted, nor what would be the ordinary and primary evidence of that fact, whether matter of record, or specialty, or writing unsealed, or mere parol. . . . This is no infringement on the rule of law requiring the best evidence, and forbidding secondary evidence to be produced till the sources of primary evidence have been exhausted; for the estoppel professes not to supply the absence of the ordinary instruments of evidence, but to supersede the necessity of any evidence by showing that the fact is already admitted; and so, too, has it been held, that an admission which is of the same nature as an estoppel, though not so high in degree, may be allowed to establish facts, which, were it not for the admission, must have been proved by certain steps appropriated by law to that purpose" (*h*).

(*d*) 2 Sm. L. C. 706. (*e*) *Bauerman* v. *Radenius*, 1 T. R. 663.
(*f*) *Doe* v. *Wainwright*, 8 A. & E. 691.
(*g*) *Papendick* v. *Bridgwater*, 5 E. & B. 166. (*h*) 2 Sm. L. C. 693.

An estoppel is only a rule of evidence, and an action cannot be founded on estoppel (*i*).

Estoppels are of three kinds:

I. By matter of record;
II. By deed (p. 206);
III. By matter *in pais* (p. 209).

N.B.—The first two are reciprocal, the last is not necessarily so.

I. **Estoppel by matter of record.**—This is the highest species of estoppel, and is based on the principles "*interest reipublicæ ut sit finis litium*" and "*res judicata pro veritate accipitur.*" The doctrine of *res judicata* does not apply only where there is a record, but applies to judgments in all kinds of litigious proceedings whether there be a record or not (*k*). Judgments are of two kinds, viz., judgments *in rem*, and judgments *in personam*, the respective effects of which by way of estoppel are very different.

A judgment in rem is, according to Lord COKE, one which is pronounced by a competent tribunal upon the *status* of some particular subject-matter, either a thing or a person. No perfectly satisfactory definition of a judgment *in rem* has, however, yet been given (*l*). The chief instances in modern times are to be found in the Ecclesiastical, Admiralty, Probate, and Prize Courts (*m*), and upon questions of legitimacy, marriage, divorce, and the like. The decision of a court of summary jurisdiction under the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), that a street is a highway repairable by the inhabitants at large is a judgment *in*

(*i*) *Per* BOWEN, L.J.: *Low* v. *Bouverie*, [1891] 3 Ch., at p. 105.
(*k*) See *In re May*, 28 Ch. D. 516.
(*l*) Institutes of Justinian by Sandars, L. iv. tit. vi. s. 1. Ditto by Ortolan, s. 1954.
(*m*) *Hughes* v. *Cornelius*, 2 Shower, 232.

rem and conclusive as to the status of the street (*n*). A certificate of a judge under the Parliamentary Elections Act, 1868 (*o*), finding that a person claiming a seat has been duly elected is a judgment *in rem* (*p*). A judgment in bankruptcy proceedings has the effect of a judgment *in rem*, but this effect it owes to the Bankruptcy Act. Judgments *in rem* are binding not only on the parties to the proceedings but upon all the world, and not only on the tribunals of the country where pronounced, but on the tribunals of other countries; but this doctrine is subject to the qualification, that such a judgment to operate by way of estoppel must not have been obtained by fraud, must not carry a manifest error on its face, and must not be contrary to natural justice.

A judgment in personam, or more correctly *inter partes*, also operates as an estoppel (if not open to impeachment on the ground of fraud), but such a judgment is conclusive only between the parties to the record and their privies, upon the maxim "*Res inter alios acta alteri nocere non debet.*" The rule, therefore, is that, as between the parties to the action and their privies, the facts actually decided by a court of competent jurisdiction cannot be litigated again, and are conclusive evidence of the state of the issue between them (*q*). There is no doubt that an action lies to impeach any judgment (even a judgment by default) on the ground of fraud (*r*). So that, where a judgment *inter partes* is relied upon as an estoppel, the person against whom it is set up can impeach it on the ground of fraud, assuming he was not himself guilty of or privy to the fraud, *i.e.*, if he was not a party to the

(*n*) *Mayor, etc. of Wakefield* v. *Cooke*, [1904] A. C. 31.
(*o*) 31 & 32 Vict. c. 125.
(*p*) *Waygood* v. *James*, L. R. 4 C. P. 361.
(*q*) *Boileau* v. *Rutton*, 2 Exch. 665.
(*r*) *Wyatt* v. *Palmer*, [1899] 2 Q. B. 106.

proceedings in which the judgment was obtained; if he was a party, then it still is not settled by any absolute decision whether he can do so (*s*); but it may be contended that he can, otherwise his opponent would be allowed to override the principle that—

"No obligation can be enforced in an English court of justice which has been procured by the fraud of the person relying upon it as an obligation" (*t*),

as well as the principle stated by Lord COLERIDGE, C.J. (*u*), that—

"No action can be maintained on the judgment of a court either in this country or any other, which has been obtained by the fraud of the person seeking to enforce it."

The judgment relied on for the estoppel must have been pronounced by a court having concurrent or exclusive jurisdiction directly on the point (*x*), and must be final.

The principle applies to the judgments of county courts, to judgments obtained in chambers (*y*), and to the judgments of courts of summary jurisdiction, but the judgment of a court of summary jurisdiction cannot operate as an estoppel, (1) as to any matter as to which that court had no authority to adjudicate directly and immediately between the parties; (2) as to any matter incidentally coming in question, as to which a finding, if held to be conclusive between the parties, would operate in prejudice of the rights of others not parties to the proceeding; or (3) as to any incidental matter not otherwise determined, than as having been the

(*s*) *I.e.*, in the case of an English judgment; in the case of a foreign judgment it is clear that he can from *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295.

(*t*) *Per* BRETT, L.J., in *Abouloff* v. *Oppenheimer*, *ubi supra*, at p. 306.

(*u*) In *Abouloff* v. *Oppenheimer*, *ubi supra*, at p. 303.

(*x*) *Per* Lord HOBHOUSE in *Attorney-General of Trinidad* v. *Eriché*, [1893] A. C. 523.

(*y*) *Shaw* v. *Herefordshire County Council*, [1899] 2 Q. B. 282.

particular ground on which the court dismissed a charge or complaint (*z*).

If a public body with powers given by Statute exceeds those powers, no estoppel arises (*a*).

In bankruptcy the consideration for a judgment debt can always be inquired into (*b*), and at the instance of the judgment debtor, as well as at that of the trustee (*c*). This enables the registrar to decide to refuse to make a receiving order on a judgment debt. But such a decision of the registrar does not operate to set aside the judgment or as an estoppel to prevent on a subsequent petition a receiving order being made based on the same judgment (*d*). The file of proceedings in a bankruptcy does not create an estoppel (*e*).

The rule formerly was that a judgment to operate as *res judicata* must have been pronounced before the commencement of the action in which it is pleaded (*f*); but a doubt has been expressed whether this is so under the present practice (*g*). A judgment by consent has the same effect by way of estoppel as any other judgment (*h*). A judgment against one of two joint debtors is a bar to proceedings against the other, and this rule applies when the two debtors are sued in one action and one of them consents to judgment against himself (*i*). A verdict and judgment in a former divorce suit brought by a husband against his wife of his having committed adultery, is conclusive evidence thereof in a subsequent suit by him against his wife for the same purpose but

(*z*) *Per* Lord SELBORNE, L.C.: *R.* v. *Hutchings*, 6 Q. B. D. 304; *cf. North Eastern Rail. Co.* v. *Dalton Overseers*, [1898] 2 Q. B. 66.
(*a*) *Vestry of St. Mary, Islington* v. *Hornsey Urban District Council*, [1900] 1 Ch. 695.
(*b*) *Ex parte Kibble*, L. R. 10 Ch. 373.
(*c*) *Ex parte Lennox*, 16 Q. B. D. 315.
(*d*) *In re Vitoria*, [1894] 1 Q. B. 259.
(*e*) *Ex parte Bacon*, 17 Ch. D. 447.
(*f*) *The Delta*, 1 P. D. 393.
(*g*) *Per* PEARSON, J.: *Houston* v. *Sligo*, 29 Ch. D. 454.
(*h*) *Re S. American and Mexican Co.*, [1895] 1 Ch. 37; *cf Shaw* v. *Herefordshire County Council*, [1899] 2 Q. B. 282.
(*i*) *McLeod* v. *Power*, [1898] 2 Ch. 295.

with a different co-respondent (*k*). This is so even if the decree be set aside on the intervention of the Queen's Proctor on grounds not affecting the propriety of the verdict (*l*).

It may be here noticed that as a general rule a verdict without a judgment is no evidence at all (*m*), and in ordinary cases if a verdict be followed by a judgment, and this judgment is afterwards set aside, the verdict falls with the judgment, and neither party can give such verdict in evidence at a second trial (*n*).

The tests whether the rule, which is founded on the maxim "*Res judicata pro veritate accipitur*," applies are—1st, that the *thing* must be the same; and one of the *criteria* of the identity of two suits in considering a plea of *res judicata* is the question whether the same evidence would support both (*o*); 2nd, that the *person* to be affected by the judgment must be party or privy to the proceedings in which it was given. It should be observed that it has been held that where a person who is not a party to the proceedings but is cognizant of them stands by and takes the benefit of the judgment, he is estopped by his conduct from reopening the questions covered by the judgment (*p*). But where an action was brought by A. against B. to enforce certain debentures, and C., who had covenanted to indemnify B., assisted B. in his defence, and paid his costs when he failed, in an action to enforce the debentures subsequently brought by A. against C., the latter was held not estopped by the judgment in the former action (*q*). Had B. sued C. on the contract of indemnity, C. would

(*k*) *Conradi* v. *Conradi*, L. R. 9 P. & D. 514.
(*l*) *Butler* v. *Butler*, [1894] P. 25.
(*m*) See judgment of SMITH, L.J., in *Butler* v. *Butler*, *ubi supra*.
(*n*) *Ibid.*
(*o*) See Lord WESTBURY'S judgment in *Hunter* v. *Stewart*, 4 De G. F. & J. 168.
(*p*) *Wilkinson* v. *Blades*, [1896] 2 Ch. 788.
(*q*) *Mercantile Investment, etc. Co.* v. *River Plate, etc. Co.*, [1894] 1 Ch. 578.

have been estopped by the judgment in the former action (*r*).

Applying the before-stated tests we find that the judgment against a man in a civil suit is not evidence against him on a criminal trial, and *vice versâ*. Where by an act injury is done to a man's property and also injury to his person, his recovering damages in an action for the former injury will not be a bar to an action by him to recover damages for the latter injury (*s*). This is because they are separate rights giving rise to distinct causes of action; but where two injuries of the same character occur to a person from the same act and in the same right the judgment in an action brought upon one bars the right to bring an action upon the other (*t*). A judgment against a man in his individual character is not evidence against him when suing in a representative character, and *vice versâ*, because he would sue or be sued in a different right. In an action for infringement of a patent, it was declared invalid; the defendant then presented a petition for revocation of the patent, and it was held that the patentee was not estopped from setting up the validity of the patent on this petition, as the petition was really presented on behalf of the public, and was not personal to the petitioner (*u*). In an administration suit, a judgment recovered against executors, who were also trustees of the real estate, has been held not to operate by estoppel, but to be *primâ facie* evidence of a debt against the persons interested in the real estate (*x*). An administratrix who brought an action, under 9 & 10 Vict. c. 83, to recover compensation for the family of an intestate for causing his death, was held not estopped by the judgment thereon in a subsequent

(*r*) *Ibid.*
(*s*) *Brunsden* v. *Humphrey*, 14 Q. B. D. 141.
(*t*) *McDougall* v. *Knight*, 25 Q. B. D. 1.
(*u*) *Re Deeley's Patent*, 12 R. P. C. 199.
(*x*) *Harvey* v. *Wilde*, L. R. 14 Eq. 438.

action brought by her as administratrix against the same defendants for injury to his personal estate from the same cause (*y*). The general rule is that a party to an action is bound by the proceedings in the action (*z*), and even where a man was improperly made a party to a suit, but did not object to his having been joined, he was held to be estopped by the decree in that suit (*a*). A judgment against the principal debtor is not binding on a surety unless he is a party to the action (*b*).

It may here be noticed that a judgment pronounced by a magistrate will operate by way of estoppel in his favour in proceedings subsequently taken against him for acting without jurisdiction, even though the facts creating jurisdiction are erroneously found by the judgment (*c*). A similar rule would apply to all persons when exercising judicial functions.

Extent of estoppel.—It was laid down by DE GREY, C.J., in the *Duchess of Kingston's Case* (*d*), that a judgment only operates by way of estoppel upon the point actually decided, and is not even evidence of any matter which came collaterally in question, although within the jurisdiction of the court, or of any matter to be inferred by argument from the judgment. Thus, a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forging in an action on the bill (*e*); but when a question is necessarily decided in effect, though not in express terms, between the parties to an action, they cannot raise the

(*y*) *Leggott* v. *Great Northern Rail. Co.*, 1 Q. B. D. 599.
(*z*) *Beardsley* v. *Beardsley*, [1899] 1 Q. B. 746.
(*a*) *Collier* v. *Walters*, L. R. 17 Eq. 252.
(*b*) *Ex parte Young*, 17 Ch. D. 668.
(*c*) *Brittain* v. *Kinnaird*, 1 Brod. & B. 432; see also *Mold* v. *Williams*, 5 Q. B. 473.
(*d*) 2 Smith's L. C. 680.
(*e*) *Per* BLACKBURN, J.: *Castrique* v. *Imrie*, L. R. 4 E. & I. 434.

same question as between themselves in any other action in any other form (*f*). Here may be appropriately cited the language of WIGRAM, V.-C., in *Henderson* v. *Henderson* (*g*):

"Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time."

Where the basis of the decision in an action in the Chancery Division of the High Court that a compromise was invalid was that a will which had been admitted to probate was a forgery, it was held that the persons to whom probate was granted were estopped from denying the will to be a forgery in a suit in the Probate Division to revoke the probate (*h*). In this case COTTON, L.J., said:

"Although the object of the present action is different from that of the Chancery action, and although that object is not within the jurisdiction of the Chancery Division, yet, inasmuch as the point for decision here is the same and the parties are the same as in the former action, I do not think we ought to allow the question to be litigated again. The former action decided the question on which the decision in the present action must turn."

In an action for infringement of a patent, when the validity of the patent had been upheld in a previous action between the same parties, the defendants were not allowed to question the validity of the patent on fresh materials for impeaching it, which they alleged they

(*f*) *Gregory* v. *Molesworth*, 3 Atkyns, 626.
(*g*) 3 Hare, at p. 115. (*h*) *Priestman* v. *Thomas*, 9 P. D. 210.

had discovered since the previous action. ROMER, J., in the course of his judgment, said:

"But a further point is now taken on behalf of the defendants. It is said that they are entitled in this action to retry the question of the validity of the patent, because they have discovered fresh materials for impeaching it, fresh alleged anticipations, and are entitled to have the issue of validity retried on the footing of these further materials. In my opinion they are not so entitled. If they were held to be so entitled I do not see how there could be any finality of the questions in an action as between parties such as these. According to this contention, a defendant might try his case piecemeal. He might raise such objections as he thought convenient, and when he was defeated he might then raise other points at his leisure, and might in that way try the case piecemeal, and, so far as I can see, extend it over as long a period as he pleased. In my opinion, a defendant is not entitled to do that. When the question of the validity of a patent is brought to trial by reason of the defendant's contesting the question, he is bound to put his whole case before the court; and if he does not do so then, it is his own fault or his misfortune. He cannot be allowed to put part of his case, or to put his case in an incomplete manner. He is bound when the question is raised to search and find out all that he intends to rely upon in support of his contention that the patent is invalid. For these reasons it appears to me that the defendants are not entitled to have this question of validity retried, because, as they say, they have found further materials which would have assisted them if they had known of them at the first trial" (*i*).

But, as was said by KNIGHT BRUCE, V.-C., in *Barrs* v. *Jackson* (*k*):

"The rule against re-agitating matters adjudicated is subject to this restriction—that however essential the establishment of particular facts may be to the soundness of judicial decisions, however it may proceed on them as established, and however binding and conclusive the decision may be as to its immediate and direct object, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided *the immediate subject of the decision* be not attempted to be withdrawn from its operation *so as to defeat its direct object*."

Unessential matter of fact.—It may here be observed that where a judge expresses his opinion or gives a finding upon a matter of fact, when that matter of fact

(*i*) *Shoe Machinery Co.* v. *Cutlan*, 13 R. P. C. 141.
(*k*) 1 Y. & C., Ch. 585; approved by Lord SELBORNE in *R.* v. *Hutchings*, 6 Q. B. D. 304.

is not essential to his decision, such matter of fact does not thereby become *res judicata*, and such opinion or finding does not operate as an estoppel, whether treated as a judgment *in rem* or as a judgment *inter partes* (*l*).

Where the decree of a court is capable of more than one construction, it is necessary to look at the pleadings to ascertain what was the issue which the court intended to decide (*m*). It is also important to bear in mind that the validity of a judgment of a court of competent jurisdiction upon parties legally before it may be questioned not only on the ground that it was pronounced through fraud, collusion or covin (*n*), but that it was not pronounced in a real suit, or, though in a real and substantial suit, yet between parties who were really not in contest with each other (*o*). It may here be observed, that the judgment against one of two co-contractors is a bar to a subsequent action against the other, and if the defendant in the first action consents to the judgment in such action being set aside, it still is a bar to the subsequent action (*p*). Where a judgment roll was erroneously made up by the plaintiff, and did not represent accurately that which the jury had really found at the trial, the court, in a subsequent action between the same parties, would not treat the judgment roll as establishing an estoppel (*q*).

Admissions in pleadings.—It is unnecessary to give evidence of facts which are admitted in pleading; nor can evidence be received to dispute such admissions. Rule 13 of Order XIX. of the R. S. C., 1883, provides that:

"Every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication,

(*l*) *Concha* v. *Concha*, 11 App. Cas. 541.
(*m*) *Robinson* v. *Dhuleep Sing*, 11 Ch. D. 798.
(*n*) *Girdlestone* v. *Brighton Aquarium Co.*, 4 Ex. D. 107.
(*o*) *Earl of Bandon* v. *Becher*, 2 C. & F. 510.
(*p*) *Hammond* v. *Schofield*, L. R. 1 Q. B. 653.
(*q*) *Want* v. *Moss*, 70 L. T. 178.

or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition."

And by Rule 19 of the same Order, the denial must not be evasive, but the point of substance must be answered. By Rule 20, the bare denial of a contract is only a denial of the making of the contract in fact, and not of its legality or sufficiency in law, whether with reference to the Statute of Frauds or otherwise. A statement by a plaintiff or defendant that "he believes," or "has been informed and believes," that a fact is true, is an admission; but if he states that he "has been informed," without any statement as to his belief, there is no admission (*r*). It has been held that admissions of a fact on the record amount only to a waiver of proof of that fact; and that if the adverse party seeks to have any inference drawn from the fact so admitted, he must prove it like any other fact (*s*).

Previous proceedings of a criminal or penal nature in a court of competent jurisdiction operate as an estoppel in favour of the accused, and therefore when a person has been once convicted for, or acquitted of, an offence by a court of competent jurisdiction, the conviction or acquittal is a bar to all further criminal proceedings for the same offence, for as has been stated, "a man should not twice be put in jeopardy for the same offence" (*t*).

On this general principle, a verdict and conviction for non-repair of a highway estops the convicted party or parish from disputing subsequently their liability to repair the highway (*u*); but a conviction for obstructing a highway does not estop the convicted person from

(*r*) Daniell's Chancery Practice, 6th ed., vol. i., p. 575.
(*s*) *Edmunds* v. *Groves*, 2 M. & W. 642; *cf. Brown* v. *Newall*, 2 M. & C. 576.
(*t*) *R.* v. *Drewry*, 18 L. J. M. C. 189.
(*u*) *R.* v. *Haughton*, 1 E. & B. 501.

maintaining trespass against the prosecutor in respect of the same highway; for the proceedings are not between the same parties in respect of the same right (*x*).

It was held that the dismissal by justices of a bastardy summons on the merits, under 7 & 8 Vict. c. 101, s. 2, was no bar to a subsequent summons under the same statute (*y*). This was so held because there was no appeal by the mother from such dismissal. LUSH, J., in the case under notice, doubted the soundness of the decision, and it is submitted rightly. There is no appeal from an order of the House of Lords, and yet such order operates as an estoppel. But when an affiliation order made under the above statute is quashed by the court of quarter sessions, on appeal by the defendant, the decision of the court of quarter sessions operates as an estoppel (*z*). The principles of the cases under notice would appear to apply equally to the dismissal of a summons under the Bastardy Act, 1872 (35 & 36 Vict. c. 65). And it has been held that where under that Act an affiliation order is made for a certain payment, the mother cannot subsequently apply for another order, *i.e.*, she is barred by the first order (*a*). And in a recent case (*b*) it was held that a dismissal of a summons for an affiliation order on the ground that the defendant was not the father of the child, did not operate by way of estoppel in an action subsequently brought by the mother of the plaintiff for damages for seduction of her daughter, on the ground that the parties were not the same in the two proceedings. But in the course of the judgments, the decision of a court of quarter sessions in affiliation proceedings seems to be treated as operating as an estoppel between the actual parties to the proceedings.

(*x*) *Petrie* v. *Nuttall*, L. R. 11 Ex. 569.
(*y*) *R.* v. *Gaunt*, L. R. 2 Q. B. 466.
(*z*) *R.* v. *Glynn*, L. R. 7 Q. B. 16.
(*a*) *Williams* v. *Davies*, 11 Q. B. D. 74.
(*b*) *Anderson* v. *Collins*, [1901] 2 K. B. 107.

Foreign judgments.—Not only the majority of foreign judgments *in rem*, but all foreign judgments *in personam* are, if pronounced by a competent court, for the purposes of estoppel, on a footing analogous to home judgments (*c*), provided they are final and unalterable by the court pronouncing them (*d*), and it makes no difference that a man has appeared in a foreign court only under the duress of wishing to protect his property (*e*). It is an important and interesting question how far a foreign judgment is liable to examination in a home tribunal. It was finally decided by the House of Lords in *Castrique* v. *Imrie* (*f*), and the Judicial Committee of the Privy Council in *Messina* v. *Petrococchino* (*g*), that the home tribunal cannot act as a court of appeal from the foreign tribunal, *i.e.*, a foreign judgment cannot be impeached as being erroneous on the merits, or founded on a mistake either of fact or law. Even where the law applied is English law, and a mistake of English law is apparent on its face, the judgment of the foreign court is still binding (*h*). There still remains the question—supposing the foreign court to have wilfully refused to apply English law, when by the comity of nations it is applicable, is its judgment then impeachable in an English court? Lord HATHERLEY was evidently of opinion that it is (*i*), and this opinion is probably correct. A foreign judgment obtained by the fraud of a party cannot be enforced by law in England, even though the foreign court may have decided that no fraud was perpetrated (*k*), and a foreign

(*c*) *Duchess of Kingston's Case*, 2 Smith's L. C. 679; *Riccardo* v. *Garcias*, 12 C. & F. 368.
(*d*) *Nouvion* v. *Freeman*, 15 App. Cas. 1.
(*e*) *Voinett* v. *Barrett*, 55 L. J. Q. B. 39.
(*f*) L. R. 4 E. & I. 415.
(*g*) L. R. 4 P. C. 150.
(*h*) See *Godard* v. *Gray*, L. R. 6 Q. B. 139.
(*i*) See *Simpson* v. *Fogo*, 1 J. & H. 18.
(*k*) *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295.

judgment can be impeached on the ground of fraud, even where to establish the fraud it is necessary to go into the merits of the case (*l*). Finally, it may be remarked that an irregularity in the procedure of the foreign court does not prevent a judgment from operating by estoppel (*m*). In short, the judgment of a foreign court will be treated as valid by an English court until set aside by the foreign court, unless there has been some defect in the initiation of the proceedings, or in the course of the proceedings, which would make it contrary to natural justice to treat the foreign judgment as valid (*n*).

Where a settlement was made in England on a marriage between a Turk domiciled in England and an English lady, the former promising to reside always in England, HALL, V.-C., held that a Turkish court could not, by a decree of divorce pronounced without notice to the wife or other persons interested under the settlement, make void the settlement (*o*). An English composition deed made before a colonial judgment is no defence to an action on such judgment in an English court, the deed not having been pleaded in the colonial action (*p*).

As previously stated, for a foreign judgment to operate by estoppel it must have been pronounced by a competent court. An English court, in deciding on the competence of a foreign court, tries that question by its own maxims (*q*); and one of the maxims of English courts is that the courts of a foreign state have authority to decide all questions touching the personal status and personal property of individuals domiciled

(*l*) *Vadala* v. *Lawes*, 25 Q. B. D. 310.
(*m*) *Pemberton* v. *Hughes*, [1899] 1 Ch. 781.
(*n*) *Per* VAUGHAN WILLIAMS, L.J., in *Pemberton* v. *Hughes*, *ubi supra*.
(*o*) *Collis* v. *Hector*, L. R. 19 Eq. 334.
(*p*) *Ellis* v. *M'Henry*, L. R. 6 C. P. 228.
(*q*) See Westlake's Private International Law, 3rd ed., Chap. XVII., *cf. Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155.

in such state. Therefore, a decree of divorce pronounced by a foreign court in the case of parties domiciled within its jurisdiction will be recognised as valid in England, although the marriage may have been solemnized in England, and although it may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England (*r*).

II. **Estoppel by deed.**—The next species of estoppel is by instruments under seal; and this kind of estoppel (as well as an estoppel by record), is equally binding on the parties to the deed and those who claim under them. The principle is, that where a man has entered into a solemn engagement by deed under his hand and seal, as to certain facts, he shall not be permitted to deny any facts which he has so asserted (*s*); but this only applies in an action or proceeding based on the deed in question; in a collateral action there is no such estoppel (*t*). There is probably an estoppel by record created by letters patent between the Crown and the grantee, but this does not extend so as to give all her Majesty's subjects the benefit of such estoppel (*u*). A lease is evidence for and against a lessee of the terms on which he holds, and also for or against an assignee who claims under him (*x*). So, a recital in a deed is evidence against him who executed the deed, and against every person claiming under him (*y*). But a recital must be the language of both parties to the deed to estop both (*z*). It may be here remarked, that the substance of a recital carries with it the context;

(*r*) *Harvey* v. *Farnie*, 8 App. Cas. 43; *cf. Pemberton* v. *Hughes*, [1899] 1 Ch. 781.

(*s*) *Per* TAUNTON, J.: *Bowman* v. *Taylor*, 2 A. & E. 291.

(*t*) See judgment of WOOD, V.-C., in *Carter* v. *Carter*, 3 K. & J. 644.

(*u*) *Per* FRY, L.J.: *Cropper* v. *Smith*, 26 Ch. D. 712.

(*x*) *Houghton* v. *Kœnig*, 18 C. B. 235.

(*y*) *Gwyn* v. *Neath*, L. R. 3 Ex. 209; but not in favour of strangers to the deed (see *Trinidad Asphalte Co.* v. *Coryat*, [1896] A. C. 592).

(*z*) *Stronghill* v. *Buck*, 14 Q. B. 787.

and, in a record, is conclusive evidence of collateral matter which was necessary to support the groundwork of the judgment (*a*). In construing recitals in deeds, and determining how far they operate as estoppels on the parties, the effect must be gathered from the apparent intention of the instrument (*b*). There are three rules applicable to the construction of a deed; if the recitals are clear and the operative part is ambiguous the recitals govern the construction; if the recitals are ambiguous and the operative part is clear, the operative part must prevail; if both the recitals and the operative parts are clear, but they are inconsistent with each other, the operative part is to be preferred (*c*). There must be a positive statement of a fact in a deed in order for it to operate by way of estoppel in relation to such fact (*d*). The rule is that an estoppel should be certain to every extent, and therefore if the thing be not precisely and directly alleged on the mere matter of supposal it shall not be an estoppel (*e*). The recital in a deed of a former deed between the same parties proves, as between such parties, so much of the former deed as is recited, and no more (*f*). If a party to a deed, or his privy, attempts to set the deed aside on the ground of misrepresentation or mistake in regard to statements which happen to be embodied in the recitals, the burden of proving them to be falsehoods rests upon such party or privy who is *primâ facie* bound by such recitals or admissions (*g*).

A recital is conclusive evidence against parties only where it is distinctly antecedent to, and related to, the

(*a*) *R.* v. *Hartington*, 4 E. & B. 780.
(*b*) *Stronghill* v. *Buck*, 19 L. J. Q. B. 209.
(*c*) *Ex parte Dawes*, 17 Q. B. D. 286.
(*d*) *General Finance Discount Co.* v. *Liberator Building Society*, 10 Ch. D. 15.
(*e*) *Per* Lord TENTERDEN in *Right* v. *Badinall*, 2 B. & Ad. 278.
(*f*) *Gillett* v. *Abbott*, 7 A. & E. 783.
(*g*) *Melbourne Banking Corporation* v. *Brougham*, 7 App. Cas. 307.

substance of the deed. The law on this point is thus laid down by PARKE, B., in *Carpenter* v. *Buller* (*h*) :

"If a distinct statement of a particular fact is made in the recital of an instrument under seal, and a contract is made with reference to that recital, it is clear that as between the parties to such instrument and in an action upon it, it is not competent for the party bound to deny the recital."

The same learned judge also laid down that a recital, even in an instrument not under seal, may be conclusive to the same extent. In other cases recitals are treated as *primâ facie* evidence which may be rebutted. A recital in a policy of insurance that a premium has been paid is conclusive against the insurance company (*i*). A covenant will not create an estoppel (*k*).

A party to a deed is not estopped from showing that it is void from fraud or illegality, or from having been executed by him while under duress or while a minor. When an educated person, who, by very simple means, might have ascertained what are the contents of a deed, is induced to execute it by a false representation of such contents, it is doubtful whether he may not, by executing it negligently, be estopped between himself and a person who innocently acted upon the faith of the deed being a valid one (*l*). The engrossment of a deed tendered for execution will operate as an admission by, but not as an estoppel against, the party tendering it (*m*).

Infants and married women.—Infants are not bound by recitals in deeds executed by their guardians (*n*). Married women are estopped by recitals in deeds by

(*h*) 8 M. & W. 212 ; *cf. Lainson* v. *Tremere*, 1 A. & E. 792.
(*i*) *Roberts* v. *Security Co.*, [1897] 1 Q. B. 111.
(*k*) See *General Finance Discount Co.* v. *Liberator Building Society*, 10 Ch. D. 15.
(*l*) *Per* MELLISH, L.J. : *Hunter* v. *Walters*, L. R. 7 Ch. 75.
(*m*) *Bulley* v. *Bulley*, L. R. 9 Ch. 739.
(*n*) See *Milner* v. *Lord Harewood*, 18 Ves. 274.

which they are bound (*o*), and *a fortiori* by such deeds. But although a married woman is bound by estoppel *quoad* her separate estate, yet she cannot get rid of a fetter on anticipation by means of the doctrine of estoppel (*p*).

III. **Estoppels by matter in pais.**—In *Lyon* v. *Reed* (*q*), PARKE, B., says of such estoppels:

"They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as livery of seisin, entry, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort, was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed."

But the courts, both of law and equity, have extended the doctrine to cases where the notoriety is less solemn and formal. Hence the rule is that when one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his previous position, the former is precluded from averring against the latter a different state of things as existing at the same time (*r*). By the term "wilfully" in the above rule it has been laid down (*s*), that

"we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon and that it is acted upon accordingly, and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act

(*o*) *Jones* v. *Frost*, L. R. 7 Ch. 776; 20 W. R. 793.
(*p*) *Bateman* v. *Faber*, [1898] 1 Ch. 144.
(*q*) 13 M. & W. 309.
(*r*) *Per* Lord DENMAN: *Pickard* v. *Sears*, 6 A. & E. 474; *cf. Attorney-General* v. *Stephens*, 1 K. & J. 724.
(*s*) *Per* PARKE, B.: *Freeman* v. *Cooke*, 2 Ex. 663. Approved and followed in *McKenzie* v. *British Linen Co.*, 6 App. Cas. 82, where a duty was under the circumstances held to be cast on a customer of a bank to inform the bank of a forgery; but in *Squire* v. *West Australian Mortgage, etc. Co.*, [1896] A. C. 257, no such duty was, under the circumstances, held to be cast.

upon it, and does act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons on the faith of their being so authorised."

Where in bankruptcy proceedings, a bill of sale given by a debtor, was treated as valid with the knowledge and acquiescence of the debtor, and on that footing he obtained a release on payment of a composition to his creditors including the grantees, it was held that the debtor could not in a subsequent action against the grantees, say that the bill of sale was invalid (*t*). Another instance is found in the doctrine that where a person, knowing that a testator, in making a disposition in his favour, intends the property to be applied for purposes other than for his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust, and in such case the court will not allow the devisee to set up the Statute of Frauds, or, rather, the Statute of Wills, by which the Statute of Frauds is now in this respect superseded, and for this reason, the devisee, by his conduct, has induced the testator to leave him the property (*u*).

Some of the "recognised propositions of an estoppel *in pais*" were once laid down by the Court of Common Pleas (*x*), and one of them was thus stated:

"If in the transaction itself which is in dispute one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and

(*t*) *Roe* v. *Mutual Loan Fund*, 19 Q. B. D. 347.
(*u*) *Llewellyn* v. *Washington*, [1902] 2 Ch. 220.
(*x*) *Carr* v. *London and North Western Rail. Co.*, L. R. 10 C. P. 318. Approved by the Court of Appeal in *Seton* v. *Lafone*, 19 Q. B. D. 68.

has led, the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist."

In that case it was held that the defendants were not, under the circumstances, estopped from showing that certain goods alleged to have been delivered to them as carriers had never reached their hands, although the plaintiff had received from them advice notes for such goods (*y*). These doctrines apply to a statement of a material fact which is untrue, even though the person making it believed it to be true (*z*): but they do not however apply to a statement of a fact not yet in existence, nor to a matter of future intention (*a*); a promise *de futuro* to be binding at all must be binding as a contract (*b*). It is generally considered that the rule is, that a person cannot be made liable for a misrepresentation, unless it is a misrepresentation in point of fact, and not merely in point of law (*c*); but this has been questioned (*d*), and it is probable that the rule is not applicable to any but cases where both parties have the same means of knowing what is the law on a given point. A statement of fact, whether written or oral, to operate as an estoppel, must be clear and unambiguous (*e*).

The result of the previous authorities on the above points was thus stated by KAY, L.J., in the case of *Low* v. *Bouverie* (*f*):

"(1) There has been from ancient time a jurisdiction in Courts of Equity in certain cases to enforce a personal demand against

(*y*) See also *Coventry* v. *Great Eastern Rail. Co.*, 12 Q. B. D. 776.
(*z*) See Lord SELBORNE'S judgment in *Vagliano* v. *Bank of England*, [1891] A. C. 107.
(*a*) *Bank of Louisiana* v. *Bank of New Orleans*, 43 L. J. Ch. 269; *cf. Jordan* v. *Money*, 5 H. L. Cas. 185; and *George Whitchurch, Limited* v. *Cavanagh*, [1902] A. C. 117.
(*b*) *Maddison* v. *Alderson*, 8 App. Cas., at p. 473.
(*c*) *Per* MELLISH, L.J., in *Beattie* v. *Lord Ebury*, L. R. 7 Ch. 802.
(*d*) *Per* BOWEN, L.J.: *West London Commercial Bank* v. *Kitson*, 13 Q. B. D. 363.
(*e*) *Low* v. *Bouverie*, [1891] 3 Ch. 82; *cf. Colonial Bank* v. *Cady*, 15 App. Cas. 267.
(*f*) *Ubi supra.*

one who made an untrue representation, upon which he knew that the person to whom it was made intended to act, if such person did act upon the faith of it and suffered loss by so acting. (2) This was readily done where the representation was fraudulently made, in which case an action of deceit would lie at law. (3) Relief would also be given at law and in equity, even though the representation was innocently made without fraud, in all cases where the suit will be effective if the defendant is estopped from denying the truth of his representation. (4) Where there is no estoppel, an innocent misrepresentation will not support an action at law for damages occasioned thereby. (5) Estoppel is effective where an action must succeed or fail, if the defendant or plaintiff is prevented from disputing a particular fact alleged."

The six following are among the most important kinds of estoppels by matter *in pais*:

(1) **Estoppel between landlord and tenant.** — A tenant, during his possession of the premises, cannot deny that the landlord under whom he has entered, or to whom he has paid rent, had title at the time of his admission, and this extends to the case of lodgers. "The security of landlords would be infinitely endangered if such a proceeding were allowed" (*g*); and even if a tenant consents to give up possession to a person claiming to be the landlord, such person is estopped as the tenant would have been from disputing the landlord's title (*h*). So, where a person had dealt with property as an executor *de son tort*, his payment of rent to the superior landlord was held to estop him from denying his liability as assignee to perform the covenants in the lease (*i*). Nevertheless a tenant, although he cannot be permitted to prove that his landlord had no title, at the time of entry, may show that his title has expired (*k*), and may prove that a parcel of land, about which he and the lessor are disputing, was never comprised in the lease at all (*l*).

(*g*) *Per* Lord ELLENBOROUGH: *Balls* v. *Westwood*, 2 Camp. 12.
(*h*) *Doe* v. *Mills*, 2 B. & Ad. 17.
(*i*) *Williams* v. *Heales*, L. R. 9 C. P. 171.
(*k*) *England* v. *Slade*, 4 T. R. 682; *cf. Langford* v. *Selmes*, 3 K. & J. 220.
(*l*) *Per* Lord BLACKBURN: *Clark* v. *Adie*, 2 App. Cas. 435.

So, too, a person who enters on land by the licence of the party in possession is estopped from denying the title of such party to such possession (*m*). When a tenant took a lease of land from a coparcener who was only entitled to a portion of the rents and profits he was held estopped from denying the title of the heir and privy in blood of the lessor to the whole land (*n*). Conversely, a landlord who has granted a lease is estopped from alleging his want of title, and this whether the lease is by deed or not. Payment of rent and receipt of rent alike raise strong presumptions of tenancy, but do not operate by way of estoppel; for, when a tenancy is attempted to be established by mere payment of rent, without any proof of an actual demise or of the tenant's having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent and to show on whose behalf such rent was received (*o*).

(2) **Estoppel between bailee and bailor.**—A bailee is estopped from denying that his bailor had, at the time the bailment was made, authority to make it (*p*). But when the bailee is evicted by title paramount he can set up that title against the bailor, with the consent of the person whose title is set up (*q*).

(3) **Estoppel between licensee and licensor.**—A licensee is estopped from denying the title of the licensor to grant the license. Thus, a licensee of a patent cannot dispute the title of the patentee; but a licensee can show that what he has done does not fall within the ambit of the patent (*r*), and for this

(*m*) *Doe* v. *Baytop*, 3 A. & E. 188.
(*n*) *Weeks* v. *Birch*, 69 L. T. 759.
(*o*) *Per* PATTESON, J.: *Doe* v. *Francis*, 2 M. & R. 57.
(*p*) *Gosling* v. *Birnie*, 7 Bing. 338.
(*q*) *Biddle* v. *Bond*, 6 B. & S. 225; *Rogers* v. *Lambert*, 24 Q. B. D. 573.
(*r*) *Clark* v. *Adie*, 2 App. Cas. 413.

purpose he may refer to former patents to show what is a proper construction of his licensor's patent (*s*). He can of course prove that the patent has come to an end (*t*). It may here be observed that a patentee is not estopped from disputing the validity of the patent as against his assignee, except where it is proved that the assignee bought on the faith of the statements in the patentee's petition to the Crown (*u*). To allow a licensee to dispute the title of his licensor would be inconsistent with the law, as it would be equally inconsistent with the ordinary reason and good sense of mankind (*x*).

(4) **An agent** is estopped from denying the title of his principal (*y*).

(5) **Estoppels arising from bills of exchange.**—The acceptor of a bill of exchange is, by s. 54 of the Bills of Exchange Act, 1882 (*z*), precluded from denying to a holder in due course—

"(a) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; (b) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement; (c) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement."

By s. 55 the drawer of a bill "is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse"; and the indorser of a bill, by indorsing it,

"is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements, and is precluded from denying

(*s*) *Couchman* v. *Greener*, 1 R. P. C. 197.
(*t*) *Muirhead* v. *Commercial Cable Co.*, 11 R. P. C. 317.
(*u*) *Cropper* v. *Smith*, 2 R. P. C. 81.
(*x*) See *Crossley* v. *Dixon*, 10 H. L. Cas. 304.
(*y*) *Dixon* v. *Hammond*, 2 B. & Ald. 310.
(*z*) 45 & 46 Vict. c. 61.

to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto."

It has been held that subsequent acknowledgment of a forged signature to a bill cannot operate as an estoppel (*a*), and that the payment of a bill upon which a man's acceptance has been forged does not make him liable to pay a second similarly forged acceptance, even without notice of repudiation (*b*). It has also been held that the acceptor of a bill of exchange is under no duty to take precautions against the fraudulent alteration of a bill after acceptance, and therefore is not estopped from relying on any such fraudulent alteration (*c*). Although if a customer of a bank by the neglect of due caution causes his bankers to pay a forged order, he cannot set up the invalidity of a document upon which he has induced them to act as genuine (*d*).

(6) **Standing by.**—Where a party, having an interest in property, stands by and permits another to deal with such property, as if he were the absolute owner, and as if there were no such secret equity, he will not be permitted to assert such secret equity against those with whom the apparent owner has dealt. This doctrine was discussed at length, in the case of *Ramsden* v. *Dyson* (*e*) in the House of Lords, when the following valuable canons were laid down by the law lords:

(i.) "If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a court of equity will not afterwards allow the real owner to assert his title to the land. (ii.) But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real

(*a*) *Brook* v. *Hook*, L. R. 6 Ex. 89.
(*b*) *Morris* v. *Bethell*, L. R. 5 C. P. 47.
(*c*) *Schofield* v. *Earl of Londesborough*, [1896] A. C. 514.
(*d*) See *Young* v. *Grote*, 4 Bing. 253, and the judgment of Lord MACNAGHTEN in *Schofield* v. *Earl of Londesborough*, *ubi supra*.
(*e*) L. R. 1 E. & I. 129.

owner from afterwards claiming the land, with the benefit of all the expenditure upon it. (iii.) So if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined."

Lord KINGSDOWN, affirming the principles of the case of *Gregory* v. *Michell* (*f*), laid down the following rule:

"If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation."

It seems now to be considered that, in order for the party standing by to be bound, he must have been aware of his legal rights (*g*), though this was not always the case (*h*). So, where a wife allows her husband to spend the income of her separate estate, he is not accountable to her afterwards for it (*i*); nor can she recover any portion thereof after his death. When an insurer of a ship has accepted notice of abandonment, with full knowledge of the facts of the loss, he is estopped from afterwards denying a total loss or relying on a breach of warranty (*k*).

As connected with the foregoing, it may be mentioned that if a person obtains possession of land, claiming under a will or deed, he cannot afterwards set up another title to the land against the will or deed, though the deed or will did not operate to pass the land in question, and any person who gains possession

(*f*) 18 Ves. 328.
(*g*) *Per* FRY, J.: *Wilmott* v. *Barber*, 15 Ch. D. 105.
(*h*) *Teesdale* v. *Teesdale*, 1 Macn. Select Cases in Equity, 170.
(*i*) *Smith* v. *Lord Camelford*, 2 Ves. jun. 716.
(*k*) *Provincial Insurance Co.* v. *Leduc*, 22 W. R. 939.

through a person interested in the land under the will or deed is equally estopped (*l*).

Misrepresentation.—Here may be noticed the extensive ground for relief in equity which arises from the principle, that where a party is drawn into a contract by misrepresentation, he has his option of avoiding or enforcing the contract. This doctrine affects not only the parties to the agreement, but all who induce others to enter into it, and applies not only where statements were made which are false in fact, but where, although false in fact, they were believed to be true by the person making them, if such person in the due discharge of his duty ought to have known, or formerly knew and ought to have remembered, that they were false (*m*).

Where a material representation is made to a person to induce him to enter into a contract, and he does enter into it, the inference of law is that he did so under the inducement of the representation, and in order to take away his title to be relieved from the contract, on the ground that the representation was untrue, it must be shown that he had knowledge of the facts contrary to the representation, or that he stated in terms, or showed clearly by his conduct, that he did not rely on the representation (*n*).

The fraud of a married woman binds her separate estate in equity (*o*).

Acts, conduct, manner, demeanour, and acquiescence will operate as admissions, some of which are rebuttable, others are not.

Thus, the assumption of a character is evidence to create a liability for acting in it, as also the tacit

(*l*) *Per* LOPES, L.J.: *Dalton* v. *Fitzgerald*, [1897] 2 Ch. 86.
(*m*) See *per* Lord ROMILLY, M.R., in *Pulsford* v. *Richards*, 17 Beav. 95; *cf. Smith* v. *Kay*, 7 H. L. Cas. 750.
(*n*) See judgment of JESSEL, M.R.: *Redgrave* v. *Hurd*, 20 Ch. D. 21.
(*o*) *Vaughan* v. *Vanderstegen*, 2 Drew. 363; *Sharp* v. *Foy*, L. R. 2 Ch. 35. *Cf. supra*, p. 209.

recognition of it waives objections to its validity. On this ground executors *de son tort* are liable for interfering with the property of a deceased person. When a person, by holding himself out as a shareholder, induces a company to register him as such, he cannot deny that he is a shareholder in an action on such shares (*p*). So, where shares were allotted to a person, in pursuance of an authority signed by him to have his name entered as a shareholder, and he paid calls and received a dividend on such shares, it was held that he was a shareholder (*q*). Where a company, under circumstances which made it doubtful whether an agreement was binding on its shareholders, transferred its business to a new company, one of the terms of the agreement being that the shareholders in the old company should receive shares in the new company, and share certificates were sent to all the shareholders in the old company, it was held, that a shareholder who had acknowledged the receipt of and retained the certificates, was a shareholder in the new company; but that one who had taken no notice of the communication was not a shareholder (*r*). In the same case Lord HATHERLEY said:

"No authority can be found for holding that a person, by simply doing nothing, may be rendered liable. The mere fact of standing by and being told there is something done which you have not authorised, cannot fix you with the heavy liabilities which shares in a joint stock company would create."

Estoppel arising on share certificates.—A company, by issuing a share certificate representing a person to be a holder of certain shares, is estopped, as against another person who *bonâ fide* acts upon the faith of the representation, from denying the truth of the share

(*p*) *Sheffield Rail. Co.* v. *Woodcock*, 7 M. & W. 574.
(*q*) *Sewell's Case*, L. R. 3 Ch. 131.
(*r*) *Challis's Case*, L. R. 6 Ch. 266; *cf. Bank of Hindustan* v. *Alison*, L. R. 6 C. P. 222.

certificate (*s*), including the statement, if any, that the shares are fully paid up (*t*). The estoppel does not give a title to the shares or make the person in whose favour it arises a shareholder, but renders the company liable in damages (*u*). No estoppel arises where the person acting on the certificate knows the true state of the facts (*x*). But estoppel arises where, if the person to whom the statement is made had thought about it, he would have seen it was not true (*y*). In one case a purchaser of shares from a person, who had become the registered holder by means of a forged transfer, was held to be entitled to compensation from the company in the event of his being compelled to re-transfer to their proper owner; since, by holding out the seller as the registered owner, they were estopped from denying him to be so after the purchaser had acted upon such representation (*z*). Again, where a person, after receiving a certificate of the registration of some shares, repaid to the vendor the amount of a previous call, on the faith of the certificate, the company were held estopped by the certificate, and liable for the value of the shares (*a*). In 1884 a company was held estopped by a certificate issued by their secretary, although he had wrongfully affixed their seal and had forged a director's signature (*b*). Recently, where the secretary had fraudulently affixed the seal to a certificate and forged the signatures of two directors, the Court of Appeal held that there had been no such negligence by the company as to fix them with responsibility for his acts, and they were not bound by the certificate (*bb*).

(*s*) *In re Bahia, etc., Rail. Co.*, 3 Q. B. 584. Approved by the House of Lords in *Balkis Consolidated Co.* v. *Tompkinson*, [1893] A. C. 396.
(*t*) *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004; *Bloomenthal* v. *Ford*, [1897] A. C. 156.
(*u*) *Balkis, etc. Co.* v. *Tompkinson*, [1893] A. C. 396.
(*x*) *Re London Celluloid Co.*, 39 Ch. D. 190.
(*y*) *Per* Lord HERSCHELL in *Bloomenthal* v. *Ford*, [1897] A. C. 156.
(*z*) *Re Bahia, etc. Rail. Co.*, 3 Q. B. 584.
(*a*) *Hart* v. *Frontino Mining Co.*, L. R. 5 Ex. 111.
(*b*) *Shaw* v. *Port Philip Colonial Gold Mining Co.*, 13 Q. B. D. 103.
(*bb*) *Ruben and Ladenburg* v. *Great Fingall Consolidated, Limited*, [1904] W. N. 163; 20 T. L. R. 720.

The House of Lords must decide which of these two decisions is right, assuming they cannot be distinguished on the facts. It is only the person in whose favour the estoppel exists that can render the company liable on it (*c*). A "certification" issued by a company estops them from denying the facts certified (*d*); but it was held by the House of Lords that where the secretary of a company having authority to certify on behalf of the company certified a transfer of shares without having received the certificates, the company were not estopped by the certification (*e*). It should be noticed that a "certification" is not under the seal of the company whereas a share certificate is, and the estoppel arising from a wrongful use of a company's seal is not governed by precisely the same considerations as an estoppel from the fraudulent acts of a company's agent.

Irregularly issued securities.—Where commissioners were empowered by a local Act to issue mortgage securities, it was held that they could not, as against a *bonâ fide* holder for value, set up an illegality in the issue of a security, but were estopped from denying its validity (*f*). A company cannot rely on an informality in the issue of their debentures as an answer to a petition for winding up (*g*). Where a company registered an assignment of debentures, it was held that they could not equitably set off against the transferee any claim against the transferor (*h*). This doctrine was extended to a case where there was no registration; for, a company having received notice of an assignment for value of one of their debentures, and acknowledged the receipt by stamping the duplicate notice, it was held that such stamping estopped them from setting up against the

(*c*) *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. D. 188.
(*d*) *Bishop* v. *Balkis Consolidated Co.*, 25 Q. B. D. 512.
(*e*) *George Whitchurch, Limited* v. *Cavanagh*, [1902] A. C. 117.
(*f*) *Webb* v. *Herne Bay Commissioners*, 5 Q. B. 642.
(*g*) *Re Exmouth Dock Co.*, L. R. 17 Eq. 181.
(*h*) *Higgs* v. *North Assam Tea Co.*, L. R. 4 Ex. 387; followed by Lord ROMILLY: *In re North Assam Tea Co.*, L. R. 10 Eq. 465; *cf. In re General Estates Co.*, L. R. 3 Ch. 758.

transferee any equities attaching between themselves and the transferor (*i*). A useful statement of the law on the subject of the right of a company to question irregularly issued securities, as developed up to 1883, is found in the judgment of Lord Justice KAY in *Re Romford Canal Co.* (*k*). He said:

"When a company have power to issue securities, an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia rite acta*. If such security be legally transferrable, such an irregularity and *a fortiori* any equity against the original holder cannot be asserted by the company against a *bonâ fide* transferee for value without notice. Nor can such an equity be set up against an equitable transferee, whether the security was transferable at law or not, if, by the original conduct of the company in issuing the security or by their subsequent dealing with the transferee, he has a superior equity. There remains the present case in which I must treat the parties as equitable transferees only of securities which the company, having power to issue such, represent on the face of them to be legally transferable, and where the company would be able to plead at law against the original holder or the first transferee that the debentures were invalid because issued by an insufficient meeting of shareholders. I think the decision of *Higgs* v. *Northern Assam Tea Company* (*l*) warrants me in saying that, if the original conduct of the company in issuing these debentures was such that the public were justified in treating it as a representation that they were legally transferable, there would be an equity on the part of any person who had agreed for value to take a transfer of these debentures to restrain the company from pleading their invalidity, although that might be a defence at law to an action by the transferor."

But it must be noticed that although a company may be estopped from questioning the validity of certain of the debentures issued by it, the holders of the other debentures are not so estopped (*m*). Where a person possessed of a security, purporting on the face of it to be transferable by delivery, leaves such security in the hands of another, who makes it over to a *bonâ fide* holder for value, the owner of the security cannot set up as against the *bonâ fide* holder that it was not so

(*i*) *Brunton's Case*, L. R. 19 Eq. 302.
(*k*) 24 Ch. D. 92.
(*l*) L. R. 4 Ex. 387.
(*m*) *Mowatt* v. *Castle Steel, etc., Co.*, 34 Ch. D. 58.

transferable (*n*). Where a person executed transfers of shares and left them in the hands of his brokers, who raised money on them, it was held that he was estopped from making any claim in respect thereof as against the lenders (*o*).

A collector of turnpike tolls, although not legally appointed, has been held capable of maintaining an action for them on a count for an account stated, where the defendant had paid part and promised the remainder (*p*). The title of an assignee in bankruptcy, if not formally disputed, has been held sufficiently established by proof that the defendant had treated with him as such (*q*); but where the plaintiff professes to sue in a particular capacity, it must be strictly proved, in the absence of an admission (*r*).

An admission by a person in one character is no evidence against him in another.—Thus, declarations by a person before becoming an executor are not evidence against him in that office (*s*).

Generally, it is a rule, as laid down by Lord ELLENBOROUGH, that any recognition of a person standing in a given relation to others is *primâ facie*, but not conclusive, evidence against the person making the recognition, that such relation exists, though the value of such evidence will depend entirely on the circumstances (*t*). It has been held by the Court of Queen's Bench, that the mere filing of an affidavit of proof against the estate of an insolvent agent to an undisclosed principal, after that principal is known to the

(*n*) *Goodwin* v. *Robarts*, 1 App. Cas. 476; *Rumball* v. *Metropolitan Bank*, 2 Q. B. D. 194.
(*o*) *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120.
(*p*) *Peacock* v. *Harris*, 10 East, 104.
(*q*) *Dickinson* v. *Coward*, 1 B. & Ald. 677.
(*r*) *Collins* v. *Carnegie*, 1 A. & E. 695.
(*s*) *Legge* v. *Edmonds*, 25 L. J. Ch. 125.
(*t*) *Dickinson* v. *Coward*, 1 B. & Ald. 679.

creditor, is not a conclusive election by the creditor to treat the agent as his debtor (*u*).

It may here be noticed that in addition to the liability which a person who is in fact a partner in a firm is under for the debts of the firm, a liability for the debts of a firm may arise by estoppel. This liability is thus defined by the Partnership Act, 1890 (*x*), s. 14, which is as follows:

"(1) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has, on the faith of any such representation, given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation, or suffering it to be made.

"(2) Provided that where after a partner's death the partnership business is continued in the old firm name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrator's estate or effects liable for any partnership debts contracted after his death."

Therefore, if a person retires from a partnership, but omits to give proper notice of dissolution, he may be liable for debts incurred in the subsequent carrying on of the business by a new firm; but he cannot be sued jointly with the new firm, and if the new firm be sued for such a debt, the retiring partner cannot afterwards be sued (*y*). This, of course, is only a branch of the doctrine of estoppel by conduct:

"If man allows his name to be held out to the public as being the person responsible for the transaction in question he may be liable in consequence of this holding out, or in consequence of his conduct, although he may not have originally authorised the act, because he has not taken steps which he should take to stop the unauthorised use of his name" (*z*).

(*u*) *Curtis* v. *Williamson*, L. R. 10 Q. B. 57.
(*x*) 53 & 54 Vict. c. 39.
(*y*) *Scarf* v. *Jardine*, 7 App. Cas. 345.
(*z*) *Per* BYRNE, J.: *Walter* v. *Ashton*, [1902] 2 Ch. 294.

It has been said that a declaration in the presence of a party to a cause, becomes evidence, as showing that the party, on hearing such a statement, did not deny its truth: such an acquiescence, indeed, is worth very little where the party hearing it has no means of personally knowing the truth or falsehood of the statement (*a*). The declaration must have been made on an occasion when a reply from the party might be properly expected (*b*). A mere conditional acknowledgment of liability, in the event of a party primarily liable not paying, will not dispense with the necessity of formal notice of dishonour of a bill (*c*). Where, however, the indorser of a bill, being told that the holders were about to take proceedings against him, said he would pay if time was given him, it was held that he had waived his right to notice of dishonour (*d*). In settlement cases, proof that a parish has relieved for seven years has been held to be evidence that the pauper was settled in the parish (*e*). So, evidence of relief given to a pauper residing out of the relieving parish admits a settlement (*f*); but mere relief of casual paupers is no evidence of a settlement (*g*), even where the relieving parish has enabled the pauper to remove to another parish (*h*). Proof that a party to an action (though not himself examined) has requested others to give false evidence, is evidence against him as an admission against his own case (*i*).

Admissions by acquiescence.—Acquiescence in an act is evidence of an admission; but, to make it so,

(*a*) *Per* PARKE, B.: *Hayslep* v. *Gymer*, 1 A. & E. 163; *cf. Neile* v. *Jakle*, 2 C. & K. 709.
(*b*) *Boyd* v. *Bolton*, Ir. R. 8 Eq. 113.
(*c*) *Hicks* v. *Duke of Beaufort*, 4 Bing. N. C. 229.
(*d*) *Woods* v. *Dean*, 3 B. & S. 101.
(*e*) *R.* v. *Barnsley*, 1 M. & S. 377.
(*f*) *R.* v. *Edwinstowe*, 8 B. & C. 671.
(*g*) *R.* v. *Chatham*, 8 East, 498.
(*h*) *R.* v. *Trowbridge*, 7 B. & C. 252.
(*i*) *Moriarty* v. *London, Chatham and Dover Rail. Co.*, L. R. 5 Q. B. 314.

it has been said that it must exhibit some act of the mind, and amount to voluntary demeanour or conduct of the party. For non-repudiation by a principal of an unauthorised act of an agent to bind the principal, the latter must have had present to his mind proper materials on which to exercise his election (*k*). It has been stated that—

> "Acquiescence and ratification must be founded on a full knowledge of the facts; and further, it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction" (*l*).

Accounts.—If an account be delivered and retained for any time without objection, it is presumed to be correct (*m*); and where an account has been stated, and a bill given for the amount, the debtor cannot, in an action on the bill, impeach the charges (*n*). An objection to one of several items in an account, without remark as to the others, is evidence of an admission that they are correct (*o*). A banker's pass book is evidence of acquiescence by the customer of the principles on which the accounts are made up (*p*); but the directors of a building society cannot ratify an illegal borrowing simply by returning a pass book (*q*). An account sent by a creditor to a debtor is, as against the sender, evidence of a contract (*r*); and, even where the account, although made out, was not sent in, a contract was implied (*s*). In an action by a surety against his principal, it has been held that the

(*k*) See *De Bussche* v. *Alt*, 8 Ch. D. 286.
(*l*) *Per* Lord FITZGERALD in *La Banque Jacques Cartier* v. *La Banque d' Epargne, etc. de Montreal*, 13 App. Cas. 118.
(*m*) *Willis* v. *Jernegan*, 2 Atk. 252.
(*n*) *Knox* v. *Whalley*, 1 Esp. 159.
(*o*) *Chesman* v. *Court*, 2 M. & G. 307.
(*p*) *Williamson* v. *Williamson*, L. R. 7 Eq. 542.
(*q*) *Per* Lord SELBORNE: *Blackburn Building Society* v. *Cunliffe*, 21 Ch. D. 72.
(*r*) *Morland* v. *Isaac*, 20 Beav. 392.
(*s*) *Bruce* v. *Garden*, 17 W. R. 990.

uncontradicted statement by the former to the latter, that he had paid a debt by cheque, is slight evidence of payment (*t*).

A notice to quit lands, which has been served and not objected to, is evidence against the tenant that the tenancy commenced at the season of the year when the notice to quit expires (*u*). So, in an action on use and occupation, payment of rent is evidence of a holding, and of its terms (*x*). Where a purchaser kept an abstract and made an appointment to examine the deeds, he was held estopped from afterwards denying the contract to purchase (*y*). The mere omission to take legal proceedings in respect thereof is not acquiescence in an act (*z*).

It is held that a party's own statements are evidence against himself, whether they corroborate the contents of a deed, or other written instrument, or not (*a*). In such a case it has been decided that an abstract or affidavit used by a person on a reference before a master to prove title in himself may be received in evidence aganst him in a subsequent litigation (*b*). The statement relied upon must be distinctly a statement of fact, and not merely an opinion or inference of law by the deponent; for in the latter case he will not be estopped (*c*). This doctrine seems to have been slightly extended in the case of *Richards* v. *Morgan* (*d*), in which a question was raised relative to the admissibility in an action of certain depositions, which the

(*t*) *Price* v. *Burra*, 6 W. R. 40.
(*u*) *Thomas* v. *Thomas*, 2 Camp. 647.
(*x*) *Harden* v. *Hesketh*, 4 H. & N. 175.
(*y*) *Thomas* v. *Brown*, 1 Q. B. D. 714.
(*z*) *Fulwood* v. *Fulwood*, 9 Ch. D. 176; *cf. Rowland* v. *Mitchell*, 13 R. P. C. 457; *London, Chatham and Dover Rail. Co.* v. *Ball*, 47 L. T. (N.S.) 413.
(*a*) *Slatterie* v. *Pooley*, 6 M. & W. 664.
(*b*) *Pritchard* v. *Bagshawe*, 11 C. B. 457.
(*c*) *Morgan* v. *Couchman*, 14 C. B. 100.
(*d*) 4 B. & S. 641.

defendant had used in a Chancery suit, wherein the same facts were in issue. CROMPTON, J., said:

"A document knowingly used as true, by a party in a court of justice, is evidence against him as an admission even for a stranger to the prior proceedings, at all events, when it appears to have been used for the very purpose of proving the very fact, for the proving of which it is offered in evidence in the subsequent suit."

So it was held, that an examined copy of answers to interrogatories, filed in the usual way, may be read in evidence against the person making them in a subsequent action to which he is a party, without proof of his handwriting or production of the interrogatories themselves (*e*).

Admissions are implied from the attornments inferred from the relation of landlord and tenant (*f*); and from submission to a distress (*g*); and in some cases unanswered letters are evidence of the statements which they contain (*h*); but their value will depend entirely on special circumstances. The mere fact of their not having been answered will amount to no recognition of their accuracy (*i*), unless, of course, the relation between the parties is such that a reply might be properly expected (*k*); but they will be receivable in conjunction with subsequent statements made with reference to them by the party to whom they are addressed (*l*).

The admission by a wife of the commission of adultery is sufficient proof against herself of the adultery, provided the court, after looking at the evidence of such admission with caution, considers that

(*e*) *Fleet* v. *Perrins*, L. R. 3 Q. B. 536.
(*f*) *Mayor of Stafford* v. *Till*, 4 Bing. 75.
(*g*) *Crowley* v. *Vitty*, 7 Ex. 319.
(*h*) *Lucy* v. *Mouflet*, 5 H. & N. 229; but see the remarks of Lord HATHERLEY in *Challis's Case*, L. R. 6 Ch. 266.
(*i*) See judgment of BOWEN, L.J., in *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 539.
(*k*) See the judgment of WILLES, J., in *Richards* v. *Gellatly*, L. R. 7 C. P. 131.
(*l*) *Gaskill* v. *Skene*, 14 Q. B. 664.

her evidence is trustworthy, and that it amounts to a clear, distinct, and unequivocal admission of adultery (*m*); and the court may act on it, even without corroboration, if all reasonable ground for suspicion is removed (*n*). Where an admission had been made in the presence of three people, two of whom were called to prove the admission, but the third, who could have given corroborative evidence of the adultery, was absent, the court declined to act on the admission unless the third person was called (*o*). This suggests the rule that whenever it is apparent that corroboration is obtainable the court will not act upon the admission in the absence of such corroboration.

It should be remembered that—

Admissions, whether written or oral, which do not operate by way of estoppel, constitute only *primâ facie* and rebuttable evidence against their makers, and those claiming under them, as between them and others.

Thus, although the acknowledgment in the body of a deed of the consideration money having been received is conclusive between the parties (*p*), a receipt indorsed on a deed was only *primâ facie* evidence of payment until it was provided by s. 55 of the Conveyancing Act, 1881, in the case of deeds executed since December 31st, 1881 (*q*), that—

"A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof" (*q*).

(*m*) *Robinson* v. *Robinson*, 1 S. & T. 393.
(*n*) *Williams* v. *Williams*, L. R. 1 P. & D. 29.
(*o*) *White* v. *White*, 62 L. T. 663.
(*p*) *Baker* v. *Dewey*, 1 B. & C. 704.
(*q*) 44 & 45 Vict. c. 41.

Receipts.—A receipt indorsed on a bill, and generally all parol receipts, are only *primâ facie* evidence of payment. It has been held, indeed, in an action by assignees in a bankrupt's name, that a receipt in full of all demands by the nominal plaintiff is conclusive against his assignees (*r*); but it seems that this case is not law (*s*); and it has been held that a plaintiff who had given the defendant a receipt for goods sold with a view to defraud his creditors, was not estopped from showing that no money had passed, and that no sale had ever taken place (*t*). Entries of moneys received are *primâ facie* evidence against the maker; but entries of payments are not, as a general rule, evidence in his favour, yet entries of payments may be so connected with entries of receipts, that if the latter are read against the maker, the former would be admissible in his favour (*u*). Under Order XXXIII., r. 3, of the R. S. C., 1883, the court or a judge may direct that, in taking an account, the books of account in which the accounts in question have been kept shall be taken as *primâ facie* evidence of the truth of the matters therein contained.

The admission of a partner concerning the partnership affairs, is evidence against his co-partners, if made in the ordinary course of business (*x*); that of an agent is evidence against his principal; and that of one of several parties jointly interested is evidence against the others or other of them.

Thus, the admission by one of several plaintiffs who sued as partners, that the subject-matter of the action was his own personal contract, has been received as

(*r*) *Alner* v. *George*, 1 Camp. 392.
(*s*) *Bowes* v. *Foster*, 2 H. & N. 779. (*t*) *Bowes* v. *Foster*, *supra*.
(*u*) *Per* KINDERSLEY, V.-C.: *Reeve* v. *Whitmore*, 2 D. & S. 450.
(*x*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 15.

evidence to bar the action (*y*). And generally, in partnership transactions, the representations, although tortious or fraudulent, of a partner are binding on his co-partners (*z*). So, the admission of a retired partner as to a partnership transaction while he was in the firm, is evidence in an action against a continuing partner (*a*); and admissions made by one partner after dissolution are admissible to prove payment of a partnership debt after dissolution (*b*).

When there is a joint interest, the admissions of one party concerning a material fact within his knowledge are generally evidence against another party (*c*). Thus, an admission by one in his character of executor is evidence against his co-executor (*d*) except perhaps under special circumstances (*e*). A receipt by one of two trustees is evidence against both (*f*).

In *Whitcomb* v. *Whiting* (*g*) it was held that payment of interest by one of several makers of a joint and several promissory note takes it out of the Statute of Limitations as against the others; and that such payment may be given in evidence in a separate action against any one of the others. It was also stated by Lord MANSFIELD in that case, that "an admission by one is an admission by all." By s. 1 of Lord Tenterden's Act (*h*) it was enacted, that no joint contractor shall lose the benefit of the statute by the written acknowledgment or promise of another; though the effect of payment by one of such joint contractors is expressly reserved to continue as before the Statute (*i*); but by the Mercantile Law Amendment

(*y*) *Lucas* v. *De la Cour*, 1 M. & S. 249.
(*z*) *Rapp* v. *Latham*, 2 B. & Ald. 795.
(*a*) *Wood* v. *Bradelech*, 1 Taunt. 104.
(*b*) *Pritchard* v. *Draper*, 1 R. & M. 191.
(*c*) *Per* LE BLANC, J.: *R.* v. *Hardwicke*, 11 East, 589.
(*d*) *Fox* v. *Waters*, 12 A. & E. 43.
(*e*) See judgment of Kay, L.J., in *Peek* v. *Ray*, [1894] 3 Ch., p. 289.
(*f*) *Scaife* v. *Johnson*, 3 B. & C. 421.
(*g*) Doug. 652.
(*h*) 9 Geo. 4, c. 14.
(*i*) *Bradfield* v. *Tupper*, 7 Ex. 27.

Act, 1856 (19 & 20 Vict. c. 97, s. 14), no co-contractor or co-debtor, whether liable jointly only, or jointly and severally, will lose the benefit of the Statutes of Limitation, by reason only of payment of any principal, interest, or other money by any other co-contractor or co-debtor.

Before the acts or acknowledgment of one party can be made evidence against another, it must be proved that such a joint interest existed as creates an express or implied authority to bind (*k*). It is not enough that there should be a mere community without an actual privity of interest. Thus, the courts have refused to extend the doctrine of *Whitcomb* v. *Whiting* to the case of a payment by one of two joint and several makers of a promissory note as against the executors of the other; and have held that such a payment does not take the note out of the Statute of Limitations as against the latter (*l*). So, payment by an executor of one of two such makers will not take the note out of the Statute as against the other (*m*). In actions of tort, the admissions of one defendant will not as a general rule affect another defendant. In settlement cases, however, it has been held that the declarations of a rated parishioner are evidence against his own parish (*n*).

Principal and agent.—In cases of principal and agent, the ordinary rule applies, *qui facit per alium facit per se:* and the principal will be affected by the admissions of his agent, so far as they are within the scope of his authority; but not when they exceed it (*o*). Thus, it was said by an eminent judge that when it is proved that A. is agent of B., whatever A. does, or says, or

(*k*) *Dickinson* v. *Valpy*, 10 B. & C. 128.
(*l*) *Atkins* v. *Tredgold*, 2 B. & C. 23.
(*m*) *Slater* v. *Lawson*, 1 B. & Ad. 396.
(*n*) *R.* v. *Hardwicke*, 11 East, 578.
(*o*) *Great Western Rail. Co.* v. *Willis*, 18 C. B. (N.S.) 748.

writes in the making of a contract as agent of B., is admissible in evidence because it is part of the contract which he makes for B., and therefore binds B. (*p*); and the principal's liability towards third parties cannot be restricted by any private arrangement between him and his agent (*q*). Evidence of an interpreter's version of an agent's language is *primâ facie* correct, and is evidence against the principal without calling the interpreter (*r*).

It should be stated that the representation, declaration, and admission of the agent does not bind the principal if it is not made at the very time of the contract but upon another occasion, or if it does not concern the subject-matter of the contract, but some other matter in no degree belonging to the *res gestæ* (*s*). Thus, a letter from an agent to his principal, containing merely an account of his transactions, is not evidence against the latter (*t*); but where an agent, within the scope of his authority, wrote to his principals that he had received a sum of money on their account, and they replied, giving directions as to its disposition, it was held that the agent's statement so recognised was evidence that the principals had received the money (*u*).

A principal will, of course, not be prejudiced by an admission of his agent which is not within the scope of his authority. On this ground in detinue for goods against a pawnbroker, to prove possession, evidence was rejected of a statement by the defendant's shopman, that it was a hard case on his master, who had advanced money on the goods. It was held that such a state-

(*p*) *Per* GIBBS, C.J.: *Langhorn* v. *Allnutt*, 4 Taunt. 519.
(*q*) *Maddick* v. *Marshall*, 18 C. B. (N.S.) 829; *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97.
(*r*) *Reid* v. *Hoskins*, 6 El. & Bl. 953.
(*s*) Story on Agency, s. 135.
(*t*) *Langhorn* v. *Allnutt*, 4 Taunt. 511.
(*u*) *Coates* v. *Bainbridge*, 5 Bing. 58.

ment was not within the scope of the shopman's authority; and TINDAL, C.J., said:

"It is dangerous to open the door to declarations by agents beyond what the cases have already done. The declaration itself is evidence against the principal, not given upon oath; it is made in his absence, when he has no opportunity to set it aside, if incorrectly made, by any observation, or any question put to the agent. . . . Evidence of such a nature ought always to be kept within the strictest limits to which the cases have confined it" (*x*).

It is not necessary to call an agent to prove his admissions (*y*).

Joint-stock companies are bound by the admissions of their directors and other agents who are acting within the scope of their authority; but when a contract entered into by the directors of a company is *ultra vires* of that company, as being against its memorandum of association, not only is it not binding on that company, but it cannot be made binding by being ratified by the general body of shareholders (*z*). Nor can a company ratify a contract entered into on its behalf previous to its registration (*a*). The statements of a chairman of directors, made at a meeting of the company, are not admissible in evidence against the company because what he says is in fact a confidential report made by the chairman (as agent) to his principals (the company). The secretary of a company is only its agent in so far as he is acting strictly within the powers conferred on him by the directors (*b*). The liability of a company for the fraud of its secretary rests on the same basis as the liability of an individual for the fraud of his agent (*c*).

If there are two principals the statements of their

(*x*) *Garth* v. *Howard*, 8 Bing. 453.
(*y*) *Irving* v. *Motley*, 7 Bing. 543; *Peyton* v. *St. Thomas's Hospital*, 4 M. & R. 625 n.
(*z*) *Ashbury Railway Carriage Co.* v. *Riche*, L. R. 7 E. & I. 668.
(*a*) *Kelner* v. *Baxter*, L. R. 2 C. P. 174.
(*b*) *George Whitchurch, Limited* v. *Cavanagh*, [1902] A. C. 117.
(*c*) See *Shaw* v. *Port Phillip, etc. Co.*, 13 Q. B. D. 103; and *Ruben* v. *Great Fingall Consolidated*, [1904] 1 K. B. 650, reversed on appeal, [1904] W. N. 163; 20 T. L. R. 720.

agent are not evidence for one of such principals against the other (*d*).

Agency must be proved before the admissions can be received; though comparatively slight evidence is received as *primâ facie* evidence of authority. Thus, to prove authority to sign a guarantee, evidence that the agent, the defendant's son, had signed for the defendant in three or four instances and accepted bills, was held sufficient *primâ facie* evidence of agency (*e*). So, production of a writ purporting to be signed by the plaintiff's town agent, coupled with a receipt for the sum claimed, purporting also to be signed by such agent, was received to prove a plea of payment (*f*).

It may be stated that a principal is liable for anything done by his general agent, or by his special agent, when doing one of the class of acts within the powers conferred on him by the principal, although no express command or privity of the principal is proved (*g*); and even when his acts are contrary to the instructions of his principal if done for the benefit of his principal (*h*), and this is so even if the agent acts fraudulently, provided the act is within the scope of the powers conferred upon the agent, and the other party is dealing with him in good faith (*i*). But a principal is not liable in an action of deceit for an act of an agent which is not within the powers conferred upon the agent and is done fraudulently and for his own benefit (*k*).

(*d*) *In re Devala Mining Co.*, 22 Ch. D. 593.
(*e*) *Watkins* v. *Vince*, 2 Stark. 368.
(*f*) *Weary* v. *Alderson*, 2 M. & Rob. 127.
(*g*) See judgment of WILLES, J., in *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; *cf. Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526.
(*h*) *Limpus* v. *London General Omnibus Co.*, *ubi supra*; *Grierson and Oldham* v. *Birmingham Hotel Co.*, 17 R. P. C. 158.
(*i*) *Bryant, Powis and Bryant* v. *Quebec Bank*, [1893] A. C. 179; *cf. Hambro* v. *Burnand*, [1904] 2 K. B. 10.
(*k*) See judgment of BOWEN, L.J., in *British Mutual Banking Co.* v. *Charnwood*, 18 Q. B. D., at p. 717; *cf. Limpus* v. *London General Omnibus Co.*, *ubi supra*; and *Farquharson Brothers & Co.* v. *King & Co.*, [1902] A. C. 325, in which case the appellants' clerk had no authority to make the sale in question, and they had not represented that he had. If they had so represented, the decision would have been against them.

The admissions of agents are receivable in criminal cases, but only to supply a link in the evidence. Thus, on Lord Melville's trial for embezzlement, evidence was received of a receipt of public money by an authorised agent, to show that the money was actually received. Lord ERSKINE said:

"The first steps in the proof of the charge must advance by evidence applicable alike to civil and criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a civil or criminal consequence; but it is a totally different question, in the consideration of criminal justice, as distinguished from civil, how the noble person now on trial may be affected by the fact, when so established. The receipt by the paymaster would in itself involve him civilly, but could, by no possibility, convict him of a crime" (*l*).

Where the wife of a prisoner charged with receiving stolen goods had made out a list of goods and prices at his request, and subsequently handed it to the police in his presence, it was held that such list could be given in evidence against the prisoner (*m*).

The instructions of a principal to his agent are not evidence in an action on a contract against a third party, unless it be shown that they were communicated to the latter (*n*). The admissions of an infant are generally not evidence against him (*o*); nor, generally, are the admissions of a guardian, or next friend, evidence against an infant who sues by him (*p*). But infants and their guardians and next friends are now compellable to make discovery of documents and to answer interrogatories in the same way as other litigants.

Admissions by solicitors.—A solicitor is presumed to have a general authority for whatever he may say or do on behalf of his client in the conduct of a case: and his authority to make admissions will be implied when

(*l*) 29 How. St. Tr. 746.
(*m*) *R.* v. *Mallory*, 13 Q. B. D. 33.
(*n*) *Smethurst* v. *Taylor*, 12 M. & W. 545.
(*o*) *Holden* v. *Hearn*, 1 Beav. 455.
(*p*) *Cowling* v. *Ely*, 2 Stark. 366; *s. v. James* v. *Hatfield*, 1 Stra. 548.

he has been proved to be the solicitor on the record (*q*). In *Young* v. *Wright* (*r*), Lord ELLENBOROUGH said:

"If a fact is admitted by the attorney on the record with intent to obviate the necessity of proving it, he must be supposed to have authority for the purpose, and his client will be bound by the admission; but it is clear that whatever the attorney says in the course of conversation is not evidence in the cause" (*s*).

The solicitor on the record is bound by the acts of his agent and so is the client (*t*).

Where an attorney on the record gave the following undertaking: "I hereby undertake to appear for A. and B., joint owners of the sloop *Arundel*," etc., this was held sufficient *primâ facie* evidence that A. and B. were such joint owners (*u*); but an admission before action by an attorney who afterwards appeared on the record, has been held insufficient, without proof that he was authorised at the time to make the admission (*x*). An admission by a solicitor's clerk or agent is as valid as an admission by the solicitor himself (*y*). Where the defendant's attorney, after a controversy had arisen, admitted in conversation with the plaintiff's attorney that his client's title was under B., and ended with B., and the plaintiff claimed as a remainderman after B., this was held to be a good admission of B's title (*z*). So, in an action on a bill, an admission by the defendant's attorney that the acceptance was in his client's handwriting is evidence of acceptance without production of the bill (*a*). Of course the client is not bound by admissions made by his solicitor fraudulently (*b*).

(*q*) *Gainsford* v. *Grammar*, 2 Camp. 9.
(*r*) 1 Camp. 159.
(*s*) See *Petch* v. *Lyon*, 9 Q. B. 147.
(*t*) *Carruthers* v. *Newen*, [1903] 1 Ch. 812.
(*u*) *Marshall* v. *Cliff*, 4 Camp. 133.
(*x*) *Wagstaff* v. *Wilson*, 4 B. & Ad. 339.
(*y*) *Taylor* v. *Williams*, 2 B. & Ad. 845.
(*z*) *Dorrett* v. *Meux*, 15 C. B. 142.
(*a*) *Chaplin* v. *Levy*, 9 Ex. 531.
(*b*) *Williams* v. *Preston*, 20 Ch. D. 672.

Admissions by counsel.—It has been said that if the parties have a particular controversy, and it seems plain that a certain fact is admitted, the jury, as men of common sense, may draw the same conclusion as to that fact as if it were formally proved before them (*c*); and therefore it has been suggested that if counsel opens statements which he does not prove, the opposite party may treat them as admissions; but this doctrine has been disputed in a later case (*d*). Generally counsel have authority to make all admissions in civil cases, which they may think proper in the conduct of a case: and accordingly a special case signed by counsel on each side, at a former trial, has been held evidence of all the facts therein stated, at a subsequent trial (*e*); but ordinary and less formal admissions by counsel at a former trial are not evidence on a subsequent trial (*f*). When counsel with the authority of their clients consent to an order the clients cannot arbitrarily withdraw such consent (*g*). In criminal cases it is clear that solicitors have no authority to make admissions; and it seems that not even counsel have such authority (*h*).

Admissions by a wife.—A wife has no implied authority to make admissions in prejudice of her husband's rights, even though he may possess such rights *jure uxoris* (*i*); nor can her admission of a tort committed by her be given in evidence to affect her husband in an action in which he is liable for costs and damages (*k*). Where a wife was carrying on business at a distance from her husband, it was held that her

(*c*) *Per* ALDERSON, B.: *Stracy* v. *Blake*, 1 M. & W. 173.
(*d*) *Duncombe* v. *Daniell*, 8 C. & P. 222; *sed cf. Machell* v. *Ellis*, 1 C. & K. 682; *Darby* v. *Ouseley*, 1 H. & N. 1.
(*e*) *Van Wart* v. *Woolley*, R. & M. 4; *Swinfen* v. *Swinfen*, 18 C. B. 485.
(*f*) *Colledge* v. *Horn*, 3 Bing. 119.
(*g*) *Harrey* v. *Croydon Rural Sanitary Authority*, 26 Ch. D. 249.
(*h*) *R.* v. *Thornhill*, 8 C. & P. 575.
(*i*) *Alban* v. *Pritchett*, 6 T. R. 681.
(*k*) *Denn* v. *White*, 7 T. R. 112.

admission as to the amount of rent, and the terms of tenancy, was not evidence of the facts against him, in replevin by him against his landlord. ALDERSON, B., said:

"A wife cannot bind her husband by her admissions, unless they fall within the scope of the authority which she may be reasonably presumed to have derived from him; and where she is carrying on a trade, if it be necessary for that purpose that she should have such a power, she may be his agent to make admissions with respect to matters connected with the trade. . . . Here it could not be necessary, for the purpose of carrying on the business of the shop, that she should make admissions of an antecedent contract for the hire of the shop" (*l*).

Whenever it can be inferred, from the antecedents of a case, that a wife had an express or implied authority, as an agent, to bind her husband, her admissions will affect him (*m*). Thus in an action against a husband for goods supplied to his wife, the jury ought not only to be asked whether the goods were necessaries, but also whether the wife had authority to buy (*n*); for a wife has no original authority to pledge her husband's credit at all (*o*). Where a business is such as is usually transacted by women, a wife's admission concerning it has been received against her husband (*p*); and, as regards her separate property, the admissions of a married woman are on the same footing as if she were unmarried.

Principal and surety.—Admissions by a principal are not evidence against a surety, unless connected and contemporaneous with the original transaction. Thus, a surety by bond for the conduct of a clerk has been held not bound by the admissions of the clerk that he had embezzled money (*q*); nor, on a guarantee

(*l*) *Meredith* v. *Footner*, 11 M. & W. 202.
(*m*) *Manby* v. *Scott*, 2 Sm. L. C.
(*n*) *Reid* v. *Teakle*, 13 C. B. 627; *cf. Jolley* v. *Rees*, 15 C. B. (N.S.) 628.
(*o*) *Reneaux* v. *Teakle*, 8 Ex. 680.
(*p*) *Anon.*, 1 Str. 527. (*q*) *Smith* v. *Whittingham*, 6 C. & P. 78.

to pay for goods, is the surety bound by the admission of his principal as to delivery (*r*). Receipts in the books of a deceased collector or clerk are evidence against a surety, as declarations in the course of business or against interest (*s*).

Finally, it is to be observed that the whole of a statement, whether verbal or in writing, containing an admission is to be received together. But every part of the statement may not have the same legal operation. Thus, in an action against a partnership firm for goods supplied between June, 1893, and February, 1894, the only evidence that one of the defendants had ever been a member of the firm at all was a letter written by him, on January 2nd, 1893, to the manager of a bank, with whom the firm had an account, in answer to an inquiry as to whether he claimed any interest in the balance standing to the credit of the firm at the bank, which letter was as follows: "I have not banked any money this last eight months, as I have dissolved partnership with my brother last April." It was contended, for the defendant, that the admission of the partnership could not be separated from the statement of the dissolution. This the county court judge held, but on appeal the Divisional Court held otherwise. WILLES, J., said:

"The letter clearly contains an admission that William was a partner in Wren Brothers in April, 1892, and it must be presumed that the state of things so admitted to have existed at that date continued to exist, unless the contrary be proved. No doubt the statement that the partnership had been dissolved is evidence in the defendant's favour; but it is for the jury to say what weight is to be attached to it" (*t*).

The statement will not be inadmissible, because portions of it contain hearsay; but the fact will be matter of comment by the judge to a jury, and he will

(*r*) *Evans* v. *Beattie*, 1 C. & P. 394.
(*s*) *Middleton* v. *Melton*, 10 B. & C. 317; *Whitmarsh* v. *George*, 8 B. & C. 556.
(*t*) *Brown* v. *Wren Brothers*, [1895] 1 Q. B. 390.

also remind them that it is their duty to consider the whole statement, although an admission in this respect will not vitiate a verdict, if it appear that the whole admission has been otherwise brought fairly before them.

A party against whom a deed is produced has a right to insist on the whole deed being read. But a mutilated document may nevertheless be given in evidence (*u*).

Payment into Court.

The effect of payment into court as an admission of liability is now governed by Order XXII. of the R. S. C., 1883. Under Rule 1 of this Order (which is confined to actions to recover a debt or damages and Admiralty actions) a defendant may pay money into court by way of satisfaction, which admits the claim or cause of action in respect of which the payment is made, or he may, with a defence denying liability (except in actions or counterclaims for libel or slander), pay money into court which will be subject to the provisions of Rule 6. Payment into court without a denial of liability is only an admission of liability up to the amount paid in. Therefore, where, in an action on a bill for work done, the defendants paid in £10 without any denial of liability, the defendants were held not precluded from showing that the work was not done at their request except as to that amount (*x*). Payment into court with a denial of liability is not an admission of the cause of action (*y*), although, under Rule 6, the plaintiff may accept it in satisfaction of the claim or cause of action in respect of which the payment into court has been made, in which case he is entitled to have the money paid out to him.

(*u*) *Lord Trimlestown* v. *Kennis*, 9 C. & F. 775.
(*x*) *Hennell* v. *Davies*, [1893] 1 Q. B. 367.
(*y*) *Cook* v. *Ford*, [1899] 2 Ch. 93.

Admissions without Prejudice.

An admission cannot be given in evidence against a party who has made it with a declaration or intimation that it is to be regarded as confidential, or without prejudice, nor can the answer to such a communication, even though not guarded by similar words (*z*); for, when a correspondence begins with a letter written "without prejudice," that covers the whole (*a*). Where a letter was written by the plaintiff's solicitors to the defendant with proposals for a compromise, but not expressed to be "without prejudice," and it was followed in a day or two by another letter from the solicitors to the effect that their communications were intended to be "without prejudice to the plaintiff's legal and other rights," it was held by HALL, V.-C., that the second letter protected the first and also subsequent letters from being used in evidence (*b*). It must appear distinctly that the communication was meant to be confidential; and an offer of compromise, unaccompanied by any such qualification, is strictly receivable in the nature of an admission (*c*). When an offer is made in a letter written without prejudice, and such offer is accepted (*d*), or when an admission is made in such a letter subject to a condition, and such condition has been performed (*e*), the letter can be used in evidence against the writer, notwithstanding that it was written "without prejudice." With these exceptions, nothing which is written or said without prejudice, can be used as evidence without the consent of both parties (*f*). It has been laid down that the rule has no application

(*z*) *Paddock* v. *Forrester*, 3 M. & G. 903.
(*a*) *Re Harris*, 44 L. J. Bk. 33.
(*b*) *Peacock* v. *Harper*, 26 W. R. 109.
(*c*) *Wallace* v. *Small*, M. & M. 446.
(*d*) *In re River Steamer Co.*, L. R. 6 Ch. 822.
(*e*) *Holdsworth* v. *Dimsdale*, 19 W. R. 798.
(*f*) *Walker* v. *Wiltshire*, 23 Q. B. D. 337.

unless some person is in dispute or in negotiation with another, and also that it has no application to a document which in its nature may prejudice the person to whom it is addressed, and, therefore, when a letter headed "without prejudice" was sent by a debtor to one of his creditors, in which the debtor offered to compound for the debt, and stated that he was unable to pay his debts and would suspend payment unless the composition was accepted, it was held that the letter was admissible in evidence as being an act of bankruptcy by the debtor (*g*). The court is entitled to look at the document for the purpose of deciding as to its admissibility (*h*).

Admissions before Hearing or Trial.

In order to save expense and facilitate proceedings, it is usual and right for each party, previous to trial, to call on the opposite party to make various admissions, by which the party so admitting cannot be prejudiced, and to which therefore he cannot reasonably object. These admissions are now regulated and required by Order XXXII. of the R. S. C., 1883, which provides under Rule 1 that any party may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party. Under Rule 2 either party may call upon the other party to admit any document, saving all just exceptions (*i*). Under Rule 4 any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts

(*g*) *Re Daintrey*, [1893] 2 Q. B. 116.
(*h*) *Ibid.*
(*i*) In complying with this notice care should be taken that the words "saving all just exceptions," are expressly used.

mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the court or a judge certify that the refusal to admit was reasonable, or unless the court or a judge shall at any time otherwise order or direct. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also, that the court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

Rule 4 was new; but Rule 2 is substantially the same as Order XXXII., Rule 2, of the R. S. C., 1875, and is also similar to the practice existing prior to 1875 under the Common Law Procedure Act, 1852, and the Chancery Amendment Act, 1858. Under those Acts it was held that a party, by admitting a document, does not thereby in any way recognise its legal validity, but merely enables the opposite party to dispense with the usual evidence which would otherwise be necessary to bring it before the court. Thus, when a party admitted his signature to a bill of exchange, he was still allowed to object to the insufficiency of the stamp (*k*); and an admission on notice of certain documents which were described as copies of, or extracts from, certain original documents, was held not to make such copies evidence, in the absence of sufficient reason for the non-production of the originals (*l*). An admission of a bill of

(*k*) *Vane* v. *Whittington*, 2 Dowl. (N.S.) 757.
(*l*) *Sharpe* v. *Lambe*, 11 A. & E. 805.

exchange drawn by the plaintiff, directed to the defendants, "and accepted by one H. B. for the defendants," was held to estop the defendants from disputing H. B.'s authority to accept (*m*); and it has been held that, after admission of a deed, no objection can be taken to an erasure or interlineation which may afterwards appear (*n*). Where the defendant objected at the trial to an unexplained interlineation which had been admitted without objection, COLERIDGE, J., said:

"Before a party admits a deed it is produced to him for the very purpose of enabling him to inspect it, and say whether he objects to its admission in the form in which it appears to be written. Here it must be considered, either that the defendant really admitted that the deed was correct, and the interlineation no objection, or that the admission was made with the dishonest intention of entrapping the plaintiff; and as it must be presumed that the defendant acted upon the inspection of the deed upon which he had a right to act, I think the objection has been waived under the notice to admit."

Where there is a variance in date between the document admitted and that which is produced, it will be immaterial, unless the opposite party has been misled by it (*o*); but it ought to be shown that the document admitted and that produced are the same (*p*).

The courts will not sanction any agreement for an admission by which any of the known principles of law are evaded. No effect, therefore, will be given to an agreement to waive an objection arising from a deed not having been stamped (*q*).

Order XVIII., Rule 6, of the County Court Rules, 1903, contains the following provision:

"Where a party desires to give in evidence any document, he may, not less than five clear days before the trial, give notice to

(*m*) *Wilkes* v. *Hopkins*, 1 C. B. 737.
(*n*) *Freeman* v. *Steggal*, 14 Q. B. 202.
(*o*) *Field* v. *Fleming*, 5 Dowl. 450.
(*p*) *Clay* v. *Thackrah*, 9 C. & P. 47.
(*q*) *Owen* v. *Thomas*, 3 M. & K. 357.

any other party in the action or matter who is competent to make admissions requiring him to inspect and admit such document; and if such other party does not within three days after receiving such notice make such admission, any expense of proving the same at the trial shall be paid by him, whatever may be the result, unless the court otherwise orders; and no costs of proving any document shall be allowed unless such notice has been given, except in cases where, in the opinion of the judge at the trial, or of the registrar on taxation, the omission to give such notice has been a saving of expense."

CHAPTER XVII.

CONFESSIONS.

As in civil controversies the admissions of parties are received against their makers, so in criminal trials the confession of a prisoner is held to be evidence against him of a high nature; but since a person charged with a crime may be induced by his situation either to criminate himself untruly, under the influence of excitement or terror, or trusting to a promise of forgiveness by a prosecutor, or other person who may be presumed to have a power of pardoning, it has long been the policy of the criminal law to reject evidence of every confession or statement by a prisoner, which has been made under the pressure of any species of physical or moral duress. Whenever, therefore, at a criminal trial, there appears to be ground of reasonable suspicion that a confession of guilt has been elicited from a prisoner by a threat of punishment in the event of a refusal to confess, or by a promise of forgiveness on condition of confessing, the court will inquire strictly into the antecedent circumstances of the statement which is to be tendered, and will not receive it unless it is proved to have been the free and voluntary declaration of the prisoner. The rule, as now recognised, is the following:

The statement of a prisoner as to the circumstances of a crime with which he is charged is evidence against himself, provided the court is satisfied (*a*), that the statement be free and voluntary, and that it has not been

(*a*) *R.* v. *Thompson*, [1893] 2 Q. B. 12.

> extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence (*b*).

This rule has been established by a series of decisions.

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

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

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

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

On these grounds a confession will be inadmissible when it has been obtained by any threat or promise of favour held out by a prosecutor or his wife (*d*); by the prisoner's master or mistress when the crime has been committed against either of them, but not otherwise (*e*); by the attorney of such person in authority; by a constable, or anyone acting under a constable (*f*); and especially by a magistrate (*g*). The mere presence of a constable, however, is not enough, if he does not interfere in giving the advice or holding out the inducement (*h*).

(*b*) *R.* v. *Fennell*, 7 Q. B. D. p. 150. (*c*) 2 Den. C. C. 430.
(*d*) *R.* v. *Spencer*, 7 C. & P. 776.
(*e*) *R.* v. *Moore*, 2 Den. 522.
(*f*) *R.* v. *Enoch*, 5 C. & P. 535.
(*g*) *R.* v. *Drew*, 8 C. & P. 140.
(*h*) *R.* v. *Jarvis*, 1 C. C. R. 96; *R.* v. *Reeve*, 1 C. C. R. 362.

The inducement must be held out by a person who is presumably in authority, and who consequently has presumably power to forgive, or otherwise influence the current of events. The inducement need not be expressed, but may be implied (*i*), and it need not be made to the accused directly if it is intended to come, and does come, to his knowledge (*k*).

Where a maid-servant was indicted for child murder, a confession elicited from her by her mistress was held admissible, because the crime was in no way connected with the management of the house, and there was, therefore, no probability that the mistress or her husband would prosecute in it (*l*). So, too, when a confession is elicited by an inducement held out by a non-resident daughter of a prosecutor, it appears that she is not a person in authority competent to hold out an inducement, and that the confession is admissible (*m*). If, however, the inducement is made in the presence of a person in authority, such as a prosecutor, or one who is likely to be a prosecutor, who stands by and does not object, his silence is treated as a tacit acquiescence in the inducement, and the confession will be rejected (*n*); but where one of two prisoners said to the other in the presence of the prosecutor and a policeman, "you had better tell him the truth," and neither the prosecutor nor the policeman spoke, a confession made by the prisoner so addressed was held admissible (*o*); and so was a confession in the case where the mother of one of the prisoners (who were young boys) said to them, in the presence of a constable and of the mother of the other boy, "you had better, as good boys, tell the truth" (*p*). When the inducement is held out by a person who has no authority in the

(*i*) *R.* v. *Gilles*, 11 Cox, C. C. 69.
(*k*) See *R.* v. *Thompson*, [1893] 2 Q. B., at p. 17.
(*l*) *R.* v. *Moore*, 2 Den. 522.
(*m*) *R.* v. *Sleeman*, Dears. 269.
(*n*) *R.* v. *Luckhurst*, Dears. 245.
(*o*) *R.* v. *Parker*, L. & C. 42.
(*p*) *R.* v. *Reeve*, 1 C. C. R. 362.

matter, a confession will be admissible. Thus, when a prisoner's neighbours, who were not connected with the prisoner, advised her to tell the truth for the sake of her family, the confession was received (*q*). When the inducement has been once held out by a person in authority, no subsequent confession to such person will be admissible, unless it appear clear that the impression which it was calculated to make has been removed from the mind of the prisoner.

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

The prosecutor must prove affirmatively to the satisfaction of the judge that the confession was not obtained by improper means (*t*). In the absence of such satisfactory proof, the confession will not, of course, be received; and if a judge subsequently discovers that a confession has been improperly received, he will strike it from his notes, and direct the jury that it is to have no weight with them (*u*).

No general rule can be laid down as to the precise inducements which are sufficient to exclude a confession. But a confession will generally be excluded if a prisoner be told that it will be better for him if he confess, or worse for him if he do not confess (*x*); and the following are instances of inducement where a subsequent confession has been rejected:

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

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

(*q*) *R.* v. *Rowe*, Russ. & R. 153; *R.* v. *Taylor*, 8 C. & P. 733.
(*r*) *R.* v. *Gibbons*, 1 C. & P. 97.
(*s*) *R.* v. *Roswell*, C. & M. 584.
(*t*) *R.* v. *Warringham*, 2 Den. C. C. 447 n.
(*u*) *R.* v. *Garner*, 2 C. & K. 920. (*x*) 2 East. P. C. 659.
(*y*) *R.* v. *Parratt*, 4 C. & P. 570.
(*z*) *R.* v. *Cass*, 1 Leach C. C. 293 n.

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

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

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

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

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

"I should be obliged to you if you would tell us what you know about it; if you will not, of course we can do nothing for you" (*f*).

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

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

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

"You had better tell the truth"; or "Be sure to tell the truth" (*i*).

"If you will tell where the property is you shall see your wife" (*k*).

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

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

In *R.* v. *Fennell* (*m*), a confession made by the prisoner to the prosecutor in the presence of a police inspector immediately after the prosecutor had said to the prisoner, "The inspector tells me you are making house-breaking implements; if that is so, you had

(*a*) *R* v. *Upchurch*, 1 Moo. C. C. 465.
(*b*) *R.* v. *Richards*, 5 C. & P. 318.
(*c*) *R.* v. *Thomas*, 6 C. & P. 353.
(*d*) *R.* v. *Morton*, 2 M. & R. 514.
(*e*) *R.* v. *Walkley*, 6 C. & P. 175.
(*f*) *R.* v. *Partridge*, 7 C. & P. 551.
(*g*) *R.* v. *Warringham*, 2 Den. 447.
(*h*) *R.* v. *Rose*, 78 L. T. 119.
(*i*) *R.* v. *Court*, 7 C & P. 486; but see *R.* v. *Rose*, *ubi supra*.
(*k*) *R.* v. *Lloyd*, 6 C. & P. 393.
(*l*) 7 C. & P. 487.
(*m*) 7 Q. B. D. 147.

better tell the truth; it may be better for you," was held not admissible in evidence. It would seem, also, that a statement made by a prisoner in expectation of a reward and a pardon which have been offered by the Crown, is inadmissible (*n*).

Official questions.—A confession obtained by mere official questions, without threat or promise, is admissible (*o*); thus, where one member of the firm by whom the prisoner was employed called the latter into the counting-house, and said, in the presence of another member of the firm and two policemen:

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

and he then produced a letter (which the prisoner denied having written), and added, "Take care; we know more than you think we know"; and the prisoner thereupon made a confession: the court held, that the above words did not operate as an inducement or a threat, but were only in the nature of a warning, and admitted the evidence (*p*). If the master had added, "It will be better for you to tell the truth," the confession would have been held inadmissible.

Statements to police officers in reply to questions.—In *R.* v. *Baldry* (*q*), the policeman who apprehended the prisoner told him, at the time of the apprehension, that "he need not say anything to criminate himself; what he did say would be taken down and used in evidence against him." The prisoner then confessed, and the Court of Criminal Appeal held that these words

(*n*) *R.* v. *Blackburn*, 6 Cox, C. C. 333.
(*o*) *R.* v. *Thornton*, R. & M. 27.
(*p*) *R.* v. *Jarvis*, L. R. 1 C. C. R. 96.
(*q*) 2 Den. C. C. 430.

did not contain any promise or threat to induce the prisoner to confess, and the confession was admissible. There have been many decisions on this subject, but it is now well settled that the statements of an accused person in answer to questions put to him by a policeman or other officer are admissible, provided they are not brought about by any inducement of advantage or suggestion of advantage, or by any threat or suggestion of a threat (*r*).

It is also necessary in order to exclude a confession, that the inducement held out should contain some promise or prospect of a temporal benefit. If, therefore, it amounts to no more than a moral or religious exhortation, it will be admitted. Thus, where a person said to a boy of fourteen, who had been apprehended on a charge of murder, "Now, kneel you down by the side of me and tell me the truth"; and, on the boy doing so, added, "I am now going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty": the confession which followed was admitted by the judges (*s*). So the words, "Do not run your soul into more sin, but tell the truth," have been held not to contain an inducement (*t*).

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

Voluntary statements made by a prisoner before a committing magistrate are strictly admissible against

(*r*) *Rogers* v. *Hawken*, 78 L. T. 655. See also *R.* v. *Rose*, 78 L. T. 119.
(*s*) *R.* v. *Wild*, R. & M. 452.
(*t*) *R.* v. *Sleeman*, Dears. C. C. 269.
(*u*) *R.* v. *Shaw*, 6 C. & P. 372.
(*v*) *R.* v. *Spilsbury*, 7 C. & P. 187.

him; but before a magistrate asks a prisoner if he wishes to make any statement, he is bound to caution him in the language of 11 & 12 Vict. c. 42, s. 18. By that section it is provided that, after the examinations of all the witnesses on the part of the prosecution shall have been completed, the justice of the peace, or one of the justices by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read, or cause to be read, to the accused the depositions taken against him, and shall say to him these words, or words to the like effect:

"Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial";

and whatever the prisoner shall then say, in answer thereto, shall be taken down in writing and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as thereinafter mentioned; and afterwards, upon the trial of the said accused person, the same may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same; provided always, that the said justice or justices, before such accused person shall make any statement, shall state to him, and give him clearly to understand that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt; but whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat; provided, nevertheless, that nothing therein enacted or

contained shall prevent the prosecutor in any case from giving in evidence any admission or confession, or other statement of the person accused or charged. A voluntary statement by a prisoner before the depositions are complete, and before the statutory caution has been given, is admissible (*x*).

When a confession is inadmissible, every statement or act, which, presumably and reasonably, flows from it will be also inadmissible in evidence; for it is held that the influence which produces a groundless confession may also produce groundless conduct (*y*). But although a confession may be inadmissible, a witness may be asked whether, in consequence of something which the prisoner had said, he has made any discovery of other facts which bear on the case (*z*).

On a joint charge.—If two persons be charged jointly, the confession of one will not be evidence against the other, for a prisoner is called upon to answer depositions on oath, but not to make any answer to the statement of another prisoner (*a*); but the record of the conviction of a principal in a felony, who has pleaded guilty, is evidence against an accessory to the commission of the principal felony (*b*). On trials for conspiracy, where the conspiracy has been proved, the acts of one conspirator are evidence against the other conspirators. Thus it was held in *R.* v. *Hardy* (*c*), that the statements in the letters addressed by one conspirator to another were evidence against the latter.

Principals and agents are not criminally liable, as such, for their respective acts, and, therefore, cannot

(*x*) *R.* v. *Stripp*, Dears. C. C. 648; *R.* v. *Sansome*, 1 Den. C. C. 545.
(*y*) *R.* v. *Jenkins*, R. & R. 492.
(*z*) *R.* v. *Gould*, 9 C. & P. 364.
(*a*) *Per* PATTESON, J.; *R.* v. *Swinnerton*, C. & M. 593; *R.* v. *Appleby*, 3 Stark. 33.
(*b*) *R.* v. *Blick*, 4 C. & P. 377
(*c*) 24 How. St. Tr. 475.

be affected by each other's confessions. Thus, on Lord Melville's trial for embezzlement, it was held, that the admissions of his agent that the latter had received money on account of his principal only affected the principal with a civil liability, and that it could by no possibility convict him of a crime (*d*). There is an exception to this rule in the case of a libel published in a newspaper, where the proprietor is *primâ facie* liable for the insertion by his agent (*e*).

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

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

A confession made before magistrates must be proved at the trial by the depositions, unless it be clearly shown that the statement was not taken down at the time.

(*d*) 29 How. St. Tr. 764.
(*e*) *R.* v. *Gutch*, 1 M. & M. 433.
(*f*) *R.* v. *Sullivan*, 16 Cox, C. C. 347.
(*g*) *Per* PARKE, B.: *Earle* v. *Picken*, 5 C. & P. 542 n.

CHAPTER XVIII.

THE BURDEN OF PROOF.

On whom does the *onus probandi*, or burden of proof, rest, when an issue between two parties is before a tribunal? The answer to this question includes the answer to another, which causes frequently great controversy, as preliminary to the opening of a case, viz., which party has the privilege, or incurs the duty, of beginning? Practically, no point connected with judicial proof involves more subtle principles of law; and none involves more important advantages and disadvantages, according to the circumstances, to the contending parties. It is needless to insist on the importance which necessarily attaches to the order in which parties are allowed to state their cases to the court.

The general rule of the civil law has been adopted in England by courts of equity, as well as courts of law. *Ei incumbit probatio qui dicit, non qui negat.* The issue must be proved by the party who states an affirmative; not by a party who states a negative. In other words, it is a legal maxim that a negative cannot be proved. This rule is, however, subtler in substance than in form. Thus, a legal affirmative is by no means necessarily a grammatical affirmative, nor is a legal negative always a grammatical negative. A legal affirmative often comes in the shape of a grammatical negative, and a legal negative often appears as a grammatical affirmative.

The rule may, therefore, more correctly be laid down that—

The issue must be proved by the party who states the affirmative in substance, and not merely the affirmative in form.

There are two tests for ascertaining on which side the burden of proof lies: first, it lies upon the party who would be unsuccessful if no evidence were given on either side (*a*): secondly, it lies upon the party who would fail if the particular allegation in question were struck out of the pleading (*b*). And it is well established, that where the party on whom the *onus* lies of proving an allegation gives evidence as consistent with one view of the case as the other, he fails in his proof (*c*). The general rule is, however, subject to exceptions. Inasmuch as the law will not presume the commission of a crime or tort, the party alleging the commission of an act amounting thereto must prove it. In *Amos* v. *Hughes* (*d*), the court would not presume the work to have been done in an unworkmanlike manner; and in an action for putting combustible goods on board the plaintiff's ship without due notice, it was held that the plaintiff was bound to prove the negative (*e*). So, in an action for breach of a covenant or promise to repair, if the plaintiff alleges that the premises were not kept in repair, and the defendant pleads that they were, the plaintiff must begin, and prove the non-repair (*f*). So, in ejectment by a landlord, on a breach of covenant by defendant to insure the premises, the burden of proof lies on the plaintiff, because the object of the action is to defeat the estate granted to a lessee (*g*). In bankruptcy the burden is

(*a*) *Amos* v. *Hughes*, 1 M. & Rob. 464.
(*b*) *Mills* v. *Barber*, 1 M. & W. 427.
(*c*) 8 E. & B. 263; *cf. Cotton* v. *Wood*, 8 C. B. (N.S.) 568.
(*d*) 1 M. & Rob. 464.
(*e*) *Williams* v. *East India Co.*, 3 East, 193; *Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 45.
(*f*) *Soward* v. *Leggatt*, 7 C. & P. 613.
(*g*) *Doe* v. *Whitehead*, 8 A. & E. 571.

on the petitioning creditor to show that the debtor's domicil is in England (*h*); but if it is not disputed, he need not adduce evidence on the point in the first instance (*i*). The owner of the surface of land has a *primâ facie* right to have it properly supported from below, and the burden of proof is on any person claiming against such right (*k*). In a case where the plaintiffs had brought an action against the defendants for non-delivery of goods shipped under a bill of lading containing the usual exceptions, but not excepting negligence, the goods had been damaged by sea water through the stranding of the vessel, and the defendants claimed exemption from liability on the ground that the loss was occasioned by perils of the sea, to which the plaintiffs rejoined that, even if that were true, that peril of the sea was the result of negligent navigation on the part of the defendants' servants. It was held by the Court of Appeal that as the loss apparently fell within the exception, the burden of showing that the defendants were not entitled to the benefit of the exception, by reason of negligence, lay upon the plaintiffs. LOPES, L.J., in giving judgment said:

"It appears to me in this case that the burden of proving that the loss which has happened is attributable to an excepted cause lies on the person who is setting it up. That in this case would be the defendants, the shipowners. If, however, the excepted cause by itself is sufficient to account for the loss, it appears to me that the burden of showing that there is something else which deprives the party of the power of relying on the excepted clause lies on the person who sets up that contention. That in this case would be the plaintiffs, who are the shippers" (*l*).

Where a plaintiff sues for damages for negligence he must prove such negligence, and where the defence of

(*h*) *Ex parte Cunningham*, 13 Q. B. D. 418.
(*i*) *Ex parte Barnes*, 16 Q. B. D. 522.
(*k*) *Lore* v. *Bell*, 9 App. Cas. 286.
(*l*) *The Glendarroch*, [1894] P. 266.

contributory negligence is set up the burden of proving such contributory negligence is on the defendant; but if the contributory negligence is admitted by the plaintiff, or proved by the plaintiffs' witnesses while establishing negligence against the defendant, that is enough (*m*).

Where there is a disputable presumption of law in favour of one party, it will be incumbent on the other to disprove it.

The maxim *omnia præsumuntur ritè esse acta* has considerable effect in shifting the burden of proof. Therefore, by s. 30 of the Bills of Exchange Act, 1882 (*n*), it is provided as follows:

"(1) Every party whose signature appears on a bill is primâ facie deemed to have become a party thereto for value: (2) Every holder of a bill is primâ facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill."

These provisions substantially reproduced the law as it stood on the cases at the time of the passing of the Act. Before the Act it had been held that when a bill sued on was accepted in the name of a firm, but the acceptance was proved to be by one of the partners in fraud of the partnership and contrary to the partnership articles, the *onus* was on the plaintiff to show that he gave consideration for the bill (*o*). On the principle that, where an act is tainted apparently with illegality, the party justifying it must disprove its illegality, a defendant in libel, who pleads a fair report of proceedings

(*m*) *Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 45.
(*n*) 45 & 46 Vict. c. 61.
(*o*) *Hogg* v. *Skeen*, 18 C. B. (N.S.) 426.

in a court of justice, must prove the correctness of the report (*p*). In actions for libel where the occasion is a privileged one, the *onus* is on the plaintiff to prove that the defendant was actuated by malice (*q*); and in actions for malicious prosecution the *onus* is of course on the plaintiff, who must show that the proceeding was entirely groundless, and it is not sufficient for him to prove the dismissal of the charge (*r*). The *onus* is on those who seek to charge an executor or trustee with a loss arising from the default of an agent where the propriety of employing an agent has been established (*s*). Where a false representation is made to a person for the purpose of inducing him to enter into a contract and he does enter into it, the burden of proof in an action to enforce the contract lies on the party who made the representation to show that the other party did not rely on it (*t*).

Whenever it is alleged by a party to a deed or his privy that the recitals in such deeds are untrue, the burden of proving their falsehood rests upon such party or privy, who is *primâ facie* bound by such recitals as admissions (*u*). Where a person sued upon a covenant in restraint of trade sets up its invalidity, it is for him to prove that it is invalid (*x*). In patent cases the burden of proof of infringement is ordinarily on the patentee (*y*); and where a defendant denies the novelty of the plaintiff's invention, the burden of proving the issue thus raised is on him, but the plaintiff can call evidence in reply to rebut the defendant's evidence on this point (*z*).

(*p*) *Melissich* v. *Lloyd*, 46 L. J. C. P. 404.
(*q*) *Clark* v. *Molyneux*, 3 Q. B. D. 237; approved, *Jenoure* v. *Delmege*, [1891] A. C., at p. 79.
(*r*) *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. 247.
(*s*) *Brier* v. *Evison*, 26 Ch. D. 238.
(*t*) *Redgrave* v. *Hurd*, 20 Ch. D. 1.
(*u*) *Melbourne Banking Corporation* v. *Brougham*, 7 App. Cas. 307.
(*x*) *Rousillon* v. *Rousillon*, 14 Ch. D. 351.
(*y*) *Neilson* v. *Betts*, L. R. 5 E. & I. 1.
(*z*) *Penn* v. *Jack*, L. R. 2 Eq. 314.

When a person, who is able to exercise what has been termed "dominion" over another, takes a benefit from him, such person must prove that the transaction was a righteous one (*a*), and that the gift was intended to be given (*b*). This is not confined to cases of parent and child, guardian and ward, solicitor and client, and the like, but extends to every case in which two persons are so situated that one may obtain considerable influence over the other (*c*). But if a married woman, who has purported to charge her separate property for money advanced to her husband, alleges undue influence, she must prove it (*d*). Where a married woman, living apart from her husband, contracts debts, the Court of Chancery will impute to her an intention to deal with her separate property (*e*), and throw upon her the *onus* of proving the contrary.

An important general principle was laid down in the opinion of the judges upon the case submitted to them by the House of Lords in *The Banbury Peerage Case* (*f*), thus:

"Where there is *primâ facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question."

Therefore, where there is a *primâ facie* right to light in the grantee of land, the burden of proving any limitation of such right is upon the grantor who alleges it (*g*). So a court always treats a deed or instrument, which is *primâ facie* good, as what it

(*a*) *Cooke* v. *Lamotte*, 15 Beav. 240; *cf. Allcard* v. *Skinner* 38 Ch. D. 145.
(*b*) *Walker* v. *Smith*, 29 Beav. 396; *cf. Turner* v. *Collins*, L. R. 7 Ch. 329.
(*c*) *Cf. ante*, p. 57.
(*d*) *Field* v. *Sowle*, 4 Russ. 112.
(*e*) *Johnson* v. *Gallager*, 3 De G. F. & J. 521; approved by the Judicial Committee of the Privy Council in *London Chartered Bank of Australia* v. *Lemprière*, L. R. 4 P. C. 572.
(*f*) 1 S. & S. 155.
(*g*) *Broomfield* v. *Williams*, [1897] 1 Ch. 602.

purports to be (*h*), and the *onus* of proving that it is not what it purports to be, or that it is invalid, rests upon the party impeaching it (*i*). But where a will is propounded, there are two rules of law which are always acted upon:

"The first that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased" (*k*).

In another case (*l*) it was held:

"That the second rule is not confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will."

In criminal proceedings the burden of proof, as a general rule, rests on the prosecution, on account of the presumption of the innocence of the accused. That burden is discharged in cases of murder and manslaughter by simply proving the killing of the deceased, and it is for the accused to prove, if he can, those facts which will reduce the act to one of manslaughter or justifiable or excusable homicide. But the practice is for the prosecution to produce all persons present when

(*h*) *Jacobs* v. *Richards*, 18 Beav. 303.
(*i*) *Nichol* v. *Vaughan*, 1 C. & F. 49.
(*k*) *Per* PARKE, B., in *Barry* v. *Butlin*, 2 Moo. P. C. 480.
(*l*) *Tyrrell* v. *Painton*, [1894] P. 151.

the killing took place, so that they shall be available as witnesses if required. In a variety of cases the legislature has thrown the burden of proving authority, consent or lawful excuse on the defendant in criminal proceedings. Thus, by the Summary Jurisdiction Act, 1879 (*m*), s. 39 (2), it is enacted that:

"Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, byelaw, regulation, or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant" (*n*).

In the case of offences under s. 2 of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), the burden of proof of the exemptions is thrown on the defendant. So, too, when a person is charged with making or possessing coining tools, under 24 & 25 Vict. c. 99, s. 24, without lawful authority or excuse, the burden of proving that he had such authority or excuse rests on him. By s. 17 of the Prevention of Cruelty to Children Act, 1894 (*o*), it is enacted that:

"Where a person is charged with an offence under this Act, or any of the offences mentioned in the schedule to this Act, in respect of a child who is alleged in the charge or indictment to be under any specified age, and the child appears to the court to be under that age, such child shall for the purposes of this Act be deemed to be under that age, unless the contrary is proved."

This applies whether the child is produced in court or not. Where the child is not produced the prosecution must of course give satisfactory evidence of age. But a certificate of birth need not be put in (*p*).

(*m*) 42 & 43 Vict. c. 49.
(*n*) A similar provision will be found specifically incorporated into many modern Acts of Parliament creating offences.
(*o*) 57 & 58 Vict. c. 41.
(*p*) *R.* v. *Cox*, [1898] 1 Q. B. 179.

The Betting and Loans (Infants) Act, 1892 (*q*), contains important provisions as to the *onus probandi* on the defendant in prosecutions under ss. 1 and 2.

In an action for goods sold and delivered, with a plea of infancy, the *onus probandi* lies upon the defendant; as the law presumes that, when a man contracts, he is of proper age to contract, until the contrary be shown (*r*). So, negligence in carriers (*s*), legitimacy of children born in wedlock (*t*), duration of life (*u*), and insanity, are all issues in which the *onus probandi* is regulated by the legal presumption as to the fact: and the party who disputes the truth of the presumption in the particular case is bound to show that it does not apply (*x*).

Another exception to the above-stated general rule arises from the principle that:

> In every case the *onus probandi* lies on the person who wishes to support his case by a particular fact which lies peculiarly within his knowledge, or of which he is reasonably cognizant (*y*).

Thus, generally, in summary proceedings before magistrates, the defendant, who claims a qualification, and not the informer who charges the want of it, must prove the fact; for this is peculiarly within the knowledge of the former (*z*). This principle has been

(*q*) 55 Vict. c. 4; see Appendix.
(*r*) *Hartley* v. *Wharton*, 11 A. & E. 934.
(*s*) *Marsh* v. *Horne*, 5 B. & C. 322.
(*t*) *Plowes* v. *Bossey*, 2 D. & S. 145. See also *ante*, p. 59.
(*u*) See *ante*, p. 74.
(*x*) *Hall* v. *Warren*, 9 Ves. 611.
(*y*) *Per* HOLROYD, J.: *R.* v. *Burdett*, 4 B. & Ald. 140.
(*z*) *R.* v. *Turner*, 5 M. & S. 206.

expressly imported into the Game Act, 1831 (1 & 2 Will. 4, c. 32, s. 42), which enacts that:

"It shall not be necessary in any proceeding against any person under this Act to negative by evidence any certificate, licence, consent, authority, or other matter of exception or defence; but the party seeking to avail himself of any such certificate, licence . . . shall be bound to prove the same."

Under the Licensing Act, 1872 (*a*), the burden of proving that the person supplied was a *bonâ fide* traveller, rests on the defendant; but, by the Licensing Act, 1874 (*b*), if he fails in such proof, but the justices are satisfied that the defendant truly believed that the purchaser was a *bonâ fide* traveller, and further that the defendant took all reasonable precautions to ascertain whether or not the purchaser was such a traveller, the justices shall dismiss the case as against the defendant.

The burden of proving that he did not know that a ship, built by order of or on behalf of any foreign state when at war with a friendly state, was intended to be used and employed in the military and naval service of such foreign state, is thrown upon the builder of such ship by the Foreign Enlistment Act, 1870 (*c*); and by s. 24 of the Elementary Education Act, 1873 (*d*), when a child is apparently of the age alleged for the purposes of any legal proceedings under that Act, or the Elementary Education Act, 1870 (*e*), it shall lie on the defendant to prove that the child is not of such age. And by s. 3 of the Betting and Loans (Infants) Act, 1892 (*f*), where such a document as mentioned in the previous sections is sent to any person at any place of education, and such person is an infant, the person sending, or causing to be sent, the document, shall be deemed to have

(*a*) 35 & 36 Vict. c. 94.
(*b*) 37 & 38 Vict. c. 49.
(*c*) 33 & 34 Vict. c. 90.
(*d*) 36 & 37 Vict. c. 86.
(*e*) 33 & 34 Vict. c. 75.
(*f*) 55 Vict. c. 4.

known that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age.

When a plaintiff takes an inquiry as to damages arising from the use of his trade mark by the defendant, the *onus* of proving some special damage by loss of custom or otherwise rests upon him (*g*); and in suits to restrain the sale of a patented article, it is incumbent on the plaintiff, not only to prove the sale, but to prove that the article was not made by himself or his agents (*h*).

In practice the plaintiff generally begins, because, to quote the words of Lord DENMAN, in *Mercer* v. *Whall* (*i*).

"It appears expedient that the judge, the jury, and the defendant himself, should know precisely how the claim is shaped. This disclosure may convince the defendant that the defence which he has pleaded cannot be established. On hearing the extent of the demand, the defendant may be induced at once to submit to it rather than persevere. Thus the affair reaches its natural and best conclusion. If this does not occur, the plaintiff, by bringing forward his case, points his attention to the proper object of the trial, and enables the defendant to meet it with the full understanding of its nature and character."

The strict rule, however, is that:

The party on whom the *onus probandi* lies, as developed by the record, must begin.

But it is considered that the plaintiff must begin in actions of libel, slander, and injuries to the person, and in all other actions in which the plaintiff seeks to recover unliquidated damages, and wherever there are several issues, and the burden of proving any one of them lies on the plaintiff, he is entitled to begin, provided he undertakes to give evidence on such issue.

(*g*) *Leather Cloth Co.* v. *Hirschfield*, L. R. 1 Eq. 299.
(*h*) *Betts* v. *Willmott*, L. R. 6 Ch. 239.
(*i*) 5 Q. B. 447.

By sub-s. (7) of s. 26 of the Patents, Designs and Trade Marks Act, 1883 (*k*), on the hearing of a petition for the revocation of a patent, the defendant is entitled to begin. Order XXXVI., Rule 22 of R. S. C., 1883, that when at the trial the defendant appears and the plaintiff does not, the defendant, if he has no counterclaim, shall be entitled to judgment dismissing the action, applies, even when the burden of proof is on the defendant (*l*).

The Merchant Shipping Act, 1894 (*m*), contains in s. 697 some provisions relative to the burden of proof in proceedings as to offences thereunder. It is as follows:

"Any exception, exemption, proviso, excuse, or qualification, in relation to any offence under this Act, whether it does or does not accompany in the same section the description of the offence, may be proved by the defendant, but need not be specified or negatived in any information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant."

(*k*) 46 & 47 Vict. c. 57.
(*l*) *Armour* v. *Bate*. [1892] 2 Q. B. 233.
(*m*) 57 & 58 Vict. c. 60.

CHAPTER XIX.

JUDICIAL NOTICE AND THE PROOF OF FOREIGN LAWS.

THE courts take judicial notice of numerous facts, which it is therefore unnecessary to prove. Theoretically all facts which are not judicially noticed must be proved; but there is an increasing tendency on the part of judges to impart into cases heard by them their own general knowledge of matters which occur in daily life.

They notice all the public Statutes of the realm (*a*); and indeed every Statute passed since 1850, unless the contrary is expressly provided by such Statute (*b*); their own course of procedure and practice, and also of the procedure and privileges of both Houses of Parliament; the maritime law of nations (*c*); a war in which the country is engaged, but not a war between foreign countries (*d*); the great and privy seals (*e*); royal proclamations; the preamble of an Act (*f*); the signature of the Clerk of Parliaments (*g*); the "London Gazette"; almanacks and divisions of the years; the status of a foreign sovereign or state, and the boundaries of the territories of such a sovereign or state, the Foreign or Colonial Office, as the case may be, having been applied to by the court for information (*h*); the negotiability of bonds to bearer whether Government or trading bonds, and whether foreign or English (*i*):

(*a*) *Pugh* v. *Robinson*, 1 T. R. 116.
(*b*) Interpretation Act, 1889, s. 9.
(*c*) *Chandler* v. *Grieves*, 2 H. Bl. 606 n.
(*d*) *Dolder* v. *Huntingfield*, 11 Ves. 292.
(*e*) 29 How. St. Tr. 707.
(*f*) *R.* v. *Sutton*, 4 M. & S. 532.
(*g*) *Badische Anilin, etc.* v. *Levinstein*, 4 R. P. C. 470.
(*h*) *Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 161; *Foster* v. *Venture Syndicate*, [1900] 1 Ch. 811.
(*i*) *Edelstein* v. *Schuler*, [1902] 2 K. B. 144.

indeed all customs established by the course of judicial decision, *e.g.*, the custom of hotel-keepers to carry on business with furniture which is not their own (*k*), and that bankers have a general lien on their customers' securities deposited with them as bankers in the absence of special circumstances (*l*).

The existence of a custom is a question of fact, and it is necessary to prove the custom in each case until it becomes so well known that the courts take judicial notice of it (*m*).

Custom of the City of London can be proved by the certificate of the Recorder, and when it has been so certified the court will take judicial notice of it (*n*).

By the Documentary Evidence Act, 1845 (*o*), s. 3, all copies of royal proclamations, purporting to be printed by the Queen's printer, are made evidence thereof in all courts, without proof being given that such copies were so printed. By the Documentary Evidence Act, 1868 (*p*), this principle was extended to orders or regulations in council, and to proclamations, orders and regulations issued by any of the Government departments or officers specified in the schedule to the Act. This Act provides that *primâ facie* evidence of any such proclamation, order or regulation may be given in any of the modes specified in the Act (*q*). The Documentary Evidence Act, 1882 (*r*), provides (s. 2) that—

"Where any enactment, whether passed before or after the passing of this Act, provides that a copy of any Act of Parliament, proclamation, order, regulation, rule, warrant, circular, list, gazette, or document shall be conclusive evidence, or be evidence, or have any other effect, when purporting to be printed by the Government Printer, or the Queen's Printer, or a printer authorised by her Majesty, or otherwise under her Majesty's authority, whatever may be the precise expression used, such copy shall also be

(*k*) *Ex parte Turquand*, 14 Q. B. D. 636.
(*l*) *London Chartered Bank of Australia* v. *White*, 4 App. Cas. 422.
(*m*) *Per* CHANNELL, J., in *Moult* v. *Halliday*, [1898] 1 Q. B. 129.
(*n*) *Crosbie* v. *Hetherington*, 4 M. & G. 933.
(*o*) 8 & 9 Vict. c. 113. See Appendix.
(*p*) 31 & 32 Vict. c. 37. See Appendix.
(*q*) See *Huggins* v. *Ward*, 21 W. R. 914. (*r*) 45 & 46 Vict. c. 9.

conclusive evidence, or evidence, or have the said effect (as the case may be) if it purports to be printed under the superintendence or authority of Her Majesty's Stationery Office."

This Act also provides (s. 4) that—

"The Documentary Evidence Act, 1868, as amended by this Act, shall apply to proclamations, orders, and regulations issued by the Lord Lieutenant, either alone or acting with the advice of the Privy Council in Ireland, as fully as it applies to proclamations, orders, and regulations issued by her Majesty."

By the Documentary Evidence Act, 1895 (*s*), the Documentary Evidence Act, 1868, as amended by the Documentary Evidence Act, 1882, is made applicable to the Board of Agriculture.

By the Documentary Evidence Act, 1845 (s. 1), it is enacted that, whenever by any Act then in force or thereafter to be in force,

"any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, byelaw, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence."

And also (s. 2)—

"All courts, judges, justices, masters in Chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document."

(*s*) 58 Vict. c. 9.

By 14 & 15 Vict. c. 99, s. 10, judicial notice is to be taken in England and Wales of documents admissible in evidence of any particular in any court of justice in Ireland.

The Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 6, which gives powers as to oaths and notarial acts abroad to British Ambassadors, and certain other officials, provides that—

"Any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal and signature of any person authorised by this section to administer an oath in testimony of any oath, affidavit, or act being administered, taken, or done by or before him, shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person, or of the official character of that person."

Affidavits or proofs in Bankruptcy sworn abroad before a consul or vice-consul are admissible under this section without further verification (*t*).

The Companies Act, 1862 (*u*), provides by s. 125, that in all proceedings under that Act judicial notice shall be taken of the signature of any officer of the Courts of Chancery or Bankruptcy in England, or in Ireland, or of the Court of Session in Scotland, or of the registrar of the Court of the Vice-Warden of the Stannaries, and also of the official seal or stamp of the several officers of such courts respectively.

By s. 61 of the Judicature Act, 1873 (*x*), judicial notice is to be taken of the seals of district registries and by s. 84 of the Patents, Designs, and Trade Marks Act, 1883 (*y*), impressions of the seal of the Patent Office are to be judicially noticed and admitted in evidence.

It appears to be the rule that the seal of a notary public in any part of her Majesty's dominions will be judicially noticed, but not the seal of a foreign notary public. It may be remarked that the certificate of a

(*t*) *Ex parte Magee*, 15 Q. B. D. 332.
(*u*) 25 & 26 Vict. c. 89.
(*x*) 36 & 37 Vict. c. 66.
(*y*) 46 & 47 Vict. c. 57.

notary public of a protest abroad of a foreign bill of exchange is evidence of that fact, but as a rule notarial or consular certificates are not evidence of facts certified, *e.g.*, the mere production of the certificate of a notary public stating that a deed had been executed before him will not in any way dispense with the proper evidence of the execution of the deed (*z*).

Foreign law.—Judicial notice is not taken of the laws or customs of foreign states, but such laws must be proved like facts by skilled witnesses (*a*). No witness will be competent to prove foreign law unless he appear to have filled an official position, or to be connected manifestly with the legal profession, or to have been in some position in which it is probable that he would have acquired a practical acquaintance with the law in question (*b*). In *The Sussex Peerage Case* (*c*), a Roman Catholic Bishop in England was called to give evidence as to the law of marriage at Rome. It appeared that it was part of his official duties to decide for spiritual purposes questions as to the validity of marriages between Roman Catholics, and that for this purpose he had to apply the law of Rome. It was held that his evidence was admissible, as he was engaged in the performance of important and responsible public duties, and that in order to discharge them properly he was bound to make himself acquainted with the law in question. A legal practitioner practising before the Privy Council is not an expert qualified to give evidence concerning the law of those countries for which the Privy Council is the ultimate Court of Appeal (*d*). A person who formerly carried on business as a merchant and commissioner of stocks at Brussels has been allowed to prove what the usage in Belgium is as to the

(*z*) *Nye* v. *Macdonald*, L. R. 3 P. C. 343.

(*a*) By 24 & 25 Vict. c. 11, s. 1, the courts are empowered to remit a case to a court of any foreign state to ascertain the law of such state, if a convention has been entered into with such state.

(*b*) *Van der Donckt* v. *Thellusson*, 8 C. B. 812.

(*c*) 11 C. & F. 134. (*d*) *Cartwright* v. *Cartwright*, 26 W. R. 682.

presentment of promissory notes there (*e*). A person who has acquired, by study in one country, a merely theoretical knowledge of the laws of another country is not competent to prove the laws of such country (*f*); but the certificate of a foreign ambassador, under the seal of the legation, has been held evidence of the law of the country by which he was accredited (*g*). Foreign law cannot be proved in England (*h*), as it can in some countries, by books printed or published under the authority of the government of a foreign country, and purporting to contain the statutes, code, or other law of such country, nor by printed or published books of reports of decisions of the courts of such country, nor by books proved to be commonly admitted in such courts as evidence of the law of such country. A witness called to prove foreign law may, however, refer to laws or treatises to aid his memory (*i*); and if the witness states that any text-book, decision, code, or other legal document truly represents the foreign law which he is called to prove, the court may look at the treatise and treat it and give effect to it as part of the testimony of the witness (*k*). A question of foreign law being one of fact must in every action be decided on evidence adduced in that action, and not by a previous decision, or on evidence adduced in another action (*l*).

Colonial laws (*m*) **and the laws of Scotland** are regarded as foreign law for the purposes of proof, except that in the House of Lords judicial notice is taken of Scotch law (*n*).

(*e*) *Van der Donckt* v. *Thellusson*, 8 C. B. 812.
(*f*) *Bristow* v. *Sequeville*, 5 Exch. 275; *In the Goods of Bonelli*, 1 P. D. 69.
(*g*) *In the Goods of Klingeman*, 3 S. & T. 18.
(*h*) *Sussex Peerage Case*, 11 C. & F. 134.
(*i*) See *Nelson* v. *Lord Bridport*, 8 Beav. 538, and *Sussex Peerage Case*, 11 C. & F. 116.
(*k*) *Concha* v. *Murietta*, 40 Ch. D. 554.
(*l*) *M'Cormick* v. *Garnett*, 5 De G. M. & G. 278.
(*m*) *Wey* v. *Galley*, 6 Mod. 194.
(*n*) *Cooper* v. *Cooper*, 13 App. Cas. 88.

In order to afford facilities for the more certain ascertainment of the law administered in one part of her Majesty's dominions, when pleaded in the courts of another part thereof, it has been enacted that:

"If in any action depending in any court within her Majesty's dominions, it shall be the opinion of such court, that it is necessary or expedient for the proper disposal of such action to ascertain the law applicable to the facts of the case as administered in any other part of her Majesty's dominions on any point on which the law of such other part of her Majesty's dominions is different from that in which the court is situate, it shall be competent to the court in which such action may depend to direct a case to be prepared setting forth the facts, as these may be ascertained by verdict of a jury or other mode competent, or may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the court for that purpose in the event of the parties not agreeing; and upon such case being approved of by such court or a judge thereof, they shall settle the questions of law arising out of the same on which they desire to have the opinion of another court, and shall pronounce an order remitting the same, together with the case, to the court in such other part of her Majesty's dominions, being one of the superior courts thereof, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act . . ." (*o*).

When an opinion has been thus obtained, the court in which the action is pending is to apply such opinion to such facts, or to order such opinion to be submitted to the jury, with the other facts of the case, as evidence, or conclusive evidence as the court may think fit, of the foreign law therein stated (*p*). Under this Act the law of Scotland has been ascertained by a case remitted to the Court of Session in Scotland (*q*), and the law of Bengal by a case remitted to the Supreme Court of Bengal (*r*).

(*o*) 22 & 23 Vict. c. 63, s. 1.
(*p*) 22 & 23 Vict. c. 63, s. 3.
(*q*) *Lord* v. *Colvin*, 1 D. & S. 24.
(*r*) *Legin* v. *Princess of Coorg*, 30 Beav. 632.

PART II.

CHAPTER I.

WRITTEN EVIDENCE.

In the first part of this work the general principles of evidence, and their application to the issue, have been considered, but chiefly in relation to oral evidence. In the second part, written or documentary evidence will be discussed. It will be first desirable to add a few more remarks upon a branch of the subject which has been already touched upon; and to show generally in what cases written instruments are treated as primary and best evidence, and in what cases as secondary and inferior evidence.

When a writing purports to be in the nature of a public or judicial record, the deliberate solemnities with which its settlement and recognition are presumed to have been accompanied render it clearly the best and primary evidence of the matters to which it refers. So, where a contract is required by the law to be in writing or has been voluntarily put into writing by the parties, all controversy as to its purport and effect ought clearly to be determined by the inspection of the written instrument, and therefore the written contract must as a general rule be produced, and though oral evidence may be given to explain such a written contract, it cannot be given to vary it, except when in equity relief is sought on the ground of mistake or

surprise (*a*). Similarly, where a writing or print is the very matter in issue, as in libel, oral evidence of the words of the libel is inadmissible as long as the writing, or print, is producable; and where it appears that a representation or statement by a witness was made in writing, his own act operates against him in the nature of an estoppel *in pais*, and he will not be allowed to say what the statement was, but the writing must be produced to prove it. Thus, a witness cannot be asked whether his name is written in a book; but the book must be produced, or its non-production be excused according to the principles under which secondary evidence is admissible (*b*). He cannot be examined as to the contents of a letter, but the whole of it must be read (*c*). In all such cases oral evidence will be inadmissible, until it be proved that every endeavour has been used, without success, to produce the writing.

An anomalous exception to the rule that parol secondary evidence is inadmissible where there is parol primary evidence which ought strictly to be produced, is found in the principle that,

"whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions must involve what must necessarily be contained in some deed or writing; for instance, a statement by a party, or one under whom he claims, that an estate has been conveyed to or from such person, or that such person filled the character of assignee—which could only be by deed."

The learned judge who laid down this principle as above added that

"the reason why such statements are admissible, without notice to produce or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources when the written evidence might have been produced; for such evidence is excluded from

(*a*) *Price* v. *Ley*, 32 L. J. Ch. 530.
(*b*) *Darby* v. *Ouseley*, 1 H. & N. 1.
(*c*) *Queen's Case*, 2 B. & B. 286.

the presumption of its untruth from the very nature of the case, when better evidence is withheld; whereas what a party himself admits to be true may reasonably be presumed to be so. The weight and value of such testimony is quite another question" (*d*).

In the case of *Slatterie* v. *Pooley* (*e*), in which this judgment was given, it was necessary to show that a certain debt was included in an insolvent's schedule. The schedule itself was tendered and rejected, because it was not duly stamped. Evidence was then tendered and rejected of a verbal admission by the defendant that the debt was included in the schedule. On a rule for a new trial, for improper rejection of this evidence, the court held that it ought to have been received, on the principle stated above. The decision in *Slatterie* v. *Pooley* has been severely attacked both in England and Ireland. But it has survived those attacks. On a similar principle, where, on an action for contribution towards money paid on a written contract, there was evidence of the express authority of the defendant to enter into the contract, of the execution thereof, and that the defendant, when informed of the amount paid, did not dispute his liability, it was held that the contract need not be put in evidence (*f*). This exception has excited much controversy, and, if fully carried out, would act perhaps as a virtual abolition of the general rule with which it professes to be consistent; but it was sanctioned by the Court of Exchequer, although it is limited to cases in which the admission has been voluntary by the party making it, since he cannot be compelled to make such admissions, nor ought questions which tend to elicit them to be allowed (*g*). Where a party gives a portion of a writing in evidence, the adverse party is entitled to have read all other passages which are connected with, or construe, control, modify, qualify, or explain the

(*d*) *Per* PARKE, B.: *Slatterie* v. *Pooley*, 6 M. & W. 668. See also *R.* v. *Basingstoke*, 14 Q. B. 611.
(*e*) *Ubi supra.* (*f*) *Chappell* v. *Bray*, 6 H. & N. 145.
(*g*) *Darby* v. *Ouseley*, 1 H. & N. 1.

passages which have been read; but not distinct passages, or passages which are irrelevant to, or not explanatory of, such first-mentioned passages (*h*).

Where the writing is merely in the nature of a personal memorandum, which has been drawn up by a witness for his own convenience, it is inadmissible as a writing, but may be used by the witness to refresh his memory. Letters to a party are only received on the presumption that, by answering them, or acting on them, or even by the bare act of receiving them, he has connected them with the controversy between himself and the writer; but a mere written statement, not made on oath by one party, and not shown to have come to the knowledge and to have been recognised or adopted in some way by another party, is no evidence against the latter.

The general rule for determining whether a writing is primary or secondary evidence, is to consider whether it contains the substance of the issue, and is in the nature of a contract or an admission by the parties, or whether it is only a personal memorandum. In the former case it must be produced as the best evidence; in the latter, it is admissible only to refresh and guide the memory of the witness in his oral depositions. Thus, records are in the nature of a contract between parties, which has been settled and ratified by public consent, as expressed in a judicial act; they are, therefore, primary evidence; but a public Act of Parliament is in the nature of a memorandum, for judges and the public, of laws which every one is presumed to have engraven in his memory (*i*).

Writings are either public or private; and public writings are either judicial or non-judicial. These will now be considered in their order.

(*h*) See *Darby* v. *Ouseley*, 1 H. & N. 1.
(*i*) *R.* v. *Sutton*, 4 M. & S. 532.

CHAPTER II.

PUBLIC JUDICIAL DOCUMENTS.

THE proof of the most important public judicial documents will here be treated of.

ACTS OF PARLIAMENT.

These are either public or private. The former are, theoretically, not proved, as the court takes cognisance of them; but, practically, they are generally proved by copies purporting to be printed and published by the King's printer; and this course seems to be implied from the terms of 41 Geo. 3, c. 90, s. 9, which enacts that the Statutes of England and of Great Britain, printed and published by the King's printer, shall be received as conclusive evidence in the Irish courts; and the Statutes of Ireland, prior to the Union, so printed and published, shall be received in like manner in any court of civil or criminal jurisdiction in Great Britain. If there be ground for supposing the printed copy inaccurate, reference should be had to the Parliament Roll (*a*). Every Act passed after 1850 is a public Act, unless the contrary is expressly provided by such Act (*b*).

Private, local, and personal Acts, which are not public Acts, can be proved under the Documentary Evidence Act, 1845 (*c*), s. 3, by copies purporting to be printed by the King's printer, without necessarily any further proof that they were so printed. Even this proof is unnecessary if the Act contains a clause

(*a*) *Price* v. *Hollis*, 1 M. & S. 105.
(*b*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 9.
(*c*) 8 & 9 Vict. c. 113.

declaring it to be a public Act, and that it shall be taken notice of as such without being specially pleaded (*d*); but such a clause will not render it evidence against third parties (*e*).

The 3rd section of the last-mentioned Act also declares that all copies of the journals of either House of Parliament and of royal proclamations, purporting to be printed by the printers to the Crown, or of either House, shall be admitted in all cases as evidence thereof without proof of their being copies so printed.

By s. 2 of the Documentary Evidence Act, 1882 (*f*), copies printed under the superintendence or authority of His Majesty's Stationery Office are also admissible.

RECORDS.

Where the existence of a record is in issue, the record itself, if producible, must be produced (for which purpose an order of a judge or master is now necessary (R. S. C., Order LXI., Rule 28)) by exemplification under the great Seal or by an examined copy. Speaking generally, a record may be proved by an office copy (under R. S. C., Order XXXVII., Rule 4), or by an examined copy.

By the 1 & 2 Vict. c. 94, the Master of the Rolls is made superintendent of the general records of the realm, and is empowered to make rules for the admission of such persons as ought to be admitted to the use of such records: and he is authorised personally, or by deputy, to allow copies to be made of such records. This is because it is expedient to allow the free use of any public records as far as stands with their safety and integrity, and with the public policy of the realm. By s. 13, a certified copy of any record, sealed with the

(*d*) *Woodward* v. *Cotton*, 1 C. M. & R. 14.
(*e*) *Brett* v. *Beales*, M. & M. 421.
(*f*) 45 & 46 Vict. c. 9.

seal of the Record Office, is evidence in every case in which the original record would be admissible; and by s. 12, any person desirous of procuring such a copy may do so at his own cost by permission of the Master of the Rolls: but such copy shall be admissible to prove the record, only after examination and certificate, under seal, by the Deputy Keeper of the Records, or one of the assistant record keepers.

By the County Court Acts, 1888 (*g*), s. 180, it is provided that—

"For every court there shall be a seal of the court, and all summonses and other process issuing out of the said court shall be sealed or stamped with the seal of the court, and all such summonses and other process purporting to be so sealed shall in England be received in evidence without further proof thereof; and every person who shall forge the seal or any process of the court, or who shall serve or enforce any such forged process, knowing the same to be forged, or deliver or cause to be delivered to any person any paper falsely purporting to be a copy of any summons or other process of the said court, knowing the same to be false, or who shall act or profess to act under any false colour or pretence of the process or authority of the said court, shall be guilty of felony."

Although all judicial proceedings, which are regulated as to the mode of proving them by the above Statutes, should be proved conformably to them, yet as their language is declaratory and directory, and is not compulsory, the records of superior and inferior courts may be proved, by means of examined copies, when they are obtainable. An examined copy must be proved to be such by a witness who has compared the copy word for word with the original, or who has examined the copy while another person read the original; and it will not be necessary to call the latter person, nor to prove that the witness also read the original while the other person compared the copy; for it will not be presumed that a person has wilfully misread a

(*g*) 51 & 52 Vict. c. 43.

record (*h*). The copy must be complete and accurate, and not contain abbreviations (*i*); and it must appear that the record was in the custody of the proper officer at the time when the copy was taken.

A decree in Chancery may be proved by an exemplification under the seal of the court; or by an examined copy, or by a decretal order or paper, with proof of the bill and answer (*j*). If it be required only to show that a decree was made, or that it has been reversed, the enrolled and sealed decree is sufficient, without producing the bill and answer (*k*).

A bill or answer in Chancery is no evidence of the facts contained in it, not even of those on which the prayer of relief is founded (*l*); but where the parties to a suit are parties in an action in which the same matters are in issue, the statements of either, in a bill or answer, are evidence against the maker in the nature of admission (*m*). Where a witness at the trial gives evidence at variance with statements which he has made in an answer in Chancery, an examined copy of such answer has been held admissible to contradict him (*n*). A decree cannot be received as evidence except against the party against whom it was made, or those claiming under him; but it may be read as a precedent. A decree or other proceeding in Chancery is not a record until it has been signed and enrolled (*o*). A judgment which has been entered in the Entry Book of Judgments can be proved by a certified copy of the entry (*p*).

(*h*) *Reid* v. *Margison*, 1 Camp. 469: *cf. Slane Peerage Case*, 5 C. & F. 23.
(*i*) *R.* v. *Christian*, C. & M. 388.
(*j*) *Trowel* v. *Castle*, 1 Keb. 21.
(*k*) Bull, N. P. 735.
(*l*) *Doe* v. *Sybourn*, 7 T. R. 2.
(*m*) *Hodgkinson* v. *Willis*, 3 Camp. 401.
(*n*) *Ewer* v. *Ambrose*, 4 B. & C. 25.
(*o*) *R.* v. *Smith*, 8 B. & C. 341.
(*p*) *Ex parte Anderson*, 14 Q. B. D. 606.

A former conviction or acquittal may now be proved under the 14 & 15 Vict. c. 99, s. 13, by a certificate purporting to be under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of indictment, trial, conviction and judgment, or acquittal, as the case may be, omitting the formal parts thereof.

On trials for perjury it is enacted by the 14 & 15 Vict. c. 100, s. 22, that such a certificate, containing the substance and effect only, omitting the formal portion of the indictment and trial for any felony or misdemeanor, shall be sufficient evidence of the same; but the mere fact of the trial may be proved by the officer of the court on production of his minutes, or apparently, by any one who was present at the first trial (*q*).

VERDICTS.

A verdict may be proved by producing the *postea*, indorsed on the Nisi Prius record, when it is only required to show that a trial took place (*r*); but the whole record and a copy of the judgment will be necessary to establish the finding of any substantial fact.

FOREIGN JUDGMENTS, ETC.

These are now regulated by 14 & 15 Vict. c. 99, s. 7, which enacts that:

"All proclamations, treaties, and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any

(*q*) *R.* v. *Newman*, 2 Den. 390.
(*r*) *Pitton* v. *Walter*, 1 Stra. 162.

foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court; and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement."

Foreign judgments and other proceedings may still be proved as before the statute by examined copies (*s*). A foreign proclamation may be proved by production of a copy proved to be accurate, but evidence of a verbal proclamation is inadmissible as hearsay.

CONVICTIONS.

Convictions before magistrates are proved by examined copies which are made out, on application, by the clerk of the peace. In many cases also, under particular statutes, copies certified by the proper officer are sufficient evidence.

(*s*) *Appleton* v. *Braybrooke*, 6 M. & S. 34.

A conviction is presumed to be unappealed against till the contrary is shown (*t*); and it is conclusive evidence against the plaintiff in an action for malicious prosecution, even where no appeal lies (*u*).

A conviction cannot be controverted in evidence (*x*); and, as long as it stands, is conclusive against every one against whom it is producible (*y*).

ORDERS.

The original Order, as in cases of removal, must be produced if possible; but secondary evidence may be given of it, if it appears that the party, whose duty it is to produce it, has been served with notice (*z*). Where the Order refers to proceedings which are not strictly judicial, and which are also extrinsic to the controversy between the parties, the person in whose custody such documentary evidence is must be subpœnaed to produce it; and, if he refuse to appear, secondary evidence cannot be given, but the recusant witness may be attached (*a*).

INQUISITIONS

Are in the nature of judicial inquiries into matters of public importance; and they are admissible under the limitations which have been already discussed in the chapters on public or general interests, and ancient possession.

(*t*) 24 & 25 Vict. c. 96, s. 112.
(*u*) *Basébé* v. *Matthews*, L. R. 2 C. P. 684.
(*x*) *Fawcett* v. *Fowler*, 7 B. & C. 394.
(*y*) See *Strickland* v. *Ward*, 7 T. R. 633; *Bynoe* v. *Bank of England*, [1902] 1 K. B. 470.
(*z*) *R.* v. *Justices of Peterborough*, 18 L. J. M. C. 79.
(*a*) *R.* v. *Llanfaethly*, 2 E. & B. 940.

An inquisition of lunacy is evidence for a prisoner to show that he was insane when he committed the offence.

ORDERS AND RULES OF THE HIGH COURT.

The Orders of the judges of the High Court are proved by the production of the original Order, signed by the judge. The court takes judicial notice of the signature.

A judge's Order will not justify a party in tendering secondary evidence, merely because the Order refers to it as if it were primary. Thus, where a judge's Order required a party to admit "a copy of a letter," it was held that the other party could not give it in evidence, without accounting first for the non-production of the original. A judge's Order secures the accuracy of the secondary evidence, but does not give it the effect of primary evidence (*b*).

CERTIFICATES.

A copy of a record of any public fact made by an officer in a public or judicial capacity, and strictly within the course of his duty (but not otherwise), is generally, and in many cases specially by Statute, evidence of the facts which it purports to record; but a mere certificate of an extra-judicial fact, or of a fact which the officer was not bound to record, is inadmissible.

In criminal law, various certificates containing the substance of the original record are evidence. Thus, by 24 & 25 Vict. c. 96, s. 116, it is enacted that when a prisoner is charged with a felony or misdemeanor, after a previous conviction for a felony or misdemeanor, the

(*b*) *Per* Lord DENMAN: *Sharp* v. *Lamb*, 11 A. & E. 805.

first offence and conviction may be proved by a certificate, containing the substance of the original record, and purporting to be signed by the clerk of the court, or other officer having the custody of the records. The 24 & 25 Vict. c. 99, s. 37, has a similar provision in offences against coin.

So the 14 & 15 Vict. c. 99, s. 13, enacts that whenever it may be necessary to prove a formal conviction or acquittal of a prisoner, it shall not be necessary to produce the original record or a copy; but it shall be sufficient to produce a certificate of such former conviction or acquittal, purporting to contain the substance of the original record, and signed by the clerk of the court or other proper officer.

The 14 & 15 Vict. c. 100, s. 22, enacts that in trials for perjury or subornation of perjury, or a trial of any indictment for felony or misdemeanor, a certificate of the trial of such indictment, purporting to be signed by the clerk of the court or of the records, shall be sufficient evidence of the former trial.

A certificate by two justices that a charge of assault and battery had been heard and dismissed, is admissible, under 24 & 25 Vict. c. 100, ss. 44, 45, to bar all subsequent civil and criminal proceedings for the same cause (*c*). Under 18 & 19 Vict. c. 126, s. 12, a similar certificate has the same effect.

Many other documents, in the nature of copies or certificates, are admissible in substitution for originals, or *per se*, by virtue of special Acts; but the limits of this work permit only a general reference to them. They are generally admissible under the Documentary Evidence Acts, but are also in many cases made specially admissible by particular Statutes.

(*c*) *Tunnicliffe* v. *Tedd*, 5 C. B. 553.

WRITS AND WARRANTS.

These must be proved, until they are returned, by actual production; but after their return they become matters of record, and are provable by copies (*e*).

ORDERS AND RULES OF INFERIOR COURTS.

Where these are in the nature of a record, they will be subject to the usual rule, and may generally be proved by a certified exemplification (*f*). Where the court is not of record, the books containing the proceedings must be produced and proved by the proper officer, who ought to be subpœnaed to attend with them; but if he does not attend, or if he refuses to produce the book or document containing the Order or Rule, secondary evidence cannot be given, but the officer may be attached (*g*).

JOURNALS OF THE HOUSES OF LORDS AND COMMONS.

The journals of the House of Lords, it being a court of record, have always been provable by copies (*h*). A question was formerly raised whether the journals of the House of Commons were records or not (*i*), but it was decided that copies of them might be tendered in evidence. Under the Documentary Evidence Acts copies of the journals of either House are admissible, if they purport to be printed by certain printers.

(*e*) Bull, N. P. 234.
(*f*) *Woodcraft* v. *Kinaston*, 2 Atk. 317.
(*g*) *R.* v. *Llanfaethly*, 2 E. & B. 940.
(*h*) See *Lord Dufferin's Case*, 4 C. & F. 368.
(*i*) *Wynne* v. *Middleton*, Doug. 593.

BANKRUPTCY PROCEEDINGS

Are proved according to the provisions of the Bankruptcy Act, 1883 (*k*), ss. 28, 30 and 132—138, for which see the Appendix. Section 132 provides that a copy of the London Gazette containing any notice inserted therein in pursuance of this Act, shall be evidence of the facts stated in the notice, and also that the production of a copy of the London Gazette containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, shall be conclusive evidence (*l*) in all legal proceedings of the due making and the date of the order.

The effect of this section is to make the advertisement conclusive evidence, not only as regards the persons who were parties to the bankruptcy proceedings, but also as against other persons (*e.g.*, the holder of a bill of sale executed by the bankrupt), of the validity of the adjudication and of the date thereof, but the advertisement has no such effect in proceedings taken for the purpose of questioning or annulling an adjudication (*m*).

By s. 28 (4), the report of the Official Receiver is made *primâ facie* evidence of the statements therein contained for the purposes of that section. It has been decided that it is also *primâ facie* evidence for the purposes of s. 18 (*n*).

PROBATES—WILLS.

A probate of a will is in the nature of a judicial proceeding or record of the court. It constitutes the proper legal proof of title in an executor to his testator's

(*k*) 46 & 47 Vict. c. 32.
(*l*) See *Ex parte Learoyd*, 10 Ch. D. 3.
(*m*) *Ex parte Geisel*, 22 Ch. D. 436.
(*n*) *Ex parte Campbell*, 15 Q. B. D. 213.

personalty, and is conclusive against all the world (*o*). It is a copy of the will, sealed with the seal of the Court of Probate, and attached to a certificate which states that the will has been proved and registered, and that administration of the goods of the deceased has been granted to one or more of the executors named therein. The will itself is not evidence (*p*), except where the court is called upon to construe a disputed will when the court may and often does look at the original will (*q*). And in such a case, where an English translation of a foreign will has been admitted to probate, the court can look at the foreign original or a certified copy thereof (*r*). If the probate be lost, either it may be proved by an examined copy, or the court will grant an exemplification, but not another probate (*s*); or a certified copy of the entry in the act book, under 14 & 15 Vict. c. 99, s. 14, is sufficient. The act book itself will also be evidence, without accounting for the non-production of the probate (*t*); and under 14 & 15 Vict. c. 100, s. 14, an unstamped copy of the act book has been received as evidence of probate, to prove an executor's title (*u*). Where no act book is kept, or other record of probates, it appears that the will itself, indorsed with the appointment of the executor, will be evidence (*x*). The same remarks apply to letters of administration (*y*).

Will of personal estate.—The rule is that (except in proceedings for the protection of the assets) no notice can be taken of an alleged will of personal estate, unless it has been proved in an English Probate Court or in a colonial court having concurrent jurisdiction

(*o*) *Allen* v. *Dundas*, 3 T. R. 125.
(*p*) *Pinney* v. *Pinney*, 8 B. & C. 335.
(*q*) *Turner* v. *Hellard*, 30 Ch. D. 390.
(*r*) *In re Cliff's Trusts*, 40 W. R. 439.
(*s*) *Shepherd* v. *Shorthose*, 1 Stra. 412.
(*t*) *Cox* v. *Allingham*, Jacob, 514.
(*u*) *Dorret* v. *Meux*, 15 C. B. 142.
(*x*) *Doe* v. *Mew*, 7 A. & E. 240.
(*y*) *Noel* v. *Wells*, 1 Lev. 352.

with the English Probate Court, or having been proved in a Colonial Court a copy has been deposited with and sealed by a Court of Probate in the United Kingdom under s. 2 of the Colonial Probates Act, 1892 (for which see Appendix). In a case where the main question was as to the liability to legacy duty of the personal estate of a testator whose will had been proved in Her Majesty's Supreme Court for China and Japan at Shanghai, and not in England, CHITTY, J., held that he would look at the Shanghai probate, because the Shanghai Court has, from its constitution, all such jurisdiction with respect to the property of British subjects as for the time being belongs to the Court of Probate in England (*z*); but in a subsequent case, where a petitioner asked for payment out of a sum of money to which he was entitled under an appointment by will, PEARSON, J., held that the probate of the will in the Supreme Court of New Zealand was not sufficient for him to act upon, but that an English probate was necessary. He distinguished the last-mentioned case on the ground of the difference in the nature of the jurisdiction of the Shanghai Court from that of the New Zealand Court (*a*).

In the case of a will relating to lands, or any description of realty, it was necessary formerly to produce the original will (*b*); but now a devise of real estate may be proved by the probate, or a sealed office copy from the Court of Probate. In this case the person tendering the evidence must give ten days' notice before trial to the other party, who may, in four days after receipt of such notice, give a counter-notice that he disputes the validity of the devise, and that the original must

(*z*) *In re Tootal's Trusts*, 23 Ch. D. 532.
(*a*) *Ex parte Limehouse Board of Works, In re Vallance*, 24 Ch. D. 177.
(*b*) *Doe* v. *Calvert*, 2 Camp. 389.

be produced (*c*). Even in the absence of a counter-notice the probate is only *primâ facie* evidence (*d*). Where a will relating to land in England had been proved in the Supreme Court of the Colony of Victoria, HALL, V.-C., accepted letters testimonial under the seal of that court as sufficient evidence for the purposes of a preliminary judgment in a partition action. He intimated, however, that the further proof might be insisted on at a later stage of the action, although probably at the cost of the party insisting (*e*).

To prove a will of land against the heir, all the witnesses must be called (*f*), unless one of them is dead, or abroad, or insane, or has not been heard of for many years, when his evidence will be dispensed with, or unless the heir admits it, when the court will establish it without declaring it to be well proved; but where the action is by the heir against the devisee, the latter is not required to produce all the witnesses (*g*).

In all other cases, to prove a will it is sufficient to call one of the witnesses who can speak to the attestation (*h*); and who can testify either that he saw the testator sign, or that he heard him acknowledge to the witness, or in his presence, that the will was his (*i*). The witnesses must also have subscribed either actually in the presence of the testator, or so near to him that, although he did not see them sign, he might have seen them without the necessity of locomotion. Thus, where the witnesses were in one room, and the testator in another; and the latter, although he did not see them sign, might have seen them through a window, the will was held good (*k*); but not so where the testator could not have seen them without changing

(*c*) 20 & 21 Vict. c. 77, ss. 64, 65.
(*d*) *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612.
(*e*) *Waite* v. *Bingley*, 21 Ch. D. 674.
(*f*) *Bootle* v. *Blundell*, 19 Ves. 494.
(*g*) *Tatham* v. *Wright*, 2 R. & M. 1.
(*h*) Bull. N. P. 264.
(*i*) *Stonehouse* v. *Evelyn*, 3 P. Wms. 113.
(*k*) *Skires* v. *Glascock*, 2 Salk. 688.

his position (*l*). To obtain probate of a will it is of course necessary to call one of the attesting witnesses (*m*), although it is not necessary to call both (*n*); but if one is called and fails to prove the execution, the other must be called, if possible, although he may be known to be adverse to the party producing him (*o*); and if a witness gives evidence against a will, he may be contradicted by other evidence, or it may be shown that he has an adverse interest (*p*). When probate of a will had been granted on the evidence of the two attesting witnesses, such probate was confirmed in subsequent proceedings although one of the witnesses testified against the will and the other was not called; the court being of opinion that the one witness had been tampered with, and good reasons were given for not calling the other (*q*). Where all the witnesses swear the will was not duly executed, other evidence is admissible to support it (*r*). The presumption of due execution often operates to prove a will (*s*).

If the witnesses are dead, their handwriting must be proved, unless the will is thirty years old, in which case it is said to prove itself (*t*); that is, if it is produced from the proper custody, and is otherwise apparently authentic, it will be presumed to be so, even though there are circumstances which would lead to the inference that it has been cancelled (*u*). The thirty years are computed from the date of the will (*x*). In such a case it is not necessary to call any one of the alleged witnesses, even though they appear to be living (*y*).

(*l*) *Doe* v. *Manifold*, 1 M. & S. 294.
(*m*) *Bowman* v. *Hodgson*, L. R. 1 P. & D. 362.
(*n*) *Belbin* v. *Skeats*, 1 Sw. & Tr. 148.
(*o*) *Coles* v. *Coles*, L. R. 1 P. & D. 70. (*p*) *Ibid.*
(*q*) *Pilkington* v. *Gray*, [1899] A. C. 401.
(*r*) See *Wright* v. *Rogers*, L. R. 1 P. & D. 678.
(*s*) *Vide supra*, p. 65. (*t*) *Rancliff* v. *Perkins*, Dow. 202.
(*u*) *Andrews* v. *Mottley*, 12 C. B. (N.S.) 526.
(*x*) *M'Kenire* v. *Fraser*, 9 Ves. 5.
(*y*) *Doe* v. *Walley*, 8 B. & C. 22.

CHAPTER III.

PUBLIC NON-JUDICIAL WRITINGS.

PUBLIC writings, which are not of a judicial character, are evidence of the matters which they purport to declare; provided they appear to have been obtained from proper custody, *i.e.*, from a place where it is reasonable to presume that they would be deposited, if authentic.

Proof of public non-judicial documents.—This is now chiefly regulated by the Law of Evidence Amendment Act, 1851 (*a*), s. 14 of which enacts that

"Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which render its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words."

Under this section it has been held that an unstamped copy of an act book of the Ecclesiastical Court is evidence of probate to prove executorship (*b*). So the journals of the House of Lords, entries in the books of tax-collectors, commissioners of the excise or customs, secretaries of state, and registers of municipal or parliamentary electors, which were provable before the Act

(*a*) 14 & 15 Vict. c. 99.

(*b*) *Dorret* v. *Meux*, 15 C. B. 142.

by examined copies, may now be proved either by examined or certified copies under the Act. So charters, letters-patent, grants from the Crown, pardons and commissions may be proved either by originals, or examined or certified copies; or also, as it seems, by exemplifications under the Great Seal. As to royal proclamations, orders in council, and orders of Government departments, see *supra*, p. 269. As to proclamations, treaties, etc., of foreign states or colonies, see *supra*, p. 283. Foreign official documents which cannot be produced here may be proved by examined copies (*c*).

The 14 & 15 Vict. c. 19, s. 14, cited above, has virtually superseded the 8 & 9 Vict. c. 113, s. 1 (the Documentary Evidence Act, 1845), so far as it refers to public documents; but, as the two Acts are construed cumulatively, and as the earlier Act extends to some private documents, it is subjoined.

The Documentary Evidence Act, 1845 (*d*), s. 1, provides that—

"Whenever by any Act now in force or hereafter to be in force any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, byelaw, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any Committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence."

The effect of these enactments, as to documents of a public nature, is to allow the substitution of certified

(*c*) *Burnaby* v. *Baillie*, 42 Ch. D. 292. (*d*) 8 & 9 Vict. c. 113.

or examined copies in all cases in which the original, if produced, would be evidence.

Whenever, therefore, it is proposed to tender an examined or certified copy of a public document in the place of an original, the practical question is, whether the original is such a public document as is intrinsically evidence *per se* (*e*).

It must be remembered that, notwithstanding the Documentary Evidence Acts, and the 14 & 15 Vict. c. 99, s. 14, there are numerous cases in which the originals of documents, apparently of a public nature, must still be produced, and where neither certified nor examined copies are admissible. A considerable degree of vagueness still attaches even to many cases in which certified or examined copies are clearly admissible; and it should be remembered that, whenever a doubt exists as to whether a document is public or private, the prudent and the right course will be to be provided with the originals.

Where a public document or mark requires to be authenticated, it may be proved by any expert and credible witness. Thus the Post Office mark may be proved by any postmaster, or by any one who is in the habit of receiving letters by the post (*f*).

Those descriptions of public documents which are practically most important will now be considered.

REGISTERS OF BIRTHS, MARRIAGES AND DEATHS.

Parish registers are in the nature of records, and need not be produced, or proved by subscribing witnesses (*g*). They are therefore provable under the 14 & 15 Vict. c. 19, s. 14, by copies purporting to be signed by the incumbents of the parishes (*h*).

(*e*) *Linsey* v. *Linsey*, L. J. P. & M. 28. (*f*) *Abbey* v. *Lill*, 5 Bing. 299.
(*g*) *Per* Lord MANSFIELD: *Birt* v. *Barlow*, Doug. 172.
(*h*) *In re Hall's Estate*, 9 Hare, App. xvi.

It should appear that the original is in the proper custody, which, in the case of marriage, baptismal and death registers, is with the incumbent, and not the parish clerk (*i*). The register, or the copy, as the case may be, is only proof of the fact of a marriage, or a birth, or a death, of a person or persons therein named. It is no evidence of the identity of a party; nor is a baptismal registry evidence of the date of the birth (*k*), but it is of age (*l*), although not strong evidence *per se* (*m*); the certificate when put in must be looked at as a whole (*n*). Identity must be shown extrinsically; in the case of a marriage, either by proving the handwriting of the parties, or by calling a witness who was present at the marriage (*o*); but the handwriting may be spoken to without producing the register (*p*).

By the 52 Geo. 3, c, 146, s. 7, verified copies of all registers of baptisms and burials are to be sent yearly by all ministers to the registrar of their diocese; and by the 6 & 7 Will. 4, c. 86, s. 38, the Registrar-General is to cause to be sealed or stamped with the seal of his office, all certified copies of entries given in his said office: and all certified copies of entries purporting to be sealed or stamped with the seal of the said register office are to be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry; and no certified copy purporting to be given in the said office is to be of any force or effect which is not sealed or stamped as aforesaid. Non-parochial registers deposited with the Registrar-General are made evidence by 3 & 4 Vict. c. 92, extended by 21 & 22 Vict. c. 25. Copies

(*i*) *Doe* v. *Fowler*, 19 L. J. Q. B. 151.
(*k*) *In re Wintle*, L. R. 9 Eq. 373.
(*l*) *R.* v. *Weaver*, L. R. 2 C. C. R. 85.
(*m*) *Per* CHITTY, J.: *Glenister* v. *Harding*, 29 Ch. D. 992.
(*n*) *Ibid.*
(*o*) *Birt* v. *Barlow*, Doug. 272.
(*p*) *Sayer* v. *Glossop*, 2 Exch. 409.

purporting to be sealed with the seal of the office are receivable in civil cases by the 3 & 4 Vict. c. 92, s. 9, subject to the regulations of s. 11 as to notice; but in criminal cases the original register or record must be produced (s. 17), and it may be used in evidence in civil cases (s. 12). As to Scotch marriages since 1856, see 19 & 20 Vict. c. 96. As to Irish marriages, see 7 & 8 Vict. c. 81, incorporated with and amended by 26 & 27 Vict. c. 27; 33 & 34 Vict. c. 110; and 36 & 37 Vict. c. 16. As to marriages by British subjects out of the United Kingdom before British consuls, see the Foreign Marriage Act, 1892 (*q*). As to marriages between Christians in British India, see *Westmacot* v. *Westmacot* (*r*). Certified copies of Scotch parochial registers are evidence in English courts on questions of Scotch pedigree relating to persons and families always resident and domiciled in Scotland (*s*).

By the Registration of Burials Act, 1864 (*t*), register books kept under the Act, or copies, are evidence of the burials entered therein.

By s. 38 of the Births and Deaths Registration Act, 1874 (*u*), it is provided that an entry or certified copy of an entry of a birth or death under the Registration Acts, 1836 and 1874, is not to be evidence of a birth or death unless it purports to be signed by some person professing to be the informant, and to be a person required by law to give information to the registrar concerning the birth or death, or purports to be made on a coroner's certificate, or in pursuance of the provisions of the Act as to registration of births and deaths at sea. An entry made under the Act of 1836 is evidence not merely of the fact but of the date of

(*q*) 55 & 56 Vict. c. 23.
(*r*) [1899] P. 183.
(*s*) *Lyell* v. *Kennedy*, 14 App. Cas. 437.
(*t*) 27 & 28 Vict. c. 97.
(*u*) 37 & 38 Vict. c. 88.

birth (*x*). Copies of the registers of baptisms kept in India by order of the Government of India are admissible in evidence (*y*).

PATENTS, DESIGNS, AND TRADE MARKS.

Section 23 of the Patents, Designs, and Trade Marks Act, 1883 (*z*), provides that the Register of patents shall be *primâ facie* evidence of any matters by the Act directed or authorised to be inserted therein.

By s. 55, the Register of designs is to be *primâ facie* evidence of any matters by this Act directed or authorised to be inserted therein.

By s. 76, the registration of a person as proprietor of a trade mark is to be *primâ facie* evidence of his right to the exclusive use of the trade mark, and shall, after the expiration of five years from the date of the registration, be conclusive evidence of his right to the exclusive use of the trade mark, subject to the provisions of the Act.

By s. 84, the impressions of the seal of the Patent Office are to be judicially noticed and admitted in evidence.

By s. 89, printed or written copies or extracts, purporting to be certified by the Comptroller, and sealed with the seal of the Patent Office, of or from patents, specifications, disclaimers, and other documents in the Patent Office, and of or from registers and other books kept there, are to be admitted in evidence in all courts in her Majesty's dominions, without further proof or production of the originals.

By s. 96, a certificate, purporting to be under the hand of the Comptroller, as to any entry, matter or

(*x*) *Payne* v. *Bennett*, [1904] P. 738.
(*y*) *Queen's Proctor* v. *Fry*, 4 P. D. 230. (*z*) 46 & 47 Vict. c. 57.

thing which he is authorised by the Act, or any general rules made thereunder, to make or do, is to be *primâ facie* evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone.

COPYRIGHT.

The Copyright Amendment Act, 1842 (*a*), s. 11 (*b*), enacts, that a register of the proprietorship in the copyright of books and assignment thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licenses affecting such copyright, shall be kept at the Hall of the Stationers' Company, and shall be open to inspection of any person, on the payment of one shilling for every entry searched for. The proper officer is empowered to give a certified copy under his hand, and impressed with the stamp of the company, of any such entry, which copy shall be received as evidence in all courts, and as *primâ facie* proof of the proprietorship or assignment of copyright or license, as therein expressed, but subject to be rebutted by other evidence (*c*); and, in cases of dramatic or musical pieces, such copy shall be *primâ facie* proof of the right of representation or performance, subject to be rebutted as aforesaid.

By s. 24, no proprietor of a copyright in any *book* first published after the passing of the Act, can take any legal proceedings for infringement of such copyright, unless it is registered. "Book" includes "map" (*d*). The name of the author or composer

(*a*) 5 & 6 Vict. c. 45.
(*b*) These provisions are incorporated by reference into the International Copyright Act, 1844 (7 & 8 Vict. c. 12), and into the Copyright of Works of Art Act, 1862 (25 & 26 Vict. c. 68).
(*c*) See *Lucas* v. *Cooke*, 13 Ch. D. 872.
(*d*) *Stannard* v. *Lee*, L. R. 6 Ch. 346.

must be correctly stated on the register (*e*), as well as the day of publication, and the names of the publishers, or their firm (*f*).

The International Copyright Act, 1886 (*g*), provides, by s. 7, that—

"Where it is necessary to prove the existence or proprietorship of the copyright of any work first produced in a foreign country to which an Order in Council under the International Copyright Acts applies, an extract from a register, or a certificate, or other document stating the existence of the copyright, or the person who is the proprietor of such copyright, or is for the purpose of any legal proceedings in the United Kingdom deemed to be entitled to such copyright, if authenticated by the official seal of a Minister of State of the said foreign country, or by the official seal or the signature of a British diplomatic or consular officer acting in such country, shall be admissible as evidence of the facts named therein, and all courts shall take judicial notice of every such official seal and signature as is in this section mentioned, and shall admit in evidence, without proof, the documents authenticated by it."

And sub-s. (2) of s. 8 of the same Act provides that—

"Where a register of copyright in books is kept under the authority of the government of a British possession, an extract from that register purporting to be certified as a true copy by the officer keeping it, and authenticated by the public seal of the British possession, or by the official seal or the signature of the governor of a British possession, or of a colonial secretary, or of some secretary or minister administering a department of the government of a British possession, shall be admissible in evidence of the contents of that register, and all courts shall take judicial notice of every such seal and signature, and shall admit in evidence, without further proof, all documents authenticated by it."

Section 15 of the Newspaper Libel and Registration Act, 1881 (*h*), provides that—

"Every copy of an entry in or extract from the register of newspaper proprietors, purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract without proof of the signature thereto or of the seal of office affixed thereto, and every such

(*e*) *Wood* v. *Boosey*, L. R. 3 Q. B. 223.
(*f*) *Low* v. *Routledge*, 33 L. J. Ch. 717.
(*g*) 49 & 50 Vict. c. 33.
(*h*) 44 & 45 Vict. c. 60.

certified copy or extract shall in all proceedings, civil or criminal, be accepted as sufficient primâ facie evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown."

REGISTER OF VOTERS AND POLL BOOKS.

The Parliamentary Registration Act, 1843 (*i*), provides (s. 79) that the register of voters under that Act shall be conclusive evidence that the persons named therein continue to have the qualifications which are annexed to their names. It has been held by the Court of Common Pleas that, though the Ballot Act, 1872 (*k*), has repealed s. 98 of the Registration Act, the register is conclusive not only on the returning officer, but also on every tribunal which has to inquire into elections, except only in the case of persons prohibited from voting by any statute or the common law of Parliament (*l*).

SHIPPING REGISTERS, ETC.

The Merchant Shipping Act, 1894 (*m*), contains provisions as to the admissibility in evidence and the mode of proof of registers, entries therein and in log-books, declarations under the Act, and Board of Trade documents. These provisions will be found in the Appendix.

CORPORATIONS.

Corporation documents are not strictly of a public nature for the purpose of evidence; but they will be conveniently considered here as being of a *quasi* public nature.

(*i*) 6 & 7 Vict. c. 18.
(*k*) 35 & 36 Vict. c. 33.
(*l*) *Stowe* v. *Jolliffe*, L. R. 9 C. P. 734.
(*m*) 57 & 58 Vict. c. 60.

Corporation books are evidence to prove entries of a public character (*n*), but not to prove transactions of the corporation with the public (*o*). They appear to be evidence in the nature of admissions between members of the corporation (*p*); but not of the rights and privileges of the corporation against strangers (*q*). Where such books are tendered as evidence, under s. 14 of the Law of Evidence Amendment Act, 1851 (*r*), they must appear to be of such a public nature as the Act intends, in order to admit of the substitution of examined or certified copies for the production of the originals; but, generally, they appear to be inadmissible unless rendered admissible by statute.

By the Municipal Corporations Act, 1882 (*s*), s. 22—

"(5) A minute of proceedings at a meeting of the council, or of a committee, signed at the same or the next ensuing meeting, by the mayor, or by a member of the council, or of the committee, describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof.

"(6) Until the contrary is proved, every meeting of the council, or of a committee, in respect of the proceedings whereof a minute has been so made, shall be deemed to have been duly convened and held, and all the members of the meeting shall be deemed to have been duly qualified; and, where the proceedings are proceedings of a committee, the committee shall be deemed to have been duly constituted, and to have had power to deal with the matters referred to in the minutes."

JOINT-STOCK COMPANIES.

The proceedings, contracts, etc., of public companies in reference to the subject-matter of this work, are subject to the provisions of several Statutes, of which

(*n*) *Marriage* v. *Lawrence*, 3 B. & A. 144.
(*o*) *Gibbon's Case*, 17 How. St. Tr. 810.
(*p*) *Hill* v. *Manchester Waterworks Co.*, 2 B. & Ad. 544.
(*q*) *Mayor of London* v. *Lynn*, 2 H. Bl. 214 n.
(*r*) 14 & 15 Vict. c. 99.
(*s*) 45 & 46 Vict. c. 50.

the principal are the Companies Act, 1862 (*t*), the Companies Winding-up Act, 1890 (*u*), and the Companies Act, 1877 (*x*).

For the sections of these Acts material for the purposes of this work see the Appendix.

It should be observed that by the last-mentioned enactment certified copies of the documents or parts of documents kept and registered at the English, Scotch, and Irish offices for the registration of joint stock companies are receivable in evidence as of equal validity with the originals. The certificate is to be under the hand of the registrar or one of the assistant registrars for the time being, whom it is not necessary to prove to be such registrar or assistant registrar.

It may be observed that where a document is tendered, purporting to be sealed by the seal of a company or corporation, the genuineness of the seal must be proved by some one who knows it (*y*), unless it be the seal of the Corporation of London (*z*), or the seal of the Apothecaries' Company, which prove themselves (*a*).

CHARITABLE TRUSTS.

By the Charitable Trusts Recovery Act, 1891 (*b*), s. 5 (1), it is provided that—

"For the purposes of any action, petition, or proceeding instituted by the board under this Act, the following provisions shall have effect: (1) The printed reports of the Charity Commissioners appointed under an Act passed in the fifty-eighth year of the reign of his Majesty George the Third, and intituled, 'An Act for appointing Commissioners to inquire concerning Charities in England for the Education of the Poor,' and under other Acts for inquiring into charities, shall be admissible as primâ facie evidence of the documents and facts therein stated; provided that either party intending to use any such report as evidence shall give notice of such intention in the prescribed manner to the other party.

(*t*) 25 & 26 Vict. c. 89.
(*u*) 53 & 54 Vict. c. 63.
(*x*) 40 & 41 Vict. c. 26.
(*y*) *Moises* v. *Thornton*, 8 T. R. 207.
(*z*) *Doe* v. *Mason*, 1 Esp. 53.
(*a*) 14 & 15 Vict. c. 99, s. 8.
(*b*) 54 Vict. c. 17.

(2) Where any yearly or other periodical payment has been made in respect of any land, to or for the benefit of any charity or charitable purpose, for twelve consecutive years, such payment shall be deemed, subject to any evidence which may be given to the contrary, primâ facie evidence of the perpetual liability of such land to such yearly or other periodical payment, and no proof of the origin of such payment shall be necessary."

BYELAWS.

These are *quasi* public documents, which are generally regulated by particular Statutes or charters. They appear to be generally within the spirit of the Documentary Evidence Acts and the Law of Evidence Amendment Act, 1851. Their validity depends, primarily, on their conformity to the powers given by special Acts, or to the provisions of the Companies Clauses Consolidation Act, 1845 (*c*), s. 124 of which empowers a company—

"from time to time to make such byelaws as they think fit, for the purpose of regulating the conduct of the officers and servants of the company, and for providing for the due management of the affairs of the company in all respects whatsoever, and from time to time to alter or repeal any such byelaws, and make others, provided such byelaws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special Act; and such byelaws shall be reduced into writing, and shall have affixed thereto the common seal of the company; and a copy of such byelaws shall be given to every officer and servant of the company affected thereby."

It is provided (s. 127) that the production of a written or printed copy of the byelaws of the company, having the common seal of the company affixed thereto, shall be sufficient evidence of such byelaws in all cases of prosecution under the same.

A railway byelaw will not be binding on strangers, unless it has been approved by the Board of Trade or

(*c*) 8 & 9 Vict. c. 16.

Commissioners of Railways, or other proper officer (*d*); nor, generally, unless it is proved to have come actually or constructively to the notice of the party who is to be affected by it (*e*). Where such byelaw is good, or where a statutory notice has been affixed under the Carriers Act, it will be sufficient, apparently, to prove that such a byelaw or notice was duly affixed, and then to prove an examined copy, for it will be a public document within s. 14 of the Law of Evidence Amendment Act, 1851 (*f*).

By the Municipal Corporations Act, 1882 (*g*), s. 24—

"The production of a written copy of a byelaw made by the council under this Act, or under any former or present or future general or local Act of Parliament, if authenticated by the corporate seal, shall, until the contrary is proved, be sufficient evidence of the due making and existence of the byelaw, and, if it is so stated in the copy, of the byelaw having been approved and confirmed by the authority whose approval or confirmation is required to the making or before the enforcing of the byelaw."

By the Salmon Fishery Act, 1873 (*h*), s. 45—

"The production of a written or printed copy of any byelaw purporting to have been confirmed, authenticated by the common seal of the board, shall be conclusive evidence of the existence and due making of such byelaw in all legal proceedings, and the production of a copy of any newspaper or newspapers containing the notice of the making of any such byelaw shall be taken and received in all legal proceedings as evidence that all things required by this Act for the making and publication of the byelaw therein advertised have been duly done, performed, and published."

The byelaws of railway companies, municipal and other corporations, will not be recognised by the courts of law, but will be treated as *ultra vires* and void, if they impose restrictions or penalties which are unreasonable

(*d*) 3 & 4 Vict. c. 97, s. 7; and see 8 & 9 Vict. c. 20, ss. 108—111.
(*e*) *Great Western Rail. Co.* v. *Goodman*, 12 C. B. 313.
(*f*) *Motteram* v. *Eastern Counties Rail. Co.*, 7 C. B. (N.S.) 58.
(*g*) 45 & 46 Vict. c. 50.
(*h*) 36 & 37 Vict. c. 71.

or unnecessary for the purposes in view, or if their provisions are inconsistent with those of any Statute of the realm (*i*).

BILLS OF LADING.

By the Bills of Lading Act, 1855 (*k*), ss. 1 and 2, every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, becomes the absolute owner, with all the personal rights and liabilities of ownership, subject to the consignor's right of stoppage *in transitu*, and claims for freight. By s. 3—

"Every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims."

It has been held that this section does not estop the owners of a ship from showing the incorrectness of the bill of lading signed by the ship's agent as to the weight of goods actually shipped (*l*); and in an action for freight the master is not estopped from denying the amount of goods actually received, though he would be estopped in an action against the owners for non-delivery (*m*).

(*i*) *Calder Navigation Co.* v. *Pilling*, 14 M. & W. 76; *Chilton* v. *London and Croydon Rail. Co.*, 16 M. & W. 212; *Everett* v. *Grapes*, 3 L. T. 669; *Johnson* v. *Mayor of Croydon*, 16 Q. B. D. 708; *Heap* v. *Day*, 34 W. R. 627.

(*k*) 18 & 19 Vict. c. 111.

(*l*) *Jessel* v. *Bath*, L. R. 2 Ex. 267.

(*m*) *Blanchet* v. *Llantivit Colliery Co.*, L. R. 9 Ex. 77.

BILLS OF SALE (*n*).

The Bills of Sale Act, 1882 (*o*), s. 8, provides that:

"Every bill of sale shall be duly attested (*p*), and shall be registered under the principal Act (*q*) within seven clear days after the execution thereof, or if it is executed in any place out of England then within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof; and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein."

This section is not retrospective (*r*); and, therefore, the registration of bills of sale executed between January 1st, 1879, and November 1st, 1882, is governed by the Bills of Sale Act, 1878 (*s*), s. 8. The registration is effected in the Bills of Sale Department of the Supreme Court (*t*).

Section 16 of the Act of 1878 is as follows:

"Any person shall be entitled to have an office copy or extract of any registered bill of sale, and affidavit of execution filed therewith, or copy thereof, and of any affidavit filed therewith, if any, or registered affidavit of renewal, upon paying for the same at the like rate as for office copies of judgments of the High Court of Justice, and any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, shall in all courts and before all arbitrators or other persons, be admitted as primâ facie evidence thereof, and of the fact and date of registration as shown thereon."

Section 16 of the Act of 1882 provides that:

"any person shall be entitled at all reasonable times to search the register, on payment of a fee of one shilling, or such other fee as may be prescribed, and subject to such regulations as may be prescribed, and shall be entitled at all reasonable times to inspect, examine, and make extracts from any and every registered bill of

(*n*) For the definition of the term "bill of sale," see ss. 4, 5, 6, and 7 of the Bills of Sale Act, 1878, in the Appendix.
(*o*) 45 & 46 Vict. c. 43.
(*p*) *I.e.*, by one or more credible witness or witnesses not being a party or parties thereto (s. 10).
(*q*) *I.e.*, the Bills of Sale Act, 1878, which requires also the filing of an affidavit containing certain particulars. See s. 10.
(*r*) *Hickson* v. *Darlow*, 23 Ch. D. 690.
(*s*) 41 & 42 Vict. c. 31. (*t*) R. S. C., 1883, Order LXI., r. 1.

sale without being required to make a written application, or to specify any particulars in reference thereto, upon payment of one shilling for each bill of sale inspected, and such payment shall be made by a judicature stamp: Provided that the said extracts shall be limited to the dates of execution, registration, renewal of registration, and satisfaction, to the names, addresses, and occupations of the parties, to the amount of the consideration, and to any further prescribed particulars."

It would seem, however, that the production of a certificate of registration of a bill of sale, even though it states that the affidavit of execution has been duly filed, does not preclude the necessity of producing an office copy of the bill of sale (*u*), although, probably, a copy of the affidavit need not be produced, still it is better to produce both.

FRIENDLY SOCIETIES, AND INDUSTRIAL AND PROVIDENT SOCIETIES.

For the provisions of the Friendly Societies Act, 1875, and the Industrial and Provident Societies Act, 1878, on the subject of evidence, see the Appendix.

NATURALISATION.

For the provisions of the Naturalisation Act, 1870, on the subject of evidence, see the Appendix.

HISTORIES

are admissible to prove a matter relating to the kingdom at large (*x*), such as the death of a sovereign or the time of his accession. They are admissible to prove

(*u*) *Emmott* v. *Marchant*, 3 Q. B. D. 555. (*x*) Bull. N. P. 248.

ancient facts of a public nature (*y*), although not to prove a particular or local custom. Maps are admissible under the circumstances mentioned in Part I., Chap. IX., and maps and charts generally offered for public sale are admitted as evidence of general geographical facts, such as the relative positions of countries, counties and towns; and distances (other than minute distances) may be proved by the use of the Ordnance maps (*z*).

Peerages, army and navy lists, directories, calendars, or other non-official publications, are inadmissible. But dictionaries are constantly referred to in court for the meanings of words, especially in trade-mark cases.

(*y*) *Read* v. *Bishop of Lincoln*, [1892] A. C. 653.
(*z*) *Mouflet* v. *Cole*, L. R. 8 Ex. 35.

CHAPTER IV.

SECONDARY EVIDENCE.—PROOF OF HANDWRITING. —ATTESTING WITNESSES. — WRITINGS WHICH REFRESH THE MEMORY.

WHEN a party has done everything in his power to bring before the court primary evidence of the documents on which he relies by searching for them in places where it was most reasonable to expect them to be deposited, and not finding them, or by giving the opposite party notice to produce them (*a*), or when the document is in the hands of a third person, who can refuse to produce it on the ground of privilege, or who is out of the jurisdiction, he will then, and not till then, be permitted by the court to give secondary evidence of such documents. When a document is alleged to have been destroyed by the opposite party, notice to produce is necessary (*b*).

The search must be *bonâ fide* and diligent (*c*).—It is not necessary to call a person of whom inquiries have been made as to a deed, but his declarations may be given in evidence (*d*). If there are several places of probable deposit, all must be searched (*e*). Every possible search need not be made, but every reasonable search will be sufficient (*f*), and the search need not be recent or made for the purposes of the trial (*g*).

There are no degrees in secondary evidence.—Therefore, when the absence of primary evidence is explained

(*a*) As to notice to produce, see Part III., Chap. VIII.
(*b*) *Doe* v. *Morris*, 3 A. & E. 46.
(*c*) *R.* v. *Denio*, 7 B. & C. 620.
(*d*) *R.* v. *Kenilworth*, 7 Q. B. 642.
(*e*) *Doe* v. *Lewis*, 11 C. B. 1035.
(*f*) *Hart* v. *Hart*, 1 Hare, 1.
(*g*) *Fitz* v. *Rabbits*, 2 Moo. & R. 60.

satisfactorily, any species of admissible secondary evidence may be substituted for the original. Thus, a lost deed may be proved, either by an examined copy (*h*), or by oral evidence of any one who can swear positively to the contents of the original; and, therefore, where it appeared that a party held a copy of an original, which was not produced, it was held that he was not obliged to produce the copy, but might give oral evidence of the original (*i*). As soon as a party has accounted for the absence of the original document, he is at liberty to give any kind of secondary evidence. The rule is, that no evidence is to be adduced which *ex naturâ rei* supposes still greater evidence behind in the party's own power and possession (*k*). In *Doe* v. *Ross* (*k*), it was held that oral evidence of an original might be substituted for an attested copy, which was tendered but rejected for want of a stamp. It is not, however, to be supposed that oral evidence of a document, although equally admissible with an attested or examined copy, is therefore entitled to the same credibility; and it will be for a jury to place their own estimate on the value of the witness's memory.

Copies of documents.—Although either a copy or oral proof of an original will be equally admissible as secondary evidence, the copy of a copy will be inadmissible (*l*) as being one step farther removed from the original. It has been suggested that if the copy tendered is proved to have been compared with the first copy and the first copy with the original, the copy tendered would be admissible, but probably this is not so.

(*h*) But not by what purports to be an attested copy, though the death and handwriting of the attesting witnesses be proved (*Brindley* v. *Woodhouse*, 1 Car. & Kir. 647).
(*i*) *Brown* v. *Woodman*, 6 C. & P. 206.
(*k*) *Per* PARKE, B.: *Doe* v. *Ross*, 7 M. & W. 102.
(*l*) *Liebman* v. *Pooley*, 1 Stark. 167.

Stamping.—It will be presumed, in the absence of contrary evidence, that the original was properly stamped, if it required to be stamped (*m*), and an unstamped copy will be good secondary evidence; but neither at law (*n*) nor in equity (*o*) can secondary evidence of the contents of an unstamped agreement be given, even though it was destroyed by the wrongful act of the party objecting to such evidence.

When a copy is tendered as secondary evidence, it must be proved to be accurate by a witness who made it, or who actually read it and compared it with the original (*p*); but drafts from which, by indorsements upon them, it appeared that certain deeds were engrossed, have been held good secondary evidence of the contents of such deeds (*q*).

All originals must be accounted for before secondary evidence can be given of any one (*r*). It may be remarked that secondary evidence of the contents of a lost will may be adduced as well as of the contents of any other lost instrument (*s*). To obtain probate of a lost will not only must its contents be proved, but also its due execution and attestation (*t*).

If a witness attends on a *subpœna duces tecum*, with a document which he refuses to produce on the ground of privilege, secondary evidence will be admissible. If he does not attend on such a subpœna or attends and refuses to produce the writing on any other ground but that of privilege, secondary evidence will not be admissible, but the witness will be punishable for contempt (*u*).

(*m*) *Marine Investment Co.* v. *Haviside*, L. R. 5 E. & I. 624.
(*n*) *Rippiner* v. *Wright*, 2 B. & Al. 478.
(*o*) *Smith* v. *Henley*, 1 Phil. 391.
(*p*) *Fisher* v. *Samuda*, 1 Camp. 193.
(*q*) *Waldy* v. *Gray*, L. R. 20 Eq. 250.
(*r*) *Per* PARKE, B.: *Alivon* v. *Furnival*, 1 C. M. & R. 292.
(*s*) See *Sugden* v. *Lord St. Leonards*, L. R. 1 P. & D. 154; and *In the Goods of Leigh*, [1892] P. 82, where the will had been torn into pieces after the testator's death and some of the pieces had been lost.
(*t*) *Harris* v. *Knight*, 15 P. D. 170.
(*u*) *R.* v. *Llanfaethly*, 2 El. & Bl. 940.

When production is refused of a document on the ground of private privilege, secondary evidence of its contents is admissible (*x*). Where a document is privileged on the ground of public policy, secondary evidence of its contents is inadmissible (*y*).

PROOF OF HANDWRITING.

The proof of signatures, or handwriting, is the essential part of the proof of private writings. There are various admissible kinds of such proof.

1. Handwriting may be proved by calling the party who wrote or signed. This is the most satisfactory evidence.

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

3. By a witness who has seen the party write on other occasions, even if it be but once only. Such witness must swear to his *belief* that the writing produced is the writing of the person, and it is not sufficient for him to swear that he *thinks* that it is (*z*).

4. By a witness who has seen documents, purporting to be written by the same party, and which, by subsequent communications with such party, he has reasons to believe the authentic writings of such party.

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

The practical principles of this department of evidence are well illustrated in the subjoined judgment of PATTESON, J., in *Doe* v. *Suckermore* (*c*). He said:

"All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief

(*x*) *Calcraft* v. *Guest*, [1898] 1 Q. B. 759.
(*y*) *Home* v. *Bentinck*, 2 B. & B. 130; *Stace* v. *Griffith*, L. R. 2 P. C. 420.
(*z*) *Eagleton* v. *Kingston*, 8 Ves. 473.
(*a*) 28 Vict. c. 18, s. 8.
(*b*) [1894] 2 Q. B. 766.
(*c*) 5 A. & E. 703.

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

Where it is desired to prove the handwriting of an ancient document, it may be proved by the evidence of a witness who has in the course of business examined documents admitted to be written by the same party, but not by a witness who has merely inspected such documents for the purpose of giving evidence (*d*).

On these common law principles has been engrafted the principle numbered 5, *supra*. The statutory provision now in force is the following:

"Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of

(*d*) *Fitzwalter Peerage Case*, 10 Cl. & F. 193.

witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute" (*e*).

Before any writing is admissible as a standard of comparison, its genuineness must be proved to the satisfaction of the judge (*f*), but it need not be relevant to the issue (*g*). Where an attesting witness swore clearly and distinctly that a deed was executed in his presence by R. and his wife, both of whom he knew, this evidence was held not to be counter-balanced by the evidence of experts who expressed an opinion that the signature purporting to be that of R. was not in the character of his handwriting (*h*). Where the handwriting of any part of a document provable by a copy is in dispute, the original must be produced (*i*).

PROOF BY ATTESTING WITNESSES.

It was a common law principle, that where a writing was attested, the witnesses, or one of them, must be called to prove the execution of the instrument; and it was not competent to a party to prove it even by the admission of the person by whom it was executed; but by s. 26 (now repealed) of the Common Law Procedure Act, 1854, it was enacted, that it should not be necessary to prove, by the attesting witness, any instrument, to the validity of which attestation is not requisite; and such instrument might be proved *by admission or otherwise*, as if there had been no attesting witness thereto. Section 103 of that Act confined this principle to courts of civil judicature in England or Ireland; but by the Evidence and Criminal Practice Amendment

(*e*) 28 Vict. c. 18, s. 8.
(*f*) *Hughes* v. *Lady Dinorben*, 32 L. T. 271.
(*g*) *Birch* v. *Ridgway*, 1 F. & F. 270.
(*h*) *Newton* v. *Ricketts*, 9 H. L. Cas. 262.
(*i*) *Auriol* v. *Smith*, 18 Ves. 198.

Act, 1865 (*k*), it was extended to criminal proceedings. Section 7 of this Act (which applies to all courts, civil and criminal, and all persons having by law or consent of parties authority to hear, receive, and examine evidence) re-enacts the above-mentioned section, with the omission of the words in italics which were really surplusage.

In determining, therefore, whether it will be necessary under these Acts to call the attesting witness to an instrument, the practical question is, whether the instrument is one which requires attestation to give it validity. If the instrument would be void without attestation, the subscribing witness must still be called; but, if attestation be unnecessary, the witness need not be called. Thus, in numerous statutory instruments, attestation is essential to their validity: *e.g.*, wills; warrants of attorney and cognovits; bills of sale; indentures of pauper apprentices under the Merchant Shipping Act, 1894 (*l*); instruments executed in pursuance of powers requiring attestation; conveyances to charitable uses, etc. On the other hand, bonds, deeds, and agreements of every kind, which are equally binding whether attested or not, are clearly provable without the production necessarily of a subscribing witness. But according to the practice on Lunacy and Chancery petitions, the court requires proof by the attesting witness of a document or proof of his signature if it can be obtained; if not, the document may be proved as if unattested (*m*). So, too, it has been held that on *ex parte* applications a deed cannot be proved, except by the attesting witness (*n*); but this is strictly confined to *ex parte* applications (*o*).

(*k*) 28 Vict. c. 18.
(*l*) 57 & 58 Vict. c. 60, s. 107.
(*m*) *Re Rice*, 32 Ch. D. 35.
(*n*) *Re Reay's Estate*, 1 Jur. (N.S.) 222.
(*o*) *Worthington* v. *Moore*, 64 L. T. (N.S.) 338.

Exceptional cases.—It is a rule that an attesting witness need not be called to prove an instrument which is more than thirty years old; or when the original is withheld by an adverse party, who refuses to produce it after notice (*p*); or when the adverse party, in producing it after notice, claims an interest under it; or when the adverse party has recognised the authenticity of the instrument by acts creating an estoppel in a judicial proceeding.

Death, etc., of attesting witness.—When the attesting witness is proved to be dead, insane, beyond the jurisdiction of the court, or otherwise not producible after due endeavours to bring him before the court, evidence of his handwriting is sufficient. In such cases it will generally be sufficient to prove the handwriting of the attesting witness. It is also held, that where an instrument requires to be attested by several witnesses, it may be proved by calling any one of them (*q*), except in the case of wills, which, under certain circumstances, can be proved only by the production of all the producible witnesses (*r*). An instrument which is required to be attested by several witnesses may be proved by evidence of the handwriting of one of such witnesses, coupled with proof of his identity, as soon as the absence of all the witnesses has been explained satisfactorily, but not otherwise (*s*).

Where a witness, called to prove the execution of an instrument, sees his signature to the attestation, and says that he is therefore sure that he saw the party execute the deed, that is a sufficient proof of the execution of the instrument, though the witness adds that he has no recollection of the fact of the execution

(*p*) *Poole* v. *Warren*, 8 A. & E. 588.
(*q*) *Holdfast* v. *Downing*, 2 Str. 1254.
(*r*) *Supra*, p. 292.
(*s*) *Nelson* v. *Whittall*, 1 B. & Ald. 19.

of the instrument (*t*). Where an attesting witness has become blind, he must be called to give evidence from recollection (*u*). If the attesting witness be called, and can recollect nothing, then the execution of the deed may be proved *aliunde* (*x*). If all the witnesses are dead, the handwriting of one of them must be proved, and then the statement in the attestation clause will be presumed to be correct (*y*). Where an attesting witness lived abroad, it seems that stricter proof of his death ought to be required (*z*). When the attesting witness to a will (the attestation clause being insufficient) refuses to make an affidavit as provided for by Rule 4 of the Probate Rules, 1862, the court, under s. 24 of the Probate Act, 1857, may order that such witness be examined in open court (*a*).

WRITINGS WHICH REFRESH THE MEMORY.

A document which may be inadmissible intrinsically and *per se* as primary or secondary evidence, either because it does not embody the substance of the issue, or because it is in the nature of hearsay, will often be admissible to refresh the memory of a witness, and to enable him to speak to the matters to which it refers.

It appears that such a document may be handed to a witness for inspection, and that the witness may give oral evidence accordingly, after a perusal of its contents:

1st. When the writing actually revives in his mind a recollection of the facts to which it refers.

(*t*) *Per* BAYLEY, J.: *Maughan* v. *Hubbard*, 8 B. & C. 516; *cf. Burling* v. *Pattison*, 9 C. & P. 579.
(*u*) *Rees* v. *Williams*, 1 D. & S. 314.
(*x*) *Talbot* v. *Hodson*, 7 Taunt. 251.
(*y*) *Adam* v. *Kerr*, 1 B. & P. 360.
(*z*) *Henley* v. *Philips*, 2 Atk. 48.
(*a*) *In the Goods of Sweet*, 61 L. J. P. & D. 15.

2nd. When, although it fail to revive such a recollection, it creates a knowledge or belief in the witness that, at the time when the writing was made, he knew or believed it to contain an accurate statement of such facts.

3rd. When, although the writing revives neither a recollection of the facts, nor of a former conviction of its accuracy, the witness is satisfied that the writing would not have been made unless the facts which it purports to describe had occurred accordingly (*b*).

It is not necessary that the memorandum should have been actually made by the witness, if he can otherwise make it an original source of personal recollection. Thus, a witness has been allowed to refresh his memory from a paper which he remembers having recognised as a correct narrative when the facts were fresh in his memory (*c*).

In this way a writing, which is inadmissible for want of a stamp, may practically be made evidence, as a memorandum to prompt the oral statement of a witness; but this case can only arise where the writing is not in itself primary or best evidence, and where a party has his option of resorting either to written or oral evidence. Thus, a writing which is void as an agreement may be equally serviceable as a memorandum; again, a memorandum of the receipt of money, which was void as a receipt for want of a stamp, has been held strictly admissible to refresh the memory of a witness, and to enable him to say, from the fact of his signature, that he had received money which he had no recollection of having received (*d*). In this case Lord TENTERDEN said:

"In order to make the paper itself evidence of the receipt of the money, it ought to have been stamped. The consequence of its not having been stamped might be, that the party who paid the money, in the event of the death of the person who received

(*b*) When a witness's knowledge of a fact is derived solely from a memorandum used to refresh his memory, his evidence is, of course, not conclusive (*Dupuy* v. *Truman*, 2 Y. & C. 341).

(*c*) *Duchess of Kingston's Case*, 20 How. St. Tr. 619.

(*d*) *Maughan* v. *Hubbard*, 8 B. & C. 14.

it, would lose his evidence of such payment. Here the witness, on seeing the entry signed by himself, said that he had no doubt that he had received the money. The paper itself was not used as evidence of the receipt of the money, but only to enable the witness to refresh his memory; and, when he said that he had no doubt he had received the money, there was sufficient parol evidence to prove the payment."

According to the third principle, *supra*, a person who is shown an entry made by himself may depose to the facts the subject of the entry, although he has no recollection of them (*e*).

As to production of the memorandum.—Generally speaking, the memorandum from which a witness speaks need not be produced in court; but, if produced, it becomes evidence for the party producing (*f*), and the opposite party will be entitled to see it, and to cross-examine from it (*g*). He may cross-examine upon such part of the memorandum as is referred to by the witness, without making the memorandum evidence *per se* for the opposite party; but if he cross-examines upon other parts, he makes them portions of his own evidence (*h*). Where a document is put into a witness's hand, but nothing is done upon it, the opposite party is not entitled to see it (*i*); and where a diary was used by a witness to refresh his memory, it was held that the opposite party was only entitled to see such portions as referred to the subject-matter of the suit (*k*). Where the witness derives his knowledge of a fact *solely* from his reliance on the accuracy of the memorandum, it must be produced (*l*). But in other cases, where the original memorandum has been lost or

(*e*) *R.* v. *St. Martin's, Leicester*, 2 A. & E. 210.
(*f*) *Payne* v. *Ibbotson*, 27 L. J. Ex. 41.
(*g*) *R.* v. *Hardy*, 24 How. St. Tr. 824.
(*h*) *Per* GURNEY, B.: *Gregory* v. *Tavernor*, 6 C. & P. 281.
(*i*) *Sinclair* v. *Stevenson*, 1 C. & P. 585.
(*k*) *Burgess* v. *Bennett*, 20 W. R. 720.
(*l*) *Doe* v. *Perkins*, 3 T. R. 754.

destroyed, a copy, if proved to be correct, may be used.

Time when made.—There is no precise time within which a writing must be shown to have been made, before it can be used by a witness. It is not necessary that it should have been made contemporaneously with the occurrence of the fact; but it ought to have been made soon afterwards, or at least within such a subsequent time as will support a reasonable probability that the memory of the witness had not become impaired when the statement was committed to paper. It appears to be only necessary that the witness should swear positively that the memorandum was made at a time when he had a distinct recollection of the facts, and *ante litem motam* (*m*).

The memorandum must either have been made by the witness, or recognised by him, at or about the time when it was made, as a correct account. It must not contain any of the elements of hearsay, and it will therefore be inadmissible if it appears to be the statement of a third person (*n*), as where it had been drawn up by such a person from the witness's own memoranda; or even if it is a copy made by the witness himself from his own original memoranda (*o*). This rule is consistent with the general principles of secondary evidence, by which the copy of a copy, unless in the nature of a duplicate original, is inadmissible, and corresponds with the express dictum of PATTESON, J., in *Burton* v. *Plummer* (*p*), that "the copy of an entry, not made by the witness contemporaneously, does not seem to be admissible for the purpose of refreshing a witness's memory." The cases

(*m*) *Wood* v. *Cowper*, 1 C. & K. 646.
(*n*) *Anon.*, Ambler, 252.
(*o*) *Jones* v. *Stroud*, 2 C. & P. 196.
(*p*) 2 A. & E. 343.

where such a privilege appears to have been conceded, as where the author of a written report (*q*), or an article in a newspaper (*r*), has been allowed to refer to the printed versions, are cases where such printed versions appear to have been treated as originals, and not as copies.

(*q*) *Horne* v. *Mackenzie*, 6 C. & F. 628.
(*r*) *Topham* v. *M'Gregor*, 1 C. & K. 320.

CHAPTER V.

MATTERS WHICH ARE REQUIRED TO BE PROVED BY WRITING—THE STATUTES OF FRAUDS AND OF LIMITATIONS—PRESCRIPTION.

MANY matters can be proved only by deed or other writing; and, in such cases, oral evidence, however distinct and direct, is wholly inadmissible.

INCORPOREAL RIGHTS,

Such as advowsons, rents, remainders, reversions, *profits à prendre*, and easements, can be created or assigned only by deed, and must therefore be proved by deed. Thus, a ticket of free admission to a theatre or a racecourse is insufficient evidence of a title to enter, unless it be by deed (*a*).

CONTRACTS BY CORPORATIONS.

A contract by a corporation must in general be either under the seal of the corporation or signed on its behalf by a person authorised under seal to do so, or must be ratified under seal (*b*).

Exceptions.—This rule is an ancient principle of the common law, and still remains in the abstract unmodified; but practically, a large number of exceptions

(*a*) *Wood* v. *Leadbitter*, 13 M. & W. 842.
(*b*) See *Arnold* v. *Mayor of Poole*, 4 M. & G. 860; *Mayor, etc. of Oxford* v. *Crow*, [1893] 3 Ch. 535.

have been engrafted on it, and their cumulative result appears to be that minor contracts, where there is a paramount convenience such as to amount almost to a necessity, or contracts connected with the objects for which the corporation was established, may be proved without being under the seal of the corporation (*c*). Although, as a general rule, an inferior servant can be retained even by a non-trading corporation by parol, the same principle does not apply to all such servants; for it has been held that the contract for the engagement of a clerk to a master of a workhouse by a board of guardians must be under seal (*d*).

The practical question in such cases is: Was the transaction incidental or foreign to the objects and daily business of the corporation? If it was incidental, as to repair the premises of the corporation (*e*); or a contract to buy or sell such goods as the corporation is formed to buy and sell (*f*), or to purchase goods for the purposes of the corporation (*g*), such a matter does not require to be proved by the corporation seal. The East India Company was formerly held liable upon bills of exchange accepted on its behalf although its seal was not on them (*h*). When the goods to be supplied are not such as those in which the corporation usually deals (*i*); or when the contract is of such a magnitude, and of such an unusual description, as to require reasonably the formal and express assent of the corporation, the fact must be proved by writing under the corporate seal (*k*); but magnitude *per se* is not an

(*c*) *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 821; *cf. Church* v. *Imperial Gas Co.*, 6 A. & E. 861.

(*d*) *Austin* v. *Bethnal Green Guardians*, L. R. 9 C. P. 91; *cf. Dyte* v. *St. Pancras Guardians*, 27 L. T. (N.S.) 342.

(*e*) *Saunders* v. *St. Neot's Union*, 8 Q. B. 810.

(*f*) *Church* v. *Imperial Gaslight and Coke Co.*, 6 A. & E. 846.

(*g*) *South of Ireland Colliery Co.* v. *Waddell*, L. R. 4 C. P. 617.

(*h*) *Murray* v. *East India Co.*, 5 B. & A. 204.

(*i*) *Copper Miners' Co.* v. *Fox*, 16 Q. B. 229.

(*k*) *Homersham* v. *Wolverhampton Rail. Co.*, 6 Exch. 137.

element in deciding whether a contract not under seal is binding on the corporation (*l*).

It may be remarked, that the tendency of recent decisions is to restrict the general principle that corporations can only contract under seal. The courts are unwilling to hold such contracts void, merely because they are not evidenced by the corporate seal; and are more and more inclined to hold corporations bound by them when they are entered into by duly appointed agents; but the agents of a corporation have no power to bind it by any act which the corporate body has not power to do. Corporations are bound by the misrepresentations of their agents (*m*); and it has been said by a high authority, that, although corporations can only contract under seal, they are bound by their conduct, and by the acts of their solicitors, after their contract, just as an individual would be (*n*). So, in torts, corporations are liable for the acts of their servants, although they have not been appointed under the corporate seal (*o*); and use and occupation may be maintained by a corporation against a tenant who has entered, but who has not been constituted tenant by a demise under seal (*p*). Entry, occupation, and payment of rent for corporate property under a demise not under seal will constitute a yearly tenancy (*q*).

As to executed contracts.—Although it was at one time doubted how far a corporation was bound by an executed contract, not under seal, and of which the corporation had received the benefit; it is now settled that the corporation will be bound if it has accepted

(*l*) *Per* ERLE, J.: *Henderson* v. *Australian Steam Navigation Co.*, 5 E. & B. 409.
(*m*) *Conybeare* v. *New Brunswick Co.*, 8 Jur. (N.S.) 375.
(*n*) *Per* Lord ST. LEONARDS: *Eastern Counties Rail. Co.* v. *Hawkes*, 5 H. L. Cas. 376.
(*o*) *Eastern Counties Rail. Co.* v. *Brown*, 6 Exch. 314; *Goff* v. *Great Northern Rail. Co.*, 3 E. & E. 672.
(*p*) *Mayor of Stafford* v. *Till*, 4 Bing. 77.
(*q*) *Ecclesiastical Commissioners* v. *Merral*, L. R. 4 Ex. 162.

the benefit of the contract (*r*), except, of course, where any Statute intervenes, as in the case of contracts by urban authorities (*s*). Where goods which a corporation has contracted by parol to buy have been received by it, or after work is done and adopted for the purposes of the corporation, the objection that the contract was not under seal cannot be taken (*t*).

Acquiescence and part performance.—The doctrines of acquiescence and part performance are applied by courts of equity to contracts by corporations or incorporated companies as well as to those by private individuals. Thus, where the directors of a railway company entered into an informal agreement, upon the faith of which certain works were executed on a spot where the company was constructively present, the company was held to the agreement (*u*).

Contracts ultra vires.—Even where the contract is *ultra vires*, and one which a corporation or incorporated company cannot lawfully enter into, still, if any benefit has been derived by the corporation or incorporated company from the contract, they are liable to the extent of such benefit. Thus, where a life assurance company granted marine policies, and the policies so granted were held void as being *ultra vires*, the holders were held to be entitled to recover from the company the amount of the premiums paid by them (*x*).

(*r*) *Melbourne Banking Corporation* v. *Brougham*, 7 App. Cas. 307.
(*s*) See *infra*, p. 331.
(*t*) *Saunders* v. *St. Neot's Union*, 8 Q. B. 810.
(*u*) *Laird* v. *Birkenhead Rail. Co.*, Johns. 500; *cf. Crook* v. *Corporation of Seaford*, L. R. 6 Ch. 551; and see *Mayor of Kidderminster* v. *Hardwick*, L. R. 9 C. P. 13.
(*x*) *In re Phœnix Life Assurance Co.*, 2 J. & H. 441.

CONTRACTS BY COMPANIES.

Under the Companies Clauses Consolidation Act, 1845 (*y*), contracts are provable under the following section :

Section 97. "The power which may be granted to any such committee to make contracts, as well as the power of the directors to make contracts, on behalf of the company, may lawfully be exercised as follows ; (that is to say,)

"With respect to any contract which, if made between private persons, would be by law required to be in writing, and under seal, such committee or the directors may make such contract on behalf of the company in writing, and under the common seal of the company, and in the same manner may vary or discharge the same :

"With respect to any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, then such committee or the directors may make such contract on behalf of the company in writing, signed by such committee or any two of them, or any two of the directors, and in the same manner may vary or discharge the same :

"With respect to any contract which, if made between private persons, would by law be valid, although made by parol only, and not reduced into writing, such committee or the directors may make such contract on behalf of the company, by parol only, without writing, and in the same manner may vary or discharge the same :

"And all contracts, made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be :

"And on any default in the execution of any such contract, either by the company or any other party thereto, such actions or suits may be brought, either by or against the company, as might be brought had the same contracts been made between private persons only."

On this section it has been held, that where a company has had the benefit of a contract made by an agent, there will be evidence for a jury of such a contract (*z*).

(*y*) 8 & 9 Vict. c. 16.
(*z*) *Pauling* v. *London and North Western Rail. Co.*, 8 Ex. 867.

By s. 98 the directors are to cause minutes to be made of all contracts entered into by them, which minutes are to be signed by the chairman of the meeting, and in this form they are to be *primâ facie* evidence that the meeting has been duly convened, and that the persons attending were directors, etc., as the entry describes them.

The above Act applies (*a*) to contracts made by companies which are incorporated by special Acts, and placed under its provisions, but it does not apply to contracts made by ordinary joint stock companies after complete registration. These are regulated by several Acts, of which the principal is the Companies Act, 1862 (*b*); but the latter Act does not contain any clauses similar to those which were contained in the Joint Stock Companies Act, 1856, and which are substantially re-enacted in the Companies Act, 1867, and therefore under this Act contracts by joint stock companies were on the same footing as contracts by corporations except as provided by s. 47 of the Act of 1862, which enacts that—

"A promissory note or bill of exchange shall be deemed to have been made, accepted, or endorsed on behalf of any company under this Act, if made, accepted, or endorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or endorsed by or on behalf or on account of the company, by any person acting under the authority of the company."

But now by s. 37 of the Companies Act, 1867 (*c*), which is, so far as is consistent with the tenor thereof, to be construed as one with the 25 & 26 Vict. c. 89, therein called "the principal Act," it is enacted, that:

"Contracts on behalf of any company under the principal Act may be made as follows; (that is to say,)

"(1) Any contract which if made between private persons would be by law required to be in writing, and if made

(*a*) Section 1.
(*b*) 25 & 26 Vict. c. 89.
(*c*) 30 & 31 Vict. c. 131.

according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged :

"(2) Any contract which if made between private persons would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged :

"(3) Any contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged :

"And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be."

TRANSFER OF SHARES.

Section 14 of the Companies Clauses Consolidation Act, 1845 (*d*), enacts, that every transfer of shares under that Act shall be by deed duly stamped, in which the consideration shall be truly stated; and a form of transfer is given in the Schedule B. to the Act. The Companies Act, 1862 (*e*), contains no similar provision, but by s. 22, provides that shares shall be transferred in manner provided by the regulations of the company, which, in the case of companies governed by Table A., is, that instruments of transfer are to be executed both by transferor and transferee, and that the transferor is to be deemed to remain the holder of a share until the name of the transferee has been entered in the company's register.

As to proof of documents registered at the Registry of Joint Stock Companies, see *ante*, p. 304.

(*d*) 8 & 9 Vict. c. 16.

(*e*) 25 & 26 Vict. c. 89.

SALE OF SHIPS.

Section 24 of the Merchant Shipping Act, 1894 (*f*), enacts that :

"A registered ship or a share therein (when disposed of to a person qualified to own a British ship) shall be transferred by bill of sale. The bill of sale shall contain such description of the ship as is contained in the surveyor's certificate, or some other description sufficient to identify the ship to the satisfaction of the registrar, and shall be in the form marked A [in the schedule], or as near thereto as circumstances permit, and shall be executed by the transferor in the presence of, and be attested by, a witness or witnesses."

It appears that this provision extends to all vessels not propelled by oars.

CONTRACTS BY URBAN AUTHORITIES.

By s. 174 of the Public Health Act, 1875 (*g*), every contract made by an urban authority whereof the value or amount exceeds £50, must be in writing and sealed with the common seal of such authority. It has been held by the House of Lords that this section prevents urban authorities from being bound by any contract whereof the value or amount exceeds £50, unless such contract is under seal, even though it be an executed contract of which the urban authority have had the full benefit, and which has been effected by their agent appointed under their seal (*h*). A compromise of an action is not a contract within the above-mentioned section (*i*). In one case it was held that under the circumstances the seal might be affixed to a contract to

(*f*) 57 & 58 Vict. c. 60.
(*g*) 38 & 39 Vict. c. 55.
(*h*) *Young* v. *Mayor, etc. of Leamington*, 8 App. Cas. 517.
(*i*) *Att.-Gen.* v. *Gaskill*, 22 Ch. D. 537.

perform certain work after the work had been partly performed (*k*). Only the contracting parties can take the objection of want of seal (*l*).

CONTRACTS BY REGISTERED INDUSTRIAL AND PROVIDENT SOCIETIES.

Contracts by the above societies are now regulated by s. 35 of the Industrial and Provident Societies Act, 1893 (*m*), which provides—

"Contracts on behalf of a registered society may be made, varied, or discharged as follows:

"(a) Any contract, which if made between private persons would be by law required to be in writing, and if made according to the English law to be under seal, may be made on behalf of the society in writing under the common seal of the society, and may in the same manner be varied or discharged;

"(b) Any contract, which if made between private persons would be by law required to be in writing and signed by the persons to be charged therewith, may be made on behalf of the society in writing by any person acting under the express or implied authority of the society, and may in the same manner be varied or discharged;

"(c) Any contract under seal which, if made between private persons, might be varied or discharged by a writing not under seal, signed by any person interested therein, may be similarly varied or discharged on behalf of the society by a writing not under seal, signed by any person acting under the express or implied authority of the society;

"(d) Any contract, which if made between private persons would be by law valid though made by parol only and not reduced into writing, may be made by parol on behalf of the society by any person acting under the express or implied authority of the society, and may in the same manner be varied or discharged;

"(e) A signature, purporting to be made by a person holding any office in the society, attached to a writing whereby any contract purports to be made, varied, or discharged by or

(*k*) *Melliss* v. *Shirley Board of Health*, 14 Q. B. D. 911.
(*l*) *Bournemouth Commissioners* v. *Watts*, 14 Q. B. D. 87.
(*m*) 56 & 57 Vict. c. 39.

on behalf of the society, shall primâ facie be taken to be the signature of a person holding at the time when the signature was made the office so stated.

"All contracts which may be or have been made, varied, or discharged according to the provisions contained in this section, shall, so far as concerns the form thereof, be effectual in law and binding on the society and all other parties thereto, their heirs, executors, or administrators as the case may be."

WARRANTS OF ATTORNEY.

The 24th section of the Debtors Act, 1869 (*n*), enacts, that after its commencement (July 1st, 1870)—

"A warrant of attorney to confess judgment in any personal action or cognovit actionem given by any person shall not be of any force unless there is present some attorney of one of the superior courts on behalf of such person expressly named by him and attending at his request to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney."

STATUTE OF FRAUDS (*o*).

The chief object of this Statute was to lessen the temptations to perjury which exist when a person is permitted to give oral evidence of an agreement in dispute between himself and another person; it therefore designates a number of cases in which none but written evidence of such a disputed agreement shall be received. Such agreements, when not proved by writings which embody their terms, and unless rendered void by the Statute, still exist in contemplation of law, but are yet, virtually, non-existent, because they cannot be established by the only species of evidence, viz., written evidence, which the legislature has declared to be admissible proof of their existence.

(*n*) 32 & 33 Vict. c. 62.

(*o*) 29 Car. 2, c. 3.

The contract may still be good, and the relative legal rights of the parties may have been constituted by word of mouth; but the statutory inadmissibility of oral evidence to prove the contract leaves the right unsupported by a legal remedy.

There is no branch of the law of evidence of more constant and immediate importance than that which regulates contracts which fall within this Statute and the Sale of Goods Act, 1893, and which can generally be proved only by written evidence. The cases are endless on the subject; but the limits of this work permit only a careful selection of such as bear prominently upon it.

INTERESTS IN LAND.

(*As affected by the Statute of Frauds.*)

Section 1. "All leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only; and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates or any former law or usage to the contrary notwithstanding."

Section 2. "Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at the least of the full improved value of the thing demised."

Under this section, any lease, extending not more than three years from the time of its creation, and commencing from the date of the lease, and not from a future date; or, if commencing from a future date, not extending more than three years from the date of the lease; may still be proved, as before the statute, by evidence of an oral lease (*p*). It seems that such

(*p*) *Rawlins* v. *Turner*, 1 Ld. Raym. 736; *Riley* v. *Hicks*, 1 Stra. 651.

a lease confers a right of action against a lessee only when he has entered, and not for a non-entry (*q*).

Section 3. "No leases, estates or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall at any time be assigned, granted, or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act or operation of law."

If a person enters into possession of land and pays rent under a lease or agreement for a lease void under these provisions, he becomes at common law tenant from year to year, upon such of the terms of the lease or agreement as are applicable to such a tenancy (*r*); but since the Judicature Acts, a tenant holding under an agreement for a lease, of which specific performance would be decreed, stands in the same position as if the lease had been executed (*s*).

All the above interests in land, if created or assigned since October 1st, 1845, are now required to be evidenced by deed, for it is enacted by 8 & 9 Vict. c. 106, s. 3, that—

"A feoffment made after the said first day of October, one thousand eight hundred and forty-five, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed; and a partition and an exchange of any tenements or hereditaments, not being copyhold, and a lease, required by law to be in writing, . . . made after the said first day of October, one thousand eight hundred and forty-five, shall also be void at law, unless made by deed. . . ."

The 4th section enacts (*inter alia*) that—

"No action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the person to be charged therewith, or some other person thereunto by him lawfully authorised."

(*q*) *Edge* v. *Strafford*, 1 Tyr. 293.
(*r*) *Ness* v. *Sarage*, 4 E. & B. 36.
(*s*) *Walsh* v. *Lonsdale*, 21 Ch. D. 9.

The term "interest" in this section has been held to cover the purchase of the building materials of a house to be taken down by the purchaser (*t*).

The subject-matter, the terms, and the parties must appear in the agreement (*u*). The agreement need not consist of a single paper, but may be gathered from several connected papers (*x*).

As to connected documents.—The connection must appear from the documents themselves, although parol evidence is admissible to aid in establishing the connection but not to establish it (*y*). An envelope and a letter, which is shown by evidence to have been enclosed in it, are so connected that the envelope may be used to supply the name of one of the parties to an agreement (*z*). It is a rule that two documents, one of which refers to the other, can be read together (*a*). Where a person seeks to prove the terms of a contract by a series of letters, he must take the whole of each letter, and cannot pick out part and reject the rest (*b*). Correspondence and telegrams taken together may constitute a contract (*c*). Where a contract has to be proved by a correspondence, the whole correspondence must be taken into consideration (*d*); and—

"If in all the letters taken together you see that the parties did not intend to make a contract, even though in two or three letters there appeared to be a contract, you would hold that on the whole correspondence there was none" (*e*).

(*t*) *Lavery* v. *Pursell*, 39 Ch. D. 508.
(*u*) *Williams* v. *Lake*, 2 E. & E. 349.
(*x*) *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; *Bauman* v. *James*, L. R. 3 Ch. 108.
(*y*) *Long* v. *Millar*, 4 C. P. D. 450; *Oliver* v. *Hunting*, 44 Ch. D. 205; *Sheers* v. *Thimbleby*, 76 L. T. 709; *Taylor* v. *Smith*, [1893] 2 Q. B. 65.
(*z*) *Pearce* v. *Gardner*, [1897] 1 Q. B. 688.
(*a*) *Per* NORTH, J., in *Studds* v. *Watson*, 28 Ch. D. 305.
(*b*) *Nesham* v. *Selby*, L. R. 7 Ch. 406.
(*c*) *Coupland* v. *Arrowsmith*, 18 L. T. (N.S.) 755; *Godwin* v. *Francis*, L. R. 5 C. P. 295.
(*d*) *Hussey* v. *Horne-Payne*, 4 App. Cas. 311.
(*e*) *Per* JESSEL, M.R., *Williams* v. *Brisco*, 22 Ch. D. 448.

"If two letters standing alone would be evidence of a sufficient contract, yet a negotiation for an important term of the purchase and sale carried on afterwards is enough to show that the contract was not complete" (*f*).

The mere reference to a future formal contract in a correspondence will not prevent the correspondence from constituting a binding agreement (*g*); but—

"If you find not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon by the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract" (*h*).

So in a case where there was a letter from the plaintiffs offering to buy a business on certain terms, and it stated that "this offer is made subject to our approving a detailed contract to be entered into," and went on to state that the purchase money was to be paid as to part in cash and as to part in preference stock and debenture stock of a company to be formed, which offer was accepted by the defendants, it was held by the Court of Appeal there was no concluded agreement (*i*).

The parties need not be specified by name; but an adequate description is sufficient. Thus, if the vendor is described in the contract as "proprietor," "owner," "mortgagee," or the like, the description is sufficient, although he is not named; but if he is described as "vendor," or as "client," or "friend" of a named agent, that is not sufficient; the reason given being, in the language of Lord CAIRNS, that the former description is a statement of matter of fact as to which there

(*f*) *Per* KAY, J.: *Bristol, etc. Bread Co.* v. *Maggs*, 44 Ch. D. 625.
(*g*) *Bonnewell* v. *Jenkins*, 8 Ch. D. 70; see *Filby* v. *Hounsell*, [1896] 2 Ch. 737.
(*h*) *Per* Lord CAIRNS: *Rossiter* v. *Miller*, 3 App. Cas. 1138; *cf. Winn* v. *Bull*, 7 Ch. D. 29.
(*i*) *Page* v. *Norfolk*, 70 L. T. 781.

can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise (see *Rossiter* v. *Miller* (*k*); *Sale* v. *Lambert* (*l*); *Potter* v. *Duffield* (*m*)); the reason against the latter description being, that in order to find out who is vendor, client, or friend you must go into evidence on which there might possibly, as in *Potter* v. *Duffield*, be a conflict, and that, as the Master of the Rolls said in the last-named case, is exactly what the Act says shall not be decided by parol evidence. "I should be thrown," he continued, "on parol evidence to decide who sold the estate, and who was the party to the contract, this Act requiring that fact to be in writing" (*n*). Parol evidence is admissible to identify the property sold where there is only a general description. Thus where there was a contract to sell "at the price of £5,000 twenty-four acres of land, freehold, with the appurtenances at Totmonslow, in the parish of Draycott, in the county of Stafford," parol evidence was held admissible to prove what were the twenty-four acres referred to (*o*). It was observed in the case under notice that a memorandum under the Statute of Frauds must be construed in a reasonable way. The written contract must show who are the contracting parties, although they or one of them may be agents or agent for others. Who are the principals need not appear upon the document but may be proved *aliunde* (*p*).

As to signature by an agent.—An authority to sign need not be in writing; but of course the agent only binds the principal when acting within the scope of his authority; thus, where the defendant having verbally agreed with the plaintiff to sell him a house, instructed

(*k*) 3 App. Cas. 1124.
(*l*) L. R. 18 Eq. 1.
(*m*) L. R. 18 Eq. 4.
(*n*) *Per* KAY, J., in *Jarrett* v. *Hunter*, 34 Ch. D. 182; *cf. Cattling* v. *King*, 5 Ch. D. 660.
(*o*) *Plant* v. *Bourne*, [1897] 2 Ch. 281.
(*p*) See *Filby* v. *Hounsell*, [1896] 2 Ch. 740.

a solicitor to prepare a formal agreement, and the solicitor sent a draft agreement to the plaintiff's solicitor for approval, accompanied by a letter stating the terms of the arrangement, but the agreement was never signed by the parties, it was held that the letter of the defendant's solicitor was not a memorandum of the agreement within the statute, because the solicitor had only authority to prepare a formal agreement and nothing more (*q*). In a case where a telegram accepting an offer to buy an estate was sent by the vendors, BOVILL, C.J., stated that he was prepared to hold that the telegram written out and signed by the telegraph clerk, with the authority of the vendors, was a sufficient signature within the Statute of Frauds (*r*).

The memorandum need only be signed by the party charged; and, if so signed, is good against him, though not against the other party; and where a written proposal signed by one contracting party is verbally assented to by the other, it is a memorandum within the Statute sufficient to charge the party signing (*s*). A printed signature may be sufficient (*t*), and so may a printed heading (*u*); for it is immaterial when the signature is placed on the document or where it was placed, provided it was placed there for the purpose of affirming that the document contains the terms of the offer or contract, as the case may be (*x*). But the signature must be so placed as to show that it is intended to refer to and does refer to every part of the instrument. It follows, therefore, that if a signature be found in an instrument incidentally only, or having

(*q*) *Smith* v. *Webster*, 3 Ch. D. 49.
(*r*) *Godwin* v. *Francis*, L. R. 5 C. P. 295.
(*s*) *Reuss* v. *Picksley*, L. R. 1 Ex. 342; *cf. Filby* v. *Hounsell*, [1896] 2 Ch., at p. 740.
(*t*) *Torret* v. *Cripps*, 48 L. J. Ch. 567.
(*u*) *Schneider* v. *Morris*, 2 M. & S. 286.
(*x*) *Jones* v. *Victoria Dock Graving Co.*, 2 Q. B. D. 314.

relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it must have in order to comply with the Statute and to give authenticity to the whole of the memorandum (*y*). It has been held that if the agent of a party sued has laid before the party suing a document containing the name of the party sued as that of a party contracting, and the party suing signs the document, that is sufficient within s. 4 of the Statute (*z*). This is an extreme case, and the soundness of the decision is doubtful.

On a sale of real estate by public auction the auctioneer is the agent of both parties, and has authority to sign a memorandum of the sale, so as to bind the purchaser as well as the vendor, provided he does so at the time of the sale, and not subsequently. He must sign himself, and the signature of his clerk will not do unless the party who takes the objection to the clerk's signature has by word, sign, or otherwise authorised the clerk to sign for him (*a*).

Specific performance of a parol contract as to an interest in land which is within the Statute of Frauds is, however, enforced, (1) where it is set out in the plaintiff's pleadings and admitted by the defendant; (2) where the reduction of the contract to writing was prevented by the fraud of one of the parties; (3) where it is a completed agreement, and has been partly carried into execution, and is definite in its terms (*b*). But if in any particular case the acts of part performance of a parol agreement as to an interest in land are to be held sufficient to exclude the operation of the Statute of

(*y*) *Per* Lord WESTBURY in *Caton* v. *Caton*, L. R. 2 E. & I. 143.
(*z*) *Evans* v. *Hare*, [1892] 1 Q. B. 593.
(*a*) *Bell* v. *Balls*, [1897] 1 Ch. 669; and *cf. Sims* v. *Landray*, [1894] 2 Ch. 318, where the auctioneer's clerk signed while the purchaser stood by.
(*b*) Smith's Manual of Equity, 13th ed., p. 279. As to what constitutes part performance, *vide id.*, p. 281.

Frauds, they must be such as are unequivocally referable to the agreement; in other words, there must be a necessary connection between the acts of part performance and the interest in the land, which is the alleged subject-matter of the agreement; and it is not sufficient that the acts are consistent with the existence of such an agreement, or that they suggest or indicate the existence of some agreement, unless it is the agreement alleged. As was said by Lord HARDWICKE in the case of *Gunter* v. *Halsey* (*c*), they must be such as could have been done with no other view or design than to perform the agreement (*d*). Payment of rent by a tenant at an increased rate is evidence of a contract for a new tenancy, as it could not apply to the old tenancy, and is an unequivocal act referable to a new contract of tenancy (*e*). The doctrine of part performance rendering a parol contract enforceable in equity, is confined to contracts as to interests in land (*f*).

CONTRACTS BY EXECUTORS, ETC.

Section 4.—"No action shall be brought whereby to charge any executor or administrator, upon any special promise. to answer damages out of his own estate . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

The agreement must embody the consideration for the promise, and be signed by the executor or the administrator, or his agent (*g*).

(*c*) 2 Amb. 586.
(*d*) Cited by BAGGALLAY, L.J.: *Humphreys* v. *Green*, 10 Q. B. D. 154.
(*e*) *Miller and Aldworth, Limited* v. *Sharp*, [1899] 1 Ch. 622.
(*f*) *Britain* v. *Rossiter*, 11 Q. B. D. 123.
(*g*) *Rann* v. *Hughes*, 7 Bro. P. C. 556.

GUARANTEES.

Section 4. "No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person . . . unless the agreement," etc. (as in the case of executors, *supra*).

The agreement must rest on a valid consideration (*h*), which must be new and executory, except where it is the embodiment of verbal terms on which the contract has been executed, and the guarantee subsequently given in writing (*i*). It is the essence of a guarantee that the original debtor should continue liable; and therefore, if his liability is extinguished, and the surety is the only party liable for the debt, his liability will not require to be evidenced by writing. If the person for whose use goods are furnished is liable at all, any promise by a third person, upon sufficient consideration, to pay that debt, must be in writing (*k*). Where there is a contract, the main object of which is not to answer for the debt of another, that contract is not within the section even though incidentally it may result in a liability to answer for the debt of another (*l*). It is also held that the promise to pay the debt of another person need be proved by writing only where the promise is given to the original creditor, and not where it is given to the debtor or a third person that the promisor will be answerable to the creditor (*m*). Therefore a promise to indemnify is not within the statute (*n*). Consequently, it was held that a promise by a defendant to keep a plaintiff indemnified against liability on

(*h*) *Semple* v. *Pink*, 1 Ex. 74.
(*i*) *Eastwood* v. *Kenyon*, 11 A. & E. 438.
(*k*) *Birkmyr* v. *Darnell*, 1 Sm. L. C. 274; *Fitzgerald* v. *Dressler*, 7 C. B. (N.S.) 374.
(*l*) *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K. B. 778.
(*m*) *Eastwood* v. *Kenyon*. 11 A. & E. 446.
(*n*) *Per* BYLES, J.: *Reader* v. *Kingham*, 13 C. B. (N.S.) 344; *cf. Wildes* v. *Dudlow*, 44 L. J. Ch. 341. See also *Harburg, etc. Co.* v. *Martin, ubi supra.*

certain bills which the defendant had asked him to accept need not be in writing (*o*). Where the chairman of a board of health virtually promised a contractor that he would see him paid for certain extra work, it was held by the House of Lords, affirming the Court of Exchequer Chamber, that the chairman's words were evidence to sustain a claim against him personally, *i.e.*, that they did not constitute a promise to pay the debt of another within the Statute of Frauds (*p*). The plaintiff's name must appear on the document (*q*). Formerly, it was necessary that the guarantee should disclose a consideration on the face of it; this is no longer required (*r*), but though parol evidence is admissible to prove the consideration, it is inadmissible to explain the promise (*s*). Any document sufficiently signed and containing the terms of the agreement may constitute a memorandum or note to satisfy the Statute. Thus an affidavit has been held sufficient, and so has a letter to a third party, and so, in a recent case, has a recital in a will (*t*). The agreement may be collected in the case of a guarantee from two or more connected documents (*u*).

MARRIAGE.

Section 4. "No action shall be brought whereby . . . to charge any person upon any agreement made upon consideration of marriage, unless the agreement," etc. (as in the case of executors, *supra*).

This provision does not extend to promises to marry (*x*), but only to cases where something collateral

(*o*) *Guild* v. *Conrad*, [1894] 2 Q. B. 885.
(*p*) *Lakeman* v. *Mountstephen*, L. R. 7 E. & I. 17.
(*q*) *Williams* v. *Lake*, 2 E. & E. 349.
(*r*) 19 & 20 Vict. c. 97, s. 3.
(*s*) *Holmes* v. *Mitchell*, 7 C. B. (N.S.) 361.
(*t*) *Hoyle* v. *Hoyle*, [1893] 1 Ch. 84.
(*u*) *Sheers* v. *Thimbleby*, 76 L. T. 709.
(*x*) *Cock* v. *Baker*, 1 Str. 34.

to and dependent upon the event of the marriage is the substance of the contract; as, where A. promises B. so much money in the event of B. marrying A.'s daughter (*y*). An oral contract, however, if complete and partly performed, will be enforced in equity; but marriage is not part performance of a contract of the kind now under consideration (*z*).

CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR.

Section 4. "No action shall be brought whereby to charge . . . any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement," etc. (as in the case of executors, *supra*).

The Statute does not apply where the contract is capable of being performed by either party within a year from the date of its making (*a*); but it applies to a contract defeasible by a contingency which may occur within that period (*b*). A contract to serve for a year, the service to commence on the second day after that on which the contract is made, is within the Statute (*c*). But where the service was to commence on the day next after that on which the contract is made, it is not within the Statute (*d*).

DECLARATIONS OR CREATIONS OF TRUSTS.

Section 7. "All declarations or creations of trust or confidence of any lands (*e*), tenements, or hereditaments shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

(*y*) *Harrison* v. *Page*, 1 Ld. Raym. 386.
(*z*) *Lassence* v. *Tierney*, 1 Mac. & G. 551.
(*a*) *Cherry* v. *Heming*, 4 Ex. 631; *Smith* v. *Neale*, 2 C. B. (N.S.) 67.
(*b*) See *Davey* v. *Shannon*, 4 Ex. D. 81.
(*c*) *Britain* v. *Rossiter*, 11 Q. B. D. 123.
(*d*) *Smith* v. *Gold Coast, etc. Explorers*, [1903] 1 K. B. 285.
(*e*) This includes lands abroad (*Rouchefoucauld* v. *Boustead*, [1897] 1 Ch. 196).

The beneficial owner is the only person who is enabled to declare the trust (*f*), and no person can create a trust of land for any larger estate than that which he possesses (*g*).

It is provided by s. 8—

"That when any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law or be transferred or extinguished by an act or operation of law then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made, anything hereinbefore contained to the contrary notwithstanding."

When the plaintiff had conveyed an estate to the defendant without consideration, on the understanding that the defendant should in certain events re-convey it to him, and on the plaintiff applying for a re-conveyance, the defendant pleaded the Statute of Frauds, the court made a decree for re-conveyance, on the ground that the Statute of Frauds was never intended to prevent a court of equity from giving relief in a case of a plain, clear and deliberate fraud (*h*). So in a later case (*i*) an assignment absolute in form was held subject to a trust for the plaintiff.

In *Foster* v. *Hale* (*k*), Lord ALVANLEY said:

"It is not required by the statute that a trust should be created by writing, and the words of the statute are very particular in the clause respecting declarations of trust. It does not by any means require that all trusts shall be created only by writing, but that they shall be manifested and proved by writing; plainly meaning that there should be evidence in writing proving that there was such a trust. Therefore, unquestionably, it is not necessarily to be created by writing, but it must be evidenced by writing, and then the statute is complied with; and indeed the great danger of parol declarations, against which the statute was intended to guard, is entirely taken away. I admit that it must be proved *in toto* not only that there was a trust, but what it was."

(*f*) *Kronheim* v. *Johnson*, 7 Ch. D. 60.
(*g*) See *Dye* v. *Dye*, 13 Q. B. D. 147.
(*h*) *Haigh* v. *Kaye*, L. R. 7 Ch. 469.
(*i*) *Davis* v. *Whitehead*, [1894] 2 Ch. 133.
(*k*) 3 Vesey, 707; *cf. Smith* v. *Matthews*, 3 De G. F. & J. 139.

A good exposition of the law on the point under consideration is to be found in the considered judgment of the Court of Appeal in *Rouchefoucauld* v. *Boustead* (*l*), which, after referring to *Foster* v. *Hale* and *Smith* v. *Matthews*, proceeds:

"According to these authorities, it is necessary to prove by some writing or writings signed by the defendant, not only that the conveyance to him was subject to some trust, but also what that trust was. But it is not necessary that the trust should have been declared by such a writing in the first instance; it is sufficient if the trust can be proved by some writing signed by the defendant, and the date of the writing is immaterial. It is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute in order to keep the land himself."

CONTRACTS FOR THE SALE OF GOODS OF THE VALUE OF £10 AND UPWARDS.

Section 4 of the Sale of Goods Act, 1893 (*m*), provides that:

"(1) A contract for the sale of any goods (*n*) of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(*l*) [1897] 1 Ch. 196.
(*m*) 56 & 57 Vict. c. 71.
(*n*) "Goods" are defined as follows: "Goods include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

"(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

"(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not."

Under this section there are three statutory modes of proving a contract for the sale or purchase of goods of the value of £10 and upwards: (1) By showing that the buyer accepted, and actually received, part of the goods. (2) By showing the giving of something in earnest by the buyer or part payment of the purchase-money by him. (3) By showing that a note or memorandum in writing of the contract has been made and signed by the party to be charged, or his agent authorised in that behalf.

This section re-enacts, with some modifications, the provisions of s. 17 of the Statute of Frauds, as amended by Lord Tenterden's Act. Under the old law the limit was £10 or upwards in price, now it is £10 or upwards in value. It may be supposed that the price of goods may be taken to be their value for the purposes of s. 4, otherwise the substitution of "value" for "price" is obviously undesirable. Under this section the contract is not void, but there is no right of action, if its formalities are not observed (*o*).

The acceptance may (under sub-s. (3)) be implied from the buyer's conduct in dealing with the goods, and it may precede the actual receipt (*p*); but it cannot be implied without some consent (*q*). The acceptance

(*o*) *Taylor* v. *Great Eastern Rail. Co.*, [1901] 1 Q. B. 774.
(*p*) *Cusack* v. *Robinson*, 1 B. & S. 299.
(*q*) *Smith* v. *Hudson*, 6 B. & S. 431.

need not, however, be absolute (*r*), and both the acceptance (*s*) and the receipt (*t*) may be constructive.

The writing must be signed before the commencement of the action (*u*) by the party charged, or by his agent, who need not be appointed in writing (*x*). Such agent must be a third person, and not one of the contracting parties (*y*). Under this section (as well as under s. 4 of the Statute of Frauds) the contract may be proved by several sufficiently connected writings. But a connection must appear from the documents themselves, although parol evidence is admissible to aid in establishing the connection but not to establish it (*z*). Where, after a long correspondence, the defendants wrote to the plaintiff offering to purchase at a certain price, adding the words, "waiting your reply," and the plaintiff afterwards accepted the offer verbally, it was held that there was a binding contract within the Statute of Frauds (*a*); but where the defendant, in reply to a letter from the plaintiff, wrote accepting the offer therein contained, but saying "there are, however, some details necessary to be introduced in the contract which I will prepare," this was held insufficient to satisfy the Statute of Frauds (*b*). A letter from the purchaser, referring to the terms of the contract, but declining to accept the goods because they were damaged, has been held a sufficient memorandum (*c*); and letters between the purchaser and his agent employed to purchase, if they contain the terms of the contract, have been held sufficient to support an action

(*r*) *Page* v. *Morgan*, 15 Q. B. D. 228.
(*s*) *Elmar* v. *Stone*, 1 Taunt. 458.
(*t*) *Marshall* v. *Green*, 1 C. P. D. 35.
(*u*) *Lucas* v. *Dixon*, 22 Q. B. D. 357.
(*x*) *Acebal* v. *Levy*, 10 Bing. 378.
(*y*) *Sharman* v. *Brandt*, L. R. 6 Q. B. 720.
(*z*) *Long* v. *Millar*, 4 C. P. D. 450; *Oliver* v. *Hunting*, 44 Ch. D. 205; *Taylor* v. *Smith*, [1893] 2 Q. B. 65.
(*a*) *Watts* v. *Ainsworth*, 1 H. & C. 83.
(*b*) *Ball* v. *Bridges*, 22 W. R. 552.
(*c*) *Bailey* v. *Sweeting*, 9 C. B. (N.S.) 843; *cf. Wilkinson* v. *Evans*, L. R. 7 C. P. 407.

by the vendor (*d*). The names of the parties or of their agents must appear in the agreement; and the Court of Exchequer, in *Vandenburgh* v. *Spooner* (*e*), held in effect that it must be collected from the agreement which of the parties is the seller; but the same court, in *Newell* v. *Radford* (*f*), held that parol evidence was admissible to prove which of the parties named is the seller. Contracts may be signed, either with both the christian and surname, or with the initials of the christian name prefixed to the whole surname (*g*), or with the surname alone; but not with merely the initials of the christian and surname (*h*).

WILLS.

Under s. 5 of the Statute of Frauds, which affected all wills up to January 1st, 1838,

"all devises and bequests of any lands or tenements" are void, unless "in writing and signed by the party so devising the same, or by some other person in his presence, and by his express directions . . . and attested and subscribed in the presence of the devisor by three or four credible witnesses."

Since January 1st, 1838, by the Wills Act (7 Will. 4 & 1 Vict. c. 26), all wills and testaments, except such as fall within the few cases in which nuncupative wills are allowed, must

"be in writing, and . . . be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged (*i*) by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

(*d*) *Gibson* v. *Holland*, L. R. 1 C. P. 1.
(*e*) 4 H. & C. 519.
(*f*) L. R. 3 C. P. 52.
(*g*) *Lobb* v. *Stanley*, 5 Q. B. 574.
(*h*) *Sweet* v. *Lee*, 3 M. & G. 452.
(*i*) As to what constitutes a sufficient acknowledgment, see *Blake* v. *Blake*, 7 P. D. 102: *Daintree* v. *Butcher*, 13 P. D. 102.

A subsequent Act, 15 & 16 Vict. c. 24, regulates the requisites of the signatures of wills, and substantially provides that no will shall be invalidated by the mere circumstance that the signature does not follow closely on the end of the will, or that a blank intervenes between the concluding words and the signature.

By the Wills Act, a will can be revoked by codicil, or other writing, but only when such codicil or writing has been executed with the formalities prescribed in the case of ordinary wills.

Where a will refers to another document it is incorporated in the will, provided (1) it is in existence at the date of the will; and (2) it is clearly identified by the description given of it in the will. Both these requisites must be established (*k*). A memorandum written after the date of a will cannot be incorporated in a will although referring to it, and although signed by the testator, if not attested, is not a codicil. But it may be binding on those who claim under the will; and, if so, will be treated as if its contents had been contained in the will (*l*).

REVIVAL OF DEBTS BARRED BY THE STATUTES OF LIMITATION.

Simple contract debts barred by the Statutes of Limitation cannot be revived except by an acknowledgment or promise in writing, for by s. 1 of Lord Tenterden's Act (*m*) it is enacted, that

"no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby."

(*k*) *In the Goods of Garnett*, [1894] P. 95.
(*l*) *Llewellyn* v. *Washington*, [1902] 2 Ch. 220.
(*m*) 9 Geo. 4, c. 14.

Under this Act it was held that signature by an agent was insufficient, but now by s. 13 of the Mercantile Law Amendment Act, 1856 (*n*), signature by a duly authorised agent has the same effect as the signature of the party to be charged. The promise to pay must be express, or there must be an unconditional acknowledgment sufficient to support a reasonable inference of a promise to pay, or a conditional promise to pay with proof that the condition has been performed (*o*). A letter written "without prejudice" is insufficient (*p*). The amount due may be proved by extrinsic oral evidence (*q*).

As to the liability of joint contractors, Lord Tenterden's Act, s. 1, enacts, that

"where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever";

and by s. 14 of the Mercantile Law Amendment Act, 1856 (*r*), it is provided, that

"no such co-contractor or co-debtor, executor or administrator shall lose the benefits of the said enactments or any of them so as to be chargeable, in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors or administrators."

But where a simple contract debt is recoverable in equity against the real estate of a debtor by virtue of 3 & 4 Will. 4, c. 104, payment of interest by the tenant

(*n*) 19 & 20 Vict. c. 97.
(*o*) *Tanner* v. *Smart*, 6 B. & C. 303; *In Re River Steamer Co.*, L. R. 6 Ch. 822; *Green* v. *Humphreys*, 26 Ch. D. 474.
(*p*) *In re River Steamer Co.*, *ubi supra*.
(*q*) *Cheslyn* v. *Dalby*, 4 Y. & Col. 238. (*r*) 19 & 20 Vict. c. 97.

for life of the real estate will keep the debt alive (*s*). An acknowledgment by one of two executors keeps the debt alive against the assets of the testator, even after the death of such executor (*t*).

In the case of specialty debts, 3 & 4 Will. 4, c. 42, s. 5, enacts,

"that if any acknowledgment shall have been made either by writing signed by the party liable by virtue of such indenture, specialty, or recognisance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid."

This applies not only to cases where one person is liable, but to cases where several persons are liable, but part payment of principal or interest by one of several debtors only keeps a specialty alive against the payee since the Mercantile Law Amendment Act, 1856. Payment by a tenant for life of land of interest on a specialty debt keeps that debt alive in equity as against the land (*u*). Payment by a debtor on the eve of bankruptcy of part of a barred debt which is honestly due, will revive the right to prove (*x*). An acknowledgment to be sufficient within s. 5 of the Act of Will. 4, need not amount to a promise to pay, and need not be made to the creditor (*y*).

(*s*) *Hollingshead* v. *Webster*, 37 Ch. D. 651.
(*t*) *Dick* v. *Fraser*, [1897] 2 Ch. 181.
(*u*) *Roddam* v. *Morley*, 1 De G. & J. 1; *cf. Pears* v. *Laing*, L. R. 12 Eq. 42.
(*x*) *Ex parte Gaze*, 23 Q. B. D. 74.
(*y*) *Moodie* v. *Bannister*, 4 Drewry, 432.

REVIVAL OF RIGHTS TO REAL PROPERTY BARRED BY THE STATUTE OF LIMITATIONS.

As a general rule, title to land is barred after a lapse of twelve years from the time when the right of action accrued to the claimant or to the party through whom he derives title (*z*); but by s. 14 of 3 & 4 Will. 4, c. 27, it is enacted that

"when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given."

In such a case the Statute runs again from the time when the acknowledgment was executed or signed, and not from the period at which it bears date (*a*). The acknowledgment, which must be made to the person entitled or his agent (and not to any third person), need not be in any particular form, provided an admission of ownership can be fairly implied. The Statute extinguishes the right of the party out of possession, but does not transfer any estate to the party in possession.

REVIVAL OF CHARGES AND LEGACIES.

Section 7 of the Real Property Limitation Act, 1874 (*b*), is as follows:

"When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in

(*z*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1.
(*a*) *Jaynes* v. *Hughes*, 10 Ex. 430. (*b*) 37 & 38 Vict. c. 57.

his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him ; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given ; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons ; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent ; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage."

Section 8 is as follows :

"No action (*c*) or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment (*d*), or lien, or otherwise charged upon or payable out of any land or

(*c*) This includes an action on a covenant in a mortgage deed to pay the principal money (*Sutton* v. *Sutton*, 22 Ch. D. 511), and an action on a contemporaneous and collateral bond to secure the principal money due under a mortgage (*Fernside* v. *Flint*, 22 Ch. D. 579).

(*d*) This includes all judgments, and not only those which operate as a charge on land (*Jay* v. *Johnstone*, [1893] 1 Q. B. 189).

rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid (*e*), or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable (*f*), or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

By s. 13 of 23 & 24 Vict. c. 38, the same principles are applicable to claims to the property of persons dying intestate.

By s. 42 of 3 & 4 Will. 4, c. 27, it is enacted that:

"No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent" (*g*).

Section 10 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), is as follows:

"No action, suit or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust."

(*e*) The payment must be one which amounts to acknowledgment of liability: see *Taylor* v. *Hollard*, [1902] 1 K. B. 676.

(*f*) It is sufficient if the person who makes the payment is bound as between herself and the debtor to make it; he need not be bound as between herself and the creditor (*Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430).

(*g*) It appears that one of two executors may give an acknowledgment of a statute-barred debt so as to bind the other, but one of two trustees cannot: see *Astbury* v. *Astbury*, [1898] 2 Ch. 111.

An "express trust" is a trust which has been expressed either in writing, or by word of mouth, and the term does not include a trust arising from the acts of the parties, and therefore does not extend to a resulting trust, or implied trust, or constructive trust (*h*).

PRESCRIPTIVE RIGHTS.

By s. 1 of 2 & 3 Will. 4, c. 71, it is provided, that no claim by custom, prescription, or grant, to any right of common or profit *à prendre* from or upon any lands belonging to the Crown, or any corporation aggregate or sole, shall, with certain exceptions, be defeated after thirty years' uninterrupted enjoyment, by showing title prior to that period; and, after sixty years, such enjoyment shall constitute an indefeasible title, unless it be proved to have been enjoyed by some consent or agreement expressly made or given by deed or in writing.

Section 2 provides that, in similar cases of disputed easements issuing out of similar demesnes, a title shall not be barred by evidence only that it began at a time prior to twenty years previously; and makes the prescription indefeasible after forty years of uninterrupted enjoyment, unless it be shown to have been under an agreement by deed or in writing.

Section 3 makes a right of user of light similarly indefeasible after twenty years of actual enjoyment, unless enjoyed by a consent or agreement expressly made or given by deed or in writing.

REPRESENTATIONS OF CHARACTER.

(9 GEO. 4, C. 14, S. 6.)

"No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability,

(*h*) See *Sands* to *Thompson*, 22 Ch. D. 614.

trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

The signature of an agent is insufficient (*i*). Joint stock companies and other corporations are within the purview of the statute (*k*).

Other instances might be cited, in which the legislature has made written evidence the only admissible kind of evidence, to the total exclusion of even the most direct oral evidence; but the above enactments are those which are of the most constant practical recurrence, and they have therefore been selected, on due deliberation, as the most suitable for the dimensions of the present work.

(*i*) *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301.
(*k*) *Bishop* v. *Balkis Consolidated Co.*, 25 Q. B. D. 77; *Hirst* v. *West Riding Union Banking Co.*, [1901] 2 K. B. 560.

CHAPTER VI.

INADMISSIBILITY OF EXTRINSIC EVIDENCE TO CONTRADICT OR VARY WRITTEN EVIDENCE.

When written evidence is primary, and not merely substitutionary, in character—or, in other words, when it is made by statute or common law the best evidence—it is clear that the principle of a fundamental rule would be destroyed if a party were allowed to contradict such evidence, or to vary it substantially by the introduction of oral or other extrinsic evidence. Therefore it is an established and inflexible rule that—

> Extrinsic evidence is inadmissible to contradict, add to, subtract from, or vary, the terms of a written instrument.

Thus, where a contract is required by Statute to be in writing, or where it has been reduced to writing by the voluntary act of the parties to it, as long as the writing is producible, it is the only admissible evidence of the terms of the contract. Neither party can show that, before the contract was reduced to writing, the parties agreed to a term which does not appear in the writing, and which is clearly repugnant to its provisions; for all such antecedent oral terms are merged in the express language of the writing. Similarly, neither party can show that, after the contract was reduced to writing, the parties agreed to a new term, which is also repugnant to the terms of the written agreement, unless such subsequent agreement amount to an entire or partial dissolution of the former contract, or to a new contract founded on a new consideration.

But a parol contract may exist collateral to a written contract (*a*).

The general rule (*b*) operates thus:

A contract, which is valid without writing, will, if put into writing, be construed strictly according to the terms of such writing.—No new term can be annexed to it, as impliedly contained in it before it was reduced into writing, or while it was being reduced into writing, if such parol term contradicts or varies a written term; but the written contract may be wholly or partially waived before breach, and a new written or verbal contract substituted for the erased term of the original contract; and then the residue of the original contract will be construed cumulatively with the new subsequent contract. Thus, there will be no contradiction or variance of the original contract, but merely, first, the erasure of a term; and, secondly, not the insertion, but the annexation, of a new contract. In short, the original contract does not suffer a contradiction, but first loses a term, and then gains a consistent addition and supplement.

Where the subsequent contract incorporates portions of the original contract, and amounts to a waiver of the rest, the subsequent contract is the only one subsisting between the parties, and if dealing with a subject-matter, where the law requires a writing, such subsequent contract must be in writing. Thus, where the plaintiffs agreed in writing with the defendant to let him a public-house, as tenant from year to year, with the option on his part to call for a lease for twenty-eight years, upon the term, among others, that if he sold the lease for more than £1,200 he was to give the plaintiffs half the excess, and subsequently, by verbal agreement, a lease was granted, the terms of which differed materially from those stipulated for in

(*a*) *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215.
(*b*) *Cf. Goss* v. *Lord Nugent*, 5 B. & Ad. 64.

the written agreement, but the parties never abandoned the agreement as to the division of the excess of the purchase-money, and the defendant having sold the lease for £2,500 the plaintiff sued him for a moiety of the £1,300, the excess of the purchase-money over the £1,200, it was held by the Court of Exchequer that the original agreement in writing was entirely superseded, and that the agreement under which the lease was taken was the verbal one of which one term was the stipulation in the original contract as to the excess of the purchase-money; and that as the agreement was not in writing, as required by the Statute of Frauds, the plaintiffs were not entitled to recover (*c*). Parol evidence is admissible to show that, after signing a document, the defendant assented to certain alterations made by the plaintiff before it was signed by the latter, for such evidence does not vary the contract, but only proves the condition of the document when it first became a contract (*d*).

It is an undoubted principle that extrinsic evidence is inadmissible to contradict or vary a written instrument. It is, however, impossible to lay down as a general rule that extrinsic oral evidence is inadmissible to prove either the entire or partial dissolution of the original contract; or the substitution or annexation of a new verbal contract; but wherever it is attempted to superadd an oral to a written contract, there must be clear evidence of the actual words used (*e*).

Contracts required by law to be in writing (*f*).—The rule does not, however, apply in its integrity to contracts which the law requires to be in writing, as to

(*c*) *Sanderson* v. *Graves*, L. R. 10 Ex. 234.
(*d*) *Stewart* v. *Eddowes*, L. R. 9 C. P. 311.
(*e*) *Per* JAMES, L.J.: *Thomson* v. *Simpson*, 18 W. R. 1091.
(*f*) Of which the following are some of the most important: (1) Sales of ships or shares of ships; (2) contracts falling within the Statute of Frauds or the Sale of Goods Act, 1893; (3) contracts under the Merchant Shipping Act; (4) contracts under the Truck Acts.

which it is generally necessary to consider the language of the particular statutes which require them to be in writing. With regard to contracts which the Statute of Frauds requires to be in writing, LINDLEY, J., in *Hickman* v. *Haines* (*g*), after referring to several well-known cases, said:

"The result of these cases appears to be, that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds."

And this is of course equally true of all attempted variations. A parol variation of a written contract may, however, be set up as a defence to an action for specific performance of the contract; and it depends on the particular circumstances in each case whether the variation is to defeat the plaintiff's title to have specific performance, or whether the court will perform the contract, taking care that the subject-matter of the parol agreement or understanding is carried into effect, so that all parties may have the benefit of what they contracted for (*h*). It was long ago decided that a contract in writing, and by the law required to be in writing, might *in equity* be waived or wholly rescinded by a parol agreement (*i*). It is now settled that this rule applies at law as well as in equity. The important question in many cases is what was the intention of the parties in entering into the subsequent agreement—was it to rescind or only to vary the original agreement (*k*). An agreement to waive or rescind may be deduced from conduct (*l*), as well as from words; but there must be clear evidence of the alleged agreement; and therefore Lord St. Leonards refused to hold a loose

(*g*) L. R. 10 C. P. 605; *cf. Noble* v. *Ward*, L. R. 2 Ex. 135.
(*h*) See *Smith* v. *Wheatcroft*, 9 Ch. D. 223; and Fry on Specific Performance, 4th ed., 337.
(*i*) Fry on Specific Performance, 4th ed., 444.
(*k*) *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634; *cf. Noble* v. *Ward*, *ubi supra*.
(*l*) *Carter* v. *Dean of Ely*, 7 Sim. 211.

conversation by a tenant, in which he stated his interest to be different to that which he claimed under a contract for a lease, to amount to an abandonment of the contract (*m*).

Contracts voluntarily put into writing.—With regard to any contract which the parties have *voluntarily* put into writing, the rule is, that it is competent to them at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement (*n*).

Rectification of deeds.—The doctrines of courts of equity in rectifying mistakes in deeds, so as to make them accord with the real agreement between the parties, may here be alluded to as an exception to the general rule under consideration. Thus, a lease which contained a larger quantity of land than was intended to be demised has been rectified as to the overplus (*o*). Again, where a settlement purports to be in pursuance of articles entered into before marriage, and there is any variance, then no evidence is necessary in order to have the settlement corrected; and although the settlement contains no reference to the articles, yet if it can be shown that the settlement was intended to be in conformity with the articles, if there is clear and satisfactory evidence showing that the discrepancy had arisen from a mistake, the court will re-form the settlement and make it conformable to the real intention of

(*m*) *Moore* v. *Crofton*, 3 J. & L. 438.
(*n*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 58.
(*o*) *Mortimer* v. *Shortall*, 2 Dru. & War. 363; *Murray* v. *Parker*, 19 Beav. 305.

the parties (*p*). Even where there are no articles the court will interfere to re-form a settlement so as to make it correspond with the intention of the parties (*q*), if there has been a mistake common to both, and if it can be proved to the satisfaction of the court in what the mistake consists. It has been said that the rectification of a settlement "is a question of evidence, and evidence alone" (*r*): and this applies equally to other deeds. The real agreement between the parties must be established by evidence, whether written or parol; if there be no previous agreement in writing, parol evidence is admissible to show what the agreement really was; if there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly; if ambiguous, parol evidence may be used to explain it in the same manner as in other cases where parol evidence is admitted to explain ambiguities in a written instrument (*s*). There is, however, a disinclination to act upon parol evidence alone (*t*), and an opinion has been expressed that it would be dangerous to set aside a portion of a deed, which deed has, as to the rest, been acted upon for a considerable time, upon no other testimony than that of the persons who are bound by the deed, who executed the deed, and who are to benefit by the deed being altered (*u*). In some more recent cases, however, marriage settlements have been rectified after the death of the husband on the uncorroborated evidence of the wife (*x*). Although extrinsic evidence is not admissible to raise a presumption, it is admissible to rebut a presumption, even if

(*p*) *Per* Lord CRANWORTH: *Bold* v. *Hutchinson*, 5 De G. M. & G. 568.
(*q*) *Marquess of Exeter* v. *Marchioness of Exeter*, 3 M. & C. 321.
(*r*) *Per* Lord ROMILLY: *Earl of Bradford* v. *Earl of Romney*, 30 Beav. 438.
(*s*) *Per* Lord ROMILLY: *Murray* v. *Parker*, 19 Beav. 308.
(*t*) *Mortimer* v. *Shortall*, 2 Dru. & War. 374.
(*u*) *Bentley* v. *Mackay*, 10 W. R. 595.
(*x*) *Hanley* v. *Pearson*, 13 Ch. D. 545; *Lovesy* v. *Smith*, 15 Ch. D. 665.

that presumption arises upon the construction of the words of a will, and therefore in a case where the question was whether a bequest in a will was in satisfaction of a covenant in a settlement, it was held that, upon the words of the will, the presumption arose that the bequest was a satisfaction, and that evidence of declarations of the testator rebutting the presumption was admissible (*y*). Where there is a mistake in a will caused by the inadvertence of those who prepared it, and it consequently does not carry out the testator's intentions, the court will not, in construing the will, correct it (*z*); but the Court of Probate, on granting probate, can do so (*a*).

In returning to the general question of the admissibility of extrinsic evidence to affect written instruments, it is to be observed that a written instrument not under seal may be released or avoided by evidence of an intrinsically inferior nature; but a deed must be released by deed, and cannot be avoided by parol (*b*). An instrument revoking a will must be executed in manner required to give validity to the will.

The completion of a contract under a written agreement may be proved by oral evidence of performance, or of discharge from performance. The payment of money, under such a contract, may be shown either by a written receipt, or oral evidence of payment. Both modes of proof are primary in their nature, and therefore, in the absence of any rule which requires written proof, are concurrently and equally admissible forms of *primâ facie* evidence. It is to be observed, also, that performance of a contract under seal is proveable by parol. Such evidence does not release

(*y*) *Tussaud* v. *Tussaud*, 9 Ch. D. 363; 47 L. J. Ch. 849; 26 W. R. 874.
(*z*) *Newburgh* v. *Newburgh*, 5 Mad. 364.
(*a*) *In the Goods of Boehm*, [1891] P. 247.
(*b*) *Unumquodque ligamen dissolvitur eodem ligamine quo et ligatur.*

or avoid the original contract; it merely shows that it has been satisfied, and leaves its original validity unimpeached.

Release of a debt in equity.—As a general rule there is no release of a debt in equity unless released in law. Mere voluntary declarations indicating the intention of a creditor to forgive or release a debt, if they are not evidence of a release at law, do not constitute a release in equity (*c*). Nothing indeed amounts to a release in equity which is not one at law, except an agreement for valuable consideration to give a release or not to sue (*d*). There may, however, be considerations which would prevent a debt from being enforced in equity, although it might be subsisting at law (*e*). Where a voluntary declaration by a creditor has been acted upon by the debtor, the former may be bound to make his representation good (*f*); *i.e.*, a creditor may so conduct himself as to preclude himself from obtaining equitable relief or even from enforcing a legal demand (*g*). Conversely a release in law may not operate as a release in equity. Thus if a debtor be appointed executor by his creditor this releases the debt in law but not in equity. Still there may be some equitable considerations which would extinguish the debt in equity; thus it may be proved that the testator intended to forgive the debt (*h*), but apparently the intention must have been communicated to the debtor in the lifetime of the testator (*i*).

Contract void ab initio.—It is allowable to show that a written contract, whether under seal or not, never

(*c*) *Cross* v. *Sprigg*, 6 Hare, 552.
(*d*) *Per* LINDLEY, L.J., in *Edwards* v. *Walters*, [1896] 2 Ch. 168.
(*e*) *Per* TURNER, L.J.: *Taylor* v. *Manners*, L. R. 1 Ch. 56.
(*f*) *Yeomans* v. *Williams*, L. R. 1 Eq. 184.
(*g*) *Per* LINDLEY, L.J., in *Edwards* v. *Walters*, [1896] 2 Ch. 169.
(*h*) *Leveson* v. *Beales*, [1891] 3 Ch. 422.
(*i*) *Hyslop* v. *Chamberlain*, [1894] 3 Ch. 522.

existed legally; or that it was formed under circumstances which rendered it void *ab initio*. Thus, a defendant in an action on a written contract, may plead that it was void, as being made under circumstances of fraud, duress, or for illegal consideration; and he may prove such a plea by any species of parol evidence (*k*). He may also show that a bill or promissory note, on which he is liable *primâ facie*, was obtained from him without consideration, for the purpose of being discounted by the plaintiff or by a third party, between whom and the plaintiff there is a privity; or he may show any other similar failure of consideration; but he may not give parol evidence, which goes merely to limit his liability (*l*). As a general rule, upon all written contracts not under seal extrinsic evidence will be admissible to support a plea of failure, or want of consideration; but in a deed a consideration is, in the absence of fraud, conclusively presumed.

Consideration.—Where it is distinctly stated in a deed that it is made in consideration of a sum of money paid down at the time of execution, a party is estopped from showing that no money passed (*m*); although he may show that a different consideration passed (*n*); but, where the payment of the consideration is not stated conclusively and unambiguously in the deed, the non-payment may be proved by extrinsic evidence. Thus, where a deed recited that a releasee had agreed to pay a certain sum, and then referred to it as "the said sum being now so paid as hereinbefore mentioned"; then followed words of reference which were equally applicable to the sum in question and other sums mentioned; then an acknowledgment in the body of the

(*k*) *Robinson* v. *Lord Vernon*, 7 C. B. (N.S.) 231.
(*l*) *Abrey* v. *Crux*, 39 L. J. C. P. 9. See also *Stott* v. *Fairlamb*, 53 L. J. Q. B. 47.
(*m*) *Rountree* v. *Jacob*, 2 Taunt. 141.
(*n*) *Smith* v. *Battams*, 26 L. J. Ex. 232.

deed of the receipt of such sums, and a receipt for the first sum was indorsed on the deed; it was held that the acknowledgment in the recital was ambiguous, that the receipt in the body of the deed was equally ambiguous, and that the indorsed receipt constituted only *primâ facie* evidence. On similar grounds, a plaintiff in assumpsit was held not to be estopped by the deed from showing by parol evidence that the sum in question, the substantial consideration money, had never been paid (*o*).

It is also allowable to prove, by extrinsic evidence, a larger or supplementary consideration; provided it be not inconsistent with the consideration named in the deed (*p*). Thus, a deed purporting to be founded on a money consideration may be proved to have been founded also on any other good consideration, such as marriage (*q*); or, not purporting to be founded on any consideration, it may be shown to have been founded on a valuable consideration (*r*); or, purporting to be founded on natural affection, it may be shown to have been founded also on a valuable consideration, at least to rebut a charge of fraud (*s*). In all such cases the rule which does not permit written evidence to be contradicted or varied by extrinsic evidence remains unaffected, because the extrinsic evidence is received only to annex an incident which is not clearly excluded by the written instrument.

In *R.* v. *Scammonden* (*t*), the court held it clear that a "party might prove other considerations than those expressed in the deed"; and allowed extrinsic parol evidence to be given to show that the actual consideration paid was thirty pounds, although the consideration

(*o*) *Lampon* v. *Corke*, 5 B. & Ald. 606.
(*p*) *Clifford* v. *Turrell*, 1 Y. & C. (Ch.) 138.
(*q*) *Villen* v. *Beaumont*, 2 Dyer, 146 a.
(*r*) *Peacock* v. *Monk*, 1 Ves. sen. 128; see *Townend* v. *Toker*, L. R. 1 Ch. 446.
(*s*) *Gale* v. *Williamson*, 8 M. & W. 405. (*t*) 3 T. R. 474.

named in the deed and the indorsed receipt was twenty-eight pounds. So, in *R.* v. *Inhabitants of London* (*u*), the same court held that parol evidence was admissible to import a consideration which converted an agreement of hiring as a servant into an agreement to serve as an apprentice. In the former case, the parol consideration appears to have been treated as explanatory of, and not as additional to, the expressed consideration; and in the latter case, Lord KENYON stated that the parol evidence was not offered to contradict the written agreement, but to ascertain an independent fact. It has been remarked that in both these cases the parol evidence was received, not to contradict a written agreement, but to ascertain an independent fact explanatory of it (*x*).

A policy of insurance cannot be contradicted by an antecedent written agreement, as where a defendant attempts to show, by such an agreement, that the risk was to begin at a place and date subsequent to those which are named in the policy (*y*); nor can a charter-party be varied by a parol agreement substituting one place of destination for another (*z*), unless such an agreement can be treated, not as a new term, but as a new and distinct contract (*a*); nor can a release be varied by evidence of verbal negotiations prior to such release (*b*).

Where the fact sought to be added is formal, and not of the essence of the contract, the rule does not appear to apply. Thus, a deed may be proved to have been delivered either before or after the day on which it purports to have been delivered (*c*), and parol evidence is admissible to show that there was a mistake

(*u*) 8 T. R. 379.
(*x*) *Per* WILLIAMS, J.: *R.* v. *Stoke-upon-Trent*, 5 Q. B. 308.
(*y*) *Kame* v. *Knightley*, Skin. 54.
(*z*) *Leslie* v. *De la Torre*, cited in *White* v. *Parker*, 12 East, 383.
(*a*) *White* v. *Parker*, *supra*.
(*b*) *Mercantile Bank of Sydney* v. *Taylor*, [1893] A. C. 317.
(*c*) *Goddard's Case*, 2 Rep. 4 b.

in the date of a charter-party (*d*), a deed (*e*) or a will (*f*); but the day appointed in a written contract for the performance of a certain act, such as the completion of a purchase, cannot be altered by extrinsic evidence (*g*). Parol evidence is admissible to prove that, owing to a subsequent agreement extending the time for payment, there has been no default within the meaning of a mortgage deed (*h*).

Where the printed conditions of sale at an auction, signed by the auctioneer, described the time and place of the sale, and the number and kind of timber sold, but said nothing about the weight, evidence of the auctioneer's statements at the sale was held inadmissible to prove that a certain weight had been warranted. Lord ELLENBOROUGH said:

"There is no doubt that the parol evidence was properly rejected. The purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, I know of no instance where a party may not by parol testimony superadd any term to a written agreement, which would be setting aside all written contracts, and rendering them of no effect. There is no doubt that the warranty as to the quality of the timber would vary the agreement contained in the written conditions of sale" (*i*).

This case is general in its application; but the rule was probably stated and observed more inflexibly, because the agreement was clearly within the Statute of Frauds; and it is distinguishable from a later case, which decided that unsigned conditions of sale are only in the nature of a personal memorandum, which may be varied at any time before the sale by an express notice to a purchaser (*k*).

(*d*) *Hall* v. *Cazenove*, 4 East, 476.
(*e*) *Payne* v. *Hughes*, 10 Ex. 430.
(*f*) *Reffell* v. *Reffell*, L. R. 1 P. & D. 139.
(*g*) *Stowell* v. *Robinson*, 3 Bing. N. C. 928.
(*h*) *Albert* v. *Grosvenor Investment Co.*, L. R. 3 Q. B. 123.
(*i*) *Powell* v. *Edmunds*, 12 East, 6.
(*k*) *Eden* v. *Blake*, 13 M. & W. 614.

Where a contract for the sale of goods specified no time for removing them, it was held that oral evidence could not be given of a condition that they should be removed immediately, because to admit the evidence would vary the contract (*l*). A written contract to supply flour of X. S. quality, cannot be varied by parol evidence to show that by X. S. quality the parties intended X. S. S. quality (*m*). So, a written contract to supply foreign refined oil cannot be varied by oral evidence that the parties agreed to consider an inferior kind of oil a foreign refined oil (*n*) ; and a policy of insurance cannot be varied by evidence of oral or written declarations which were made to the insurer, but not embodied in the policy (*o*). The valuation of a ship in a valued policy is, in the absence of fraud or wagering, conclusive between the parties for the purposes of the contract (*p*).

Where a deed conveys Blackacre, as specified in a schedule and map annexed, parol evidence will not be received to show that Whiteacre, which is not mentioned in the schedule or map, has always been part of Blackacre (*q*). When several classes of goods, of superior and inferior quality, are comprised under one generic name, and a written contract is made to supply goods of that name, the contract will be fulfilled by a supply of any goods to which that name is applicable ; and parol evidence will not be received to show that the parties intended that goods of the superior quality should be supplied (*r*).

In order to avoid liability a person who appears on the face of a written contract to have contracted as a

(*l*) *Greaves* v. *Ashlin*, 3 Camp. 426.
(*m*) *Harnor* v. *Groves*, 15 C. B. 667.
(*n*) *Nichol* v. *Godts*, 10 Ex. 191.
(*o*) *Halhead* v. *Young*, 6 E. & B. 312.
(*p*) *North of England Ship Insurance Co.* v. *Armstrong*, L. R. 5 Q. B. 244 ; *cf. Burnand* v. *Rodocanachi*, 7 App. Cas. 333.
(*q*) *Barton* v. *Dawes*, 10 C. B. 261.
(*r*) *Smith* v. *Jeffryes*, 15 M. & W. 561.

principal, cannot show by extrinsic evidence that he contracted as an agent (*s*); nor can he show that a contract, signed by him expressly as a principal, was made by him as an agent for the party to the action (*t*). If the contract appears to have been made merely in his own name, without addition, it may be shown that he was in fact an agent for another in order to make such other liable (*u*), as this does not contradict the contract, nor does it make any difference if the name of the principal is disclosed at the time the contract is made (*x*).

Extrinsic evidence is inadmissible to show that a person not a party to a written instrument on the face of it, was, in fact, a party (*y*); but where a defendant had signed an agreement under seal as agent for a firm, whereby the firm agreed to make certain payments to the plaintiffs, which agreement contained a clause to the effect that the defendant guaranteed such payments, although the defendant was not named as a party to the agreement, extrinsic evidence was held admissible by the Court of Appeal to prove that the defendant intended to sign on his own behalf as well as for his principals so as to make him liable as a guarantor (*z*). It may, however, be observed that this decision does not establish any such principle as that the capacity in which a man signs a document is always provable by extrinsic evidence.

On similar grounds, evidence of a custom cannot be received to vary the express language of a contract (*a*).

(*s*) *Higgins* v. *Senior*, 8 M. & W. 834.
(*t*) *Humble* v. *Hunter*, 12 Q. B. 310.
(*u*) *Per* PATTESON, J.: *ibid.*
(*x*) *Calder* v. *Dobell*, L. R. 6 C. P. 439.
(*y*) *Robinson* v. *Rudkins*, 26 L. J. Ex. 56.
(*z*) *Young* v. *Schuler*, 11 Q. B. D. 651.
(*a*) *Hudson* v. *Clementson*, 18 C. B. 213.

CHAPTER VII.

ADMISSIBILITY OF EXTRINSIC EVIDENCE TO EXPLAIN WRITTEN EVIDENCE.

THE second branch of the principle of evidence, which was discussed in the preceding chapter, is contained in the rule that—

Extrinsic evidence is admissible to explain written evidence.

First, parol evidence is admissible to prove that that which purports to be a deed or writing of a certain kind has been made under circumstances which deprive it of all such effect. Thus it may be shown that a written instrument purporting to be a contract between the parties was not so intended (*a*), or that it was made subject to a condition through the non-fulfilment of which no contract has ever arisen (*b*); and on the same principle Lord PENZANCE held that it might be shown that a duly executed codicil was not intended by the testator to be operative (*c*). So it may be shown that an instrument, which purports to be a binding one to take effect immediately, was delivered as an escrow, and was not intended to operate until certain things were done (*d*). If an oral arrangement was made as a mere suspension of a written agreement, it will be admissible in evidence (*e*); and, on the same principle, when an agreement does not declare the time from

(*a*) *Clever* v. *Kirkman*, 24 W. R. 159.
(*b*) *Pym* v. *Campbell*, 6 E. & B. 370; followed in *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25.
(*c*) *Lister* v. *Smith*, 3 Sw. & Tr. 282.
(*d*) *Davis* v. *Jones*, 17 C. B. 625; *cf. Pattle* v. *Hornibrook*, *ubi supra*.
(*e*) *Wallis* v. *Littell*, 11 C. B. (N.S.) 369.

which and to which it is to operate, parol evidence is receivable to supply the ambiguity (*f*). If a written agreement has been treated as incomplete, parol evidence of a subsequent further and fuller agreement may be given (*g*). Where the defendant had signed an agreement as agent for a firm, whereby the firm agreed to make certain payments to the plaintiffs, which agreement contained a clause to the effect that the defendant guaranteed such payments, evidence was admitted to show that the defendant intended to sign on his own behalf, as well as for his principals, so as to make him liable as a guarantor (*h*).

Collateral oral agreement.—Evidence is admissible to show that immediately before the written agreement was signed a distinct oral arrangement was made, adding to, but not inconsistent with, the former (*i*); and whether the oral agreement precede or be contemporaneous with the written agreement is of no consequence, provided it be on a distinct collateral matter, although it is part of the same transaction. Thus a consignor of goods may prove any additional contract to carry which does not contradict or vary the written one (*k*). So, too, a tenant may prove the existence of a warranty by his landlord, as to drains, collateral to the lease (*l*). But in no case can a collateral oral agreement be set up if it contradicts the terms of the written one (*m*).

The law recognises, according to the authority of Lord BACON, two kinds of ambiguity in written instruments, viz., patent and latent.

(*f*) *Davis* v. *Jones*, 17 C. B. 625.
(*g*) *Johnson* v. *Appleby*, L. R. 9 C. P. 158.
(*h*) *Young* v. *Schuler*, 11 Q. B. D. 651. As to which case, *vide supra*, p. 371.
(*i*) *Lindley* v. *Lacey*, 17 C. B. (N.S.) 578.
(*k*) *Malpas* v. *London and South Western Rail. Co.*, L. R. 1 C. P. 336.
(*l*) *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215.
(*m*) *New London Credit Syndicate* v. *Neale*, [1898] 2 K. B. 487.

Patent ambiguities.—A patent ambiguity is said to exist when the instrument, on its face, is unintelligible, as where a gift is made by will, and a blank appears in the place of the name of the devisee or legatee. In such a case, extrinsic evidence is wholly inadmissible to show who was intended to be the devisee or legatee; for, if it were admissible, it would be tantamount to permitting wills to be made verbally, and would also be a violation of the principle, that where a contract, or other substantial matter of issue, has been reduced to writing, the writing is the only admissible proof of such contract or transaction; but intrinsic evidence is admissible in the case of latent ambiguities (*n*). And extrinsic evidence has been admitted to supplement intrinsic evidence (*o*). Therefore, although, as stated above, a blank in the place of the name of a devisee or legatee cannot be filled up by extrinsic evidence, yet if the christian name is stated in a will, followed by a blank for the surname, extrinsic evidence will be admitted to show whom the testator intended to designate (*p*). Extrinsic evidence has been admitted to rebut the presumption against an executor taking the residue beneficially where a specific legacy is left to him and also a presumption arising from the frame of the will (*q*).

Latent ambiguities.—Where a written instrument is intelligible on its face, but a difficulty arises from extrinsic circumstances in understanding and carrying out its terms, the ambiguity is said to be latent, and extrinsic evidence will be strictly admissible to explain and apply those circumstances, so as to reconcile them to the terms of the writing. Such evidence, however,

(*n*) *Turner* v. *Hellard*, 30 Ch. D. 390.
(*o*) *Furniss* v. *Phear*, 36 W. R. 521.
(*p*) *In the Goods of De Rosaz*, 2 P. D. 66.
(*q*) *Camp* v. *Coe*, 31 Ch. D. 460.

is admissible only to explain, and not to vary. Thus, in *Goldshede* v. *Swan* (*r*), PARKE, B., said:

"You cannot vary the terms of a written instrument by parol evidence; that is a regular rule; but if you can construe an instrument by parol evidence, when that instrument is ambiguous, in such a manner as not to contradict, you are at liberty to do so."

These introductory remarks may be appropriately closed by quoting the following remarks of Sir James Wigram (*s*):

"A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only if found to be of uncertain meaning when persons of competent skill and information are unable to do so. Words cannot be ambiguous because they are unintelligible to a man who cannot read, nor can they be ambiguous merely because the court which is called upon to explain them may be ignorant of a particular fact, art, or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used."

The general principle is that if a written instrument is plain and unambiguous, it must be construed according to the plain and unambiguous language of the instrument itself; and the fact that the parties to the instrument have put a different construction on the language to that which the words plainly bear, is immaterial (*t*). Words which have a fixed meaning cannot be shown by extrinsic evidence to have been used by the parties to mean something different; but when words are capable of more than one meaning, extrinsic evidence is admissible to prove what were the facts the negotiating parties had in mind, so as to

(*r*) 1 Ex. 158.
(*s*) On Extrinsic Evidence in Aid of the Interpretation of Wills, 2nd ed., p. 130.
(*t*) *North Eastern Rail Co.* v. *Hastings*, [1900] A. C. 260.

show the sense in which these parties used such words (*u*). It has been stated as a general rule—

"That all facts are admissible which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected" (*x*).

The leading principles of the general rule now under consideration may be treated under those subdivisions which occur most frequently in practice.

(1) Foreign or technical words;
(2) Difficulties created by extrinsic circumstances;
(3) Usage or custom as explaining and controlling a contract.

1. Foreign or technical words.—Where a written instrument is in a foreign language, or where it contains technical words of trade or custom, the ambiguity will be treated as latent; and oral or other extrinsic evidence will be received to inform the court of the sense of the instrument. Thus, in *Shore* v. *Wilson*, PARKE, B., said:

"I apprehend that there are two descriptions of evidence . . . which are clearly admissible for the purpose of enabling a court to construe any written instrument, and to apply it practically. In the first place, there is no doubt that not only when the language of the instrument is such as the court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms are used, or, indeed, any expressions which at the time when the instrument was written had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes. . . . This description of evidence is admissible in order to enable the court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate" (*y*).

(*u*) *Bank of New Zealand* v. *Simpson*, [1900] A. C. 182.
(*x*) *Per* BLACKBURN, J.: *Grant* v. *Grant*, L. R. 5 C. P., p. 728.
(*y*) 9 C. & F. 555.

When a document is in a foreign language the court requires a translation by a competent translator; and if there are technical expressions in the document, evidence of experts to explain to the court what meaning those words would convey to people in whose language the document is written (*z*). Before admitting evidence of the secondary meaning of a word, the court must be satisfied from the instrument itself, or from the circumstances of the case, that the word ought to be construed not in its popular or primary signification, but according to its secondary intention (*a*). Thus, extrinsic evidence was received to explain the meaning of the phrase, "Godly preachers of Christ's Holy Gospel," and to show that according to the usage of a sect to which the grantor belonged, the grant was intended for that sect. So, such evidence has been received to explain the meaning of the phrase "across a country" in a steeplechase transaction (*b*); that "close," by local usage, signified "a farm" (*c*); that "a thousand" meant a hundred dozen (*d*); and that a contract to pay an actor so much a week was a contract to pay only during the theatrical season (*e*). So, also, it has been received to explain the local meaning of "good" or "fine" barley (*f*); of a month, whether lunar or calendar (*g*); the amount indicated under a contract to buy "your wool" from a party (*h*); and, generally, in all cases where the signification of a particular phrase is unsettled and variable in its nature, and where it is liable to have different senses attached to it in different places. It is essential in all such

(*z*) See *Chatenay* v. *Brazilian Telegraph Co.*, [1891] 1 Q. B. 79; *cf.* *De Sora* v. *Phillips*, 10 H. L. Cas. 633.
(*a*) See the judgment of FRY, J., in *Holt* v. *Collyer*, 16 Ch. D. 718.
(*b*) *Evans* v. *Pratt*, 3 M. & G. 759.
(*c*) *Richardson* v. *Watson*, 4 B. & Ad. 799.
(*d*) *Smith* v. *Wilson*, 3 B. & Ad. 278.
(*e*) *Grant* v. *Maddox*, 15 M. & W. 737.
(*f*) *Hutchinson* v. *Bowker*, 5 M. & W. 545.
(*g*) *Simpson* v. *Margitson*, 11 Q. B. 32.
(*h*) *Macdonald* v. *Longbottom*, 29 L. J. Q. B. 256.

cases that the peculiar sense should be of a public and popular kind; and it will not be allowable to show that a party used the term in a sense opposed to its local and conventional usage. Thus, where a testatrix was in the habit of treating certain shares as "double shares," evidence of this was not allowed to influence the construction of her will, Lord HATHERLEY saying:

"I must take things to be as I find them, and cannot allow particular expressions, said to have been made use of by this testatrix, to prevail, when they are not the general language universally applicable to the subject-matter" (*i*).

Evidence is always admissible for the purpose of explaining the meaning of words used by the testator (as distinguished from evidence of the testator's intention); and for the purpose of explaining the meaning of the words used by the testator, evidence is admissible of the circumstances surrounding the testator at the time of making his will (*k*).

2. Difficulties created by extrinsic circumstances.—Extrinsic evidence is admissible to explain a latent ambiguity which is raised, not by any intrinsic obscurity of language, but by a difficulty created by extrinsic circumstances in applying the terms of a written instrument to such extrinsic circumstances. Thus, where it is shown that words apply equally to two different things or subject-matters, extrinsic evidence is admissible to show which of them was the thing or subject-matter intended (*l*). A familiar illustration of this doctrine is cited from Lord BACON, where a man devises his manor of S. to J. F., and it turns out that he has two manors answering the description, *e.g.*, North S. and South S. In such cases it may be shown by extrinsic evidence, and even by declarations of the

(*i*) *Millard* v. *Bailey*, L. R. 1 Eq. 382.
(*k*) *Rayner* v. *Rayner*, [1904] 1 Ch. 176.
(*l*) *Per* ALDERSON, B.: *Smith* v. *Jeffryes*, 15 M. & W. 562.

testator, which manor was intended to pass (*m*). In a recent case, where a testatrix by her will bequeathed £4,000 to C. "for the charitable purposes agreed upon between us," the Court of Appeal (affirming FARWELL, J.) held that an affidavit by C. was admissible to show what the charitable purposes were, but (reversing FARWELL, J.) not to show that only the income of the £4,000 during his life was to be devoted to the charitable purposes, as that would contradict the will (*n*). In another case, about the same time, a testator had given to his wife all his property for life, and added: "I desire and empower her by her will, or in her lifetime, to dispose of my estate in accordance with my wishes verbally expressed by me to her." JOYCE, J., held that parol evidence was inadmissible to show what those wishes were, and that the clause quoted above was void for uncertainty (*o*). The distinction between these two cases is that the former was one relating to a power, and the general rule is that extrinsic evidence of a testator's intention is inadmissible to aid the construction of his will (*p*); but where, on the construction of the words of the will, a presumption arises, extrinsic evidence is admissible to rebut such presumption (*q*).

Declarations of a testator.—When they are admissible, it is immaterial that they are made some time after the execution of the will (*r*), or before it (*s*), and they are admissible to prove the contents of a lost will (*t*). In *Quick* v. *Quick* (*u*), Lord PENZANCE held

(*m*) *Doe* v. *Needs*, 2 M. & W. 129; *Ricketts* v. *Turquand*, 1 H. L. Cas. 472.
(*n*) *Huxtable* v. *Crawford*, [1902] 2 Ch. 793.
(*o*) *Hetley* v. *Hetley*, [1902] 2 Ch. 866.
(*p*) *Doe* v. *Hiscock*, 5 M. & W. 369; *cf. Stanley* v. *Stanley*, 2 J. & H. 491; *Bishop* v. *Holt*, [1900] 2 Ch. 620.
(*q*) *Tussaud* v. *Tussaud*, 9 Ch. D. 363.
(*r*) *Doe* v. *Allen*, 12 A. & E. 455.
(*s*) *Langham* v. *Sandford*, 19 Ves. 649.
(*t*) *Sugden* v. *Lord St. Leonards*, 1 P. D. 154; *Gould* v. *Lakes*, 6 P. D. 1.
(*u*) 3 Sw. & Tr. 442.

that the declarations of a testator made *after* the execution of a lost will were not admissible to prove its contents. This case was, however, overruled by the majority of the Court of Appeal in *Sugden* v. *St. Leonards*, which held that the declarations of a testator, written and oral, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents, MELLISH, L.J., dissenting as regards declarations made after execution. A similar question was under consideration in the House of Lords in *Woodward* v. *Goulstone* (*x*), but was not decided. The learned lords present took the very inconvenient course of saying that, under the circumstances of that case, the question did not arise for determination, but that they desired to leave the question open, should it hereafter come before the House for decision; and the Lord Chancellor in his judgment expressed considerable doubts as to the correctness of the decision of the majority of the judges of the Court of Appeal in *Sugden* v. *St. Leonards*. The result is, that the decision of the Court of Appeal stands, and is binding on inferior courts, in spite of the cloud cast over it by the House of Lords. But it has been held that this case does not alter the old rule that the fact of the execution of a will cannot be proved by the declarations of the testator (*y*).

Verbal statements made by a testator, in and about the making of his will, when accompanying acts done by him in relation to that subject, have been held admissible in evidence (*z*). A letter written to a testator by a solicitor, whether by way of advice or statement, is inadmissible for the purpose of construction of the will (*a*).

(*x*) 11 App. Cas. 469.
(*y*) *Atkinson* v. *Morris*, [1897] P 40.
(*z*) *Johnson* v. *Lyford*, L. R. 1 P. & D. 546.
(*a*) *Per* JAMES, L.J.: *Wilson* v. *O'Leary*, L. R. 7 Ch. 456.

Extrinsic evidence is admissible to show the intention with which an ambiguous instrument was executed, *i.e.*, to show whether an ambiguous instrument was executed as a deed poll or as a will (*b*).

A witness cannot be asked what a testator said about property, not distinctly devised, in order to show it was intended to pass with other property devised (*c*). Where the testator was in the habit of calling persons by nicknames or wrong names, and these names appear in his will, they can only be explained and construed by the aid of evidence to show the sense in which he used them, just as if his will was written in cipher or in a foreign language (*d*). Thus, a bequest to Mrs. G. was upheld by evidence that the testator was in the habit of calling a Mrs. Gregg, Mrs. G. (*e*). Here the evidence was of a fact, not of a declaration. So, parol evidence is admissible to show what lands of the testator were reputed to lie in a parish, in order to construe a devise of lands in the parish (*f*) ; but where the testatrix, after a specific devise to "my niece, A. B." (who was in fact her husband's niece), left her residue to "all my nephews and nieces," JESSEL, M.R., refused to admit A. B. to participate in the residue (*g*). Where the testator appointed his "nephew, A. B." executor, and his own nephew and his wife's nephew both bore that name, extrinsic evidence was admitted to show that the latter was the person designated (*h*). But where a testator left a legacy to his "niece E. W.," and neither he nor his wife had any niece, but his wife had a legitimate grandniece, E. W., and an illegitimate grandniece, E. W., evidence to show that the testator

(*b*) *In re Goods of Slinn*, 15 P. D. 156.
(*c*) *Doe* v. *Hubbard*, 15 Q. B. 228.
(*d*) *Per* Lord ABINGER : *Doe* v. *Hiscock*, 5 M. & W. 368.
(*e*) *Abbott* v. *Morice*, 3 Ves. 148 ; *cf. Lee* v. *Pain*, 4 Hare, 251.
(*f*) *Anstee* v. *Nelms*, 1 H. & N. 225.
(*g*) *Wells* v. *Wells*, L. R. 18 Eq. 204.
(*h*) *Grant* v. *Grant*, L. R. 5 C. P. 727.

intended the latter was rejected on the ground that, under the circumstances, there was no latent ambiguity as there would have been had both been legitimate (*i*). To identify the person or thing intended as the object or subject of the testator's bounty the court may inquire into every material fact, and all extrinsic circumstances known to the testator as to his family and affairs; but extrinsic evidence of the testator's intention is admissible only in the event of there being more than one person or thing answering to the description he has used (*k*). It must be borne in mind that "children" in a will always means legitimate children unless, on the facts being ascertained and applied to the words of the will, some repugnancy or inconsistency would result from so interpreting it (*l*). In cases such as those under consideration the testator's own declarations are probably inadmissible (*m*). Punctuation in a will must be disregarded (*n*).

In an action arising out of a contract to accept goods which were to arrive by a particular ship, it appeared that there were two ships of the same name, and parol evidence was admitted to show which ship was meant (*o*). So it has been held that extrinsic evidence was admissible to prove who was the buyer and who the seller in a memorandum or note under s. 17 of the Statute of Frauds (*p*), and what is the subject-matter of a contract to sell twenty-four acres of land under s. 4 of the same Act (*q*). And where the defendants had by a deed covenanted to pay the plaintiff a royalty on all articles manufactured or sold "under the powers hereby granted," and the deed did not on the face of it disclose what the powers were, it was held to create a

(*i*) *Ingham* v. *Rayner*, [1894] 2 Ch. 85.
(*k*) *Charter* v. *Charter*, L. R. 7 E. & I. 364.
(*l*) *Per* Lord SELBORNE, in *Dorin* v. *Dorin*, L. R. 7 E. & I. 577.
(*m*) *Per* Sir F. H. JEUNE: *In the Goods of Chappell*, [1894] P. 98.
(*n*) *Per* Lord WESTBURY: *Gordon* v. *Gordon*, L. R. 5 E. & I. 276.
(*o*) *Raffles* v. *Wichelhaus*, 2 H. & C. 906.
(*p*) *Newell* v. *Radford*, L. R. 3 C. P. 52.
(*q*) *Plant* v. *Bourne*, [1897] 2 Ch. 281.

latent ambiguity on the face of the deed, and extrinsic evidence was admitted to prove what was intended by the parties (*r*).

In almost all cases where extrinsic evidence has been received to explain written evidence, it will appear that it had been received, not in the form of declarations of intention by parties, but in the form of collateral and surrounding facts, which, like every other species of presumptive evidence, may reasonably be connected with the substantial issue, and so form *data* to aid the court or jury (*s*). They must be related to the written evidence, and yet independent of it. They must not be personal declarations of a party, but distinct incidents, which may be presumed to have been present to the mind of the party, without wearing the suspicious form of oral statements. The strict sense of a word is its legal sense; and if it be intelligible in this sense, it cannot be varied or explained by evidence that it was used by the party in a popular, still less in a peculiar, sense. Thus, if a man devises to his "children" and he has both legitimate and illegitimate children, only the former will take; extrinsic evidence cannot be received to show that he intended that his illegitimate children should also take. But where there are no legitimate children to take, the illegitimate will take, or where there is a devise to children, and the evidence shows only one legitimate child, and children who are illegitimate, the latter will take equally with the former (*t*). In such a case the extrinsic evidence of a collateral fact is strictly admissible to explain a written instrument which would otherwise be insensible. Where a testator uses a "flexible" word such as "issue" it must be gathered from the will in what sense he has used it (*u*).

(*r*) *Roden* v. *London Small Arms Co.*, 47 L. J. Q. B. 413.
(*s*) *Smith* v. *Thompson*, 8 C. B. 44.
(*t*) *Gill* v. *Shelley*, 2 Phill. 373.
(*u*) *Kenyon* v. *Birks*, [1900] 1 Ch. 417.

3. Usage or custom as explaining and controlling a contract.—Usage or custom is also admissible to explain and control, but not to contradict, a written instrument, such as a contract. It may be admissible to explain what is doubtful; it is never admissible to contradict what is plain (*x*). Thus, wherever the language of a written instrument is so clear that there can be no reasonable ground for construing it as subject to a custom, or where, although the language is ambiguous, the custom itself is uncertain, the writing must be construed strictly according to its literal terms (*y*).

On the general principle, it has been held allowable to show that, by the custom of the country, a provision in a lease as to ten thousand rabbits, signified twelve hundred to the thousand (*z*); that "acre" and that "perch" mean one quantity in one county, and another quantity in another county (*a*). So usage is admissible to explain the phrase "regular turns of loading" (*b*). In such cases the customary meaning of an ambiguous term is for the jury; and, unless such a custom be proved, a judge ought not to leave it to the jury to pronounce on the sense in which the term was used, but should himself construe the term according to its fixed legal or popular signification. Thus, where an auctioneer sued for a sum which he was to receive under a written contract, only if he sold "within two months," it was held, that, in the absence of admissible extrinsic evidence, this meant in point of law two lunar months, and that, unless the context, or the circumstances of the contract, showed that the parties meant two calendar months,

(*x*) *Per* Lord CAMPBELL: *Hall* v. *Janson*, 4 E. & B. 500; see *The Nifa*, [1892] P. 411.
(*y*) *In re Stroud*, 8 C. B. 502; *Hurst* v. *Usborne*, 18 C. B. 144.
(*z*) *Smith* v. *Wilson*, 3 B. & Ad. 728.
(*a*) *Barksdale* v. *Morgan*, 4 Mod. 186.
(*b*) *Leidemann* v. *Schultz*, 14 C. B. 38.

the conduct of the parties to the written contract alone was not admissible to withdraw the construction of a word therein, of a settled primary meaning, from the judge and transfer it to the jury (*c*). In general, where there are two alternative constructions, evidence of usage will be received to determine which is the right one (*d*). But in order to admit extrinsic evidence the phrase need not be on the face of it ambiguous (*e*).

Trade usage.—Where a doubt is raised by evidence upon the meaning of a written contract, or where the contract contains words which have more than one meaning (*f*), extrinsic evidence is admissible of the usage or course of trade at the place where the contract is made, or where it is to be carried into effect, to explain or remove such doubt. Again, where a similar doubt arises as to the *lex loci* by which such a contract is to be construed, evidence of usage will be received to determine the place. Thus, where the question was whether goods were to be liable to freight according to their weight at the place of shipment, or according to their expanded weight at the place of consignment, the terms of the charter-party were construed by extrinsic evidence that the usage was to measure the goods according to their weight at the place of shipment (*g*); and where the question was as to the date of the arrival of the ship at the port named in the charter-party, evidence was admitted to show what spot in the port must be reached before, by the usage of the port, it was considered that the ship had arrived (*h*).

Annexing incidents to a contract.—Extrinsic evidence is also admissible to annex incidents to a written instrument, where such incidents are consistent with the

(*c*) *Simpson* v. *Margitson*, 11 Q. B. 23.
(*d*) *Blackett* v. *Royal Exchange Assurance Co.*, 2 C. & J. 250.
(*e*) *Per* BLACKBURN, J.: *Myers* v. *Sarl*, 3 E. & E. 319.
(*f*) *Buckle* v. *Knoop*, L. R. 2 Ex. 125.
(*g*) *Bottomley* v. *Forbes*, 5 Bing. N. C. 121.
(*h*) *Steamship Co., Norden* v. *Dempsey*, 1 C. P. D. 654.

reasonable intention of the writing. Such incidents fall generally within the definition of express or implied usage. In such cases the notoriety of the usage makes it an element of the writing. Thus, where a written contract contained a stipulation that a party should "lose no time on his own account, and do his work well and behave himself in all respects as a good servant," extrinsic evidence was received to show that, by the custom of his trade, such a party was entitled to certain holidays (*i*). As was once said by PARKE, B.:

"It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages" (*k*).

"Mercantile contracts are very commonly framed in a language peculiar to merchants; the intention of the parties, though perfectly well known to themselves, would often be defeated, if the language were strictly construed according to its ordinary import in the world at large. Evidence, therefore, of mercantile custom and usage is admitted in order to expound it, and arrive at its true meaning. Again, in all contracts as to the subject-matter of which a known usage prevails, parties are found to proceed with the tacit assumption of those usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify those known usages which are included, however, as of course, by mutual understanding: evidence, therefore, of such incidents is receivable. The contract, in truth, is partly express and in writing, partly implied or understood and unwritten; but in these cases a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to or inconsistent with the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less; neither in the construction of a contract among merchants, tradesmen, or others, will the evidence be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words, perfectly unambiguous in their ordinary meaning, are used by the contractors in a different sense from that.

(*i*) *R.* v. *Stoke-upon-Trent*, 5 Q. B. 303.
(*k*) *Hatton* v. *Warren*, 1 M. & W. 475.

What words more plain than 'a thousand,' 'a week,' 'a day'? Yet the cases are familiar in which 'a thousand' has been held to mean twelve hundred; 'a week' only a week during the theatrical season; 'a day' a working day. In such cases the evidence neither adds to, nor qualifies, nor contradicts, the written contract—it only ascertains it by expounding the language" (*l*).

So, there being in every voyage policy of insurance an implied warranty of seaworthiness, parol evidence is admissible to show the amount of seaworthiness required (*m*).

A few more illustrations will complete the outline of this doctrine. In *Browne* v. *Byrne*, a bill of lading specified a certain sum as payable for freight, and it was held that an indorsee, in an action for the amount, might give evidence of a customary deduction. The extrinsic evidence in this case, although bordering on repugnancy, was received because the bill of lading merely specified a sum certain for freight, without stipulating that it was to be free of all deductions. If the bill of lading had expressed, or if from the language of it the intention of the parties could have been collected, that the freight at the specified rate should be paid free from all deductions, customary or otherwise, then it would have been repugnant to it to set up the usage (*n*). Under a contract to carry a full and complete cargo of molasses from London to Trinidad, evidence has been received to qualify the contract by showing that a cargo is full and complete, if the ship be filled with casks of the standard size, although there be smaller casks of other produce freighted in the same vessel (*o*).

Where the defendants buy as brokers for a principal, whose name they do not disclose at the time of contract, it has been held that evidence of a custom will

(*l*) *Per* COLERIDGE, J.: *Browne* v. *Byrne*, 3 E. & B. 703.
(*m*) *Burges* v. *Wickham*, 3 B. & S. 669.
(*n*) 3 E. & B. 703; *cf. Phillipps* v. *Briard*, 1 H. & N. 21.
(*o*) *Cuthbert* v. *Cumming*, 11 Ex. 405.

be admitted to show that in this case the broker is personally liable on the contract (*p*). It may be shown that by the usage of trade an inferior kind of palm oil answers to the description of "best palm oil" (*q*); or that by the custom of the building trade the words "weekly accounts" refer to regular day work only (*r*); or that credit "for six or eight weeks" does not necessarily give the whole eight weeks for payment for goods (*s*). It is a leading principle that an agricultural custom, as that a tenant shall have an away-going crop, is good if not repugnant to the terms of a lease, although the lease says nothing about it; but not if the custom be repugnant to the express or implied terms of the lease (*t*). Evidence of surrounding circumstances is admissible to show that a guarantee was intended to be a continuing one (*u*).

Expressum facit cessare tacitum.—When the usage is inconsistent with the express or implied terms of the written contract, it will be inadmissible to control it, on the principle *expressum facit cessare tacitum* (*x*); and therefore evidence of a custom, inconsistent with an arbitration clause in a bought note, was held inadmissible (*y*). In so far as parties have come to an express contract, usage cannot be implied; and therefore, where a person contracts by writing in express terms, he cannot sue on an implied contract (*z*). It seems that no usage will be binding on a party unless the circumstances raise a sufficient presumption that

(*p*) *Humfrey* v. *Dale*, 7 E. & B. 266.
(*q*) *Lucas* v. *Bristow*, E. B. & E. 907.
(*r*) *Myers* v. *Sarl*, 3 E. & E. 306.
(*s*) *Ashforth* v. *Retford*, L. R. 9 C. P. 20.
(*t*) *Hefield* v. *Meadows*, L. R. 4 C. P. 595; *Wigglesworth* v. *Dallison*, 1 Dougl. 201.
(*u*) *Hefield* v. *Meadows*, L. R. 4 C. P. 595.
(*x*) *Blackett* v. *Royal Exchange Assurance Co.*, 2 C. & J. 250; *Suse* v. *Pompe*, 8 C. B. (N.S.) 538.
(*y*) *Barrow* v. *Dyster*, 13 Q. B. D. 633.
(*z*) *Cutter* v. *Powell*, 2 Sm. L. C. 1.

he knew of its existence, and contracted with reference to it (*a*). The mere habit of affixing a special meaning to words in one class of contracts cannot amount to a custom of trade, so as to control a written agreement (*b*).

Alterations or interlineations.—Extrinsic evidence is not only admissible, but necessary, to explain any alteration or interlineation that may appear in a written instrument. As a general rule the party tendering it in evidence must account for the alteration (*c*). If it appears to have been made contemporaneously with the instrument, or if it was made subsequently to its execution, with the privity of the parties, and there is no fraud upon, nor invasion of the stamp laws, its validity may be maintained, provided it is an immaterial alteration (*d*); but not if the alteration is material (*e*). What is immaterial depends to a great extent upon the nature of the particular instrument; but if the date (*f*), or amount, or time of payment of a bill of exchange be altered (*g*), or a joint responsibility is converted into a joint and several responsibility (*h*), the instrument will be void, unless the alteration was made by consent of the parties; and equally so, although made with consent, if the stamp laws are infringed (*i*). Where a bill has been altered with the privity of an indorser and his indorsee, but without the privity of the acceptor, the latter is discharged (*k*). The same rule holds when the alteration is accidental (*l*), or by a stranger without

(*a*) *Kirchner* v. *Venus*, 12 Moo. P. C. 361.
(*b*) *Abbott* v. *Bates*, 24 W. R. 101.
(*c*) *Clifford* v. *Parker*, 2 M. & G. 909.
(*d*) *Howgate and Osborn's Contract*, [1902] 1 Ch. 451.
(*e*) *Suffell* v. *Bank of England*, 9 Q. B. D. 555.
(*f*) *Clifford* v. *Parker*, 2 M. & G. 905.
(*g*) *Warrington* v. *Early*, 2 E. & B. 763.
(*h*) *Alderson* v. *Langdale*, 3 B. & Ad. 660.
(*i*) *Perring* v. *Hone*, 4 Bing. 28.
(*k*) *Master* v. *Miller*, 1 Sm. L. C. 796.
(*l*) *Burchfield* v. *Moore*, E. & B. 683.

the privity of either party (*m*). Parol evidence may be called to show that a variation between a bought note and a sold note is immaterial (*n*).

In the case of wills, s. 21 of the Wills Act, 1837, provides that no obliteration, interlineation, or other alteration made after execution shall have any effect except so far as the words or effect of the will before such alteration shall not be apparent unless such alteration is executed as provided by the section.

(*m*) *Davidson* v. *Cooper*, 13 M. & W. 352; *Crookwit* v. *Fletcher*, 1 H. & N. 293.

(*n*) *Holmes* v. *Mitchell*, 7 C. B. (N.S.) 361.

PART III.

CHAPTER I.

THE ATTENDANCE OF WITNESSES.

PROCESS.

THE attendance of witnesses in the High Court (*a*), and, when such process is necessary, in the criminal courts, is obtained by serving the witness with a *subpœna ad testificandum*. If the witness is required to produce a document he is served with a *subpœna duces tecum*. A subpœna can be issued without leave of the court at any stage of the proceedings (*b*), but must not be issued oppressively (*c*) or prematurely (*d*). A *subpœna duces tecum* ought to specify the documents required, and the court will not act upon a subpœna which is too general; but if a person served with a subpœna admits that he has the documents required with him, he must produce them (*e*). He may be asked what documents he has with him, and he is bound to answer the question without being sworn, and produce the documents. The witness produces the document to the court and not to the parties, and the court decides whether it is to be used or not. The

(*a*) R. S. C. 1883, Order XXXVII., rr. 26—34. See also r. 20.
(*b*) *Raymond* v. *Tapson*, 22 Ch. D. 430.
(*c*) *Steele* v. *Sarory*, W. N. (1891), 195.
(*d*) *London and Globe Finance Corporation* v. *Kaufman*, 69 L. J. Ch. 190.
(*e*) *Lee* v. *Angas*, L. R. 2 Eq. 59.

witness can, of course, take any legal objection to producing the document. If a witness attends on a *subpœna duces tecum*, with a document which he refuses to produce on the ground of privilege, secondary evidence will be admissible. If he does not attend on such a subpœna or attends and refuses to produce the writing on any other ground but that of privilege, secondary evidence will not be admissible, but the witness will be punishable for contempt (*f*). A person cannot, of course, be compelled by subpœna to produce documents which are not in his possession or under his control. Thus, a secretary of a company served with a subpœna to produce the books of the company was held not to have disobeyed the subpœna by not producing the books, they having been removed from him since the service of the subpœna by the board of directors of the company (*g*).

PENALTY FOR NON-ATTENDANCE.

(5 ELIZ. c. 9, s. 6.)

"If any person upon whom any process out of a court of record shall be served to testify concerning any cause or matter depending there, and having tendered to him, according to his countenance or calling, such reasonable sum of money for his costs and charges, as with regard to the distance of the place is necessary to be allowed, do not appear according to the tenor of the process, not having a lawful and reasonable cause to the contrary, he shall forfeit for every such offence £10, and yield such further recompense to the party aggrieved as by the discretion of the judge of the court, out of which the process issues, shall be awarded."

If a witness does not attend on his subpœna he may be proceeded against in either of three ways: (1) Under the above statute he may be sued for the penalty of £10, and further recompense; or (2) in an

(*f*) *R.* v. *Lanfaethly*, 2 E. & B. 940.
(*g*) See *R.* v. *Stuart*, 2 T. L. R. 144.

action for damages (*h*), but, of course, actual damage must be proved; or (3) he may be attached for contempt of court; but, on the motion for an attachment, it must be shown distinctly on affidavit that the witness was served; that his expenses were paid or tendered to him at the time of service; and that everything reasonable has been done to secure his attendance (*i*).

ATTENDANCE IN CRIMINAL PROCEEDINGS.

Generally the witnesses for a prosecution are bound over, by the committing magistrate or coroner, on recognizances conditioned to be forfeited if the witness does not appear to give evidence on the trial of the prisoner; but if a witness is not so bound over, his attendance may, and ought to be, secured at the trial by serving him previously with a subpœna to appear and give evidence, on the prosecution of the prisoner, at the trial. A magistrate or coroner may bind over a person to appear as a witness at the trial, at any time before the trial, and may commit him if he refuses to be bound over. If the witness does not appear, the recognizance is forfeited and the penalty levied. A subpœna may be obtained at the Crown Office in London, from the clerk of assize at the assizes, and the clerk of the peace at quarter sessions. If a subpœnaed witness does not attend he may be attached or indicted. A prisoner may subpœna witnesses for his defence (*k*). By 30 & 31 Vict. c. 35, s. 3, prisoners are to be asked by magistrates if they wish to call witnesses; if they do, the depositions are to be taken, and signed, and transmitted to the court of trial in the same way as the depositions of the witnesses for the prosecution; and the magistrate may bind over by

(*h*) *Pearson* v. *Isles*, Dougl. 561.
(*i*) *Garden* v. *Cresswell*, 2 M. & W. 319. (*k*) 1 Anne, c. 9, s. 3.

recognizance to give evidence at the trial such witnesses as in their opinion give evidence material to the case, or tending to establish the innocence of the accused; and such witnesses are to be liable to all laws in force relating to witnesses for the prosecution. This provision does not extend to witnesses to character. By s. 5, where witnesses are bound over to appear on behalf of the prisoner at his trial, the court may allow their expenses.

ATTENDANCE IN THE BANKRUPTCY COURTS

Is enforced by subpœna issued by the court at the instance of an official receiver, trustee, creditor, debtor, or respondent, in any matter (*l*). The subpœna may be *duces tecum*. The names of three witnesses may be inserted in the subpœna. The subpœna must be served personally, and service may be proved by affidavit. Wilful non-compliance with a subpœna is punishable as a contempt of court.

With the view of facilitating the obtaining of information as to the debtor, his dealings, or his property, the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), contains the following provisions:

Section 27. (1) The court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property (*m*).

(2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the court at the time

(*l*) Bankruptcy Rules, 1886, 61—71.

(*m*) The deponent may be cross-examined, but his evidence cannot be contradicted (*Ex parte Tilley*, 20 Q. B. D. 518).

appointed, or refuses to produce any such document, having no lawful impediment made known to the court at the time of its sitting and allowed by it, the court may, by warrant, cause him to be apprehended and brought up for examination.

(3) The court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings or property.

. . . . .

(6) The court may, if it think fit, order that any person who if in England would be liable to be brought before it under this section shall be examined in Scotland or Ireland, or in any other place out of England (*n*).

These provisions correspond with ss. 96—98 of the Bankruptcy Act, 1869, under which the following points were decided:

An irregularity in the summons will be waived by the appearance of the witness (*o*). A witness summoned is not entitled to any costs for the attendance of his counsel or solicitor, unless he is charged with having property of the bankrupt in his possession, and is summoned to give evidence with respect to it (*p*). If a creditor establishes a *primâ facie* case he can obtain the examination of the debtor or any other person under the above-mentioned provisions; but the court must be satisfied that some benefit will result to the estate before it will issue a summons on the application of any person other than an official receiver or a trustee (*q*). A witness cannot be ordered to furnish accounts (*r*), and is entitled to refuse to answer any question on the ground that his answer would tend to criminate himself, but this, of course, does not extend to the bankrupt (*s*).

(*n*) By s. 3 (16) of the Bankruptcy Act, 1890, this section applies *mutatis mutandis* to a trustee appointed under or in pursuance of a composition or scheme.
(*o*) *R.* v. *Widdop*, L. R. 2 C. C. R. 3.
(*p*) *Ex parte Waddell*, 6 Ch. D. 328.
(*q*) *Ex parte Nicholson*, 14 Ch. D. 243.
(*r*) *Ex parte Reynolds*, 21 Ch. D. 601.
(*s*) *Ex parte Schofield*, 6 Ch. D. 230.

The mere fact that there is an action pending between the trustee and a third party relating to property alleged to belong to a bankrupt's estate is not enough to entitle the trustee to examine such third party under s. 27 (*t*). The Registrar must be personally present during the examination of a witness (*u*). When a person summoned under s. 27 is too ill to attend the court, an order may be made for his examination at his own residence (*x*).

ATTENDANCE IN THE COUNTY COURTS.

The County Courts Act, 1888 (*y*), provides (s. 110), that—

"Either of the parties to any action or matter may obtain from the registrar summonses to witnesses, with or without a clause requiring the production of books, deeds, papers, and writings in the possession or control of the person summoned as a witness" [*and provides how such summonses are to be served*].

Section 111. Every person summoned as a witness, either personally or in such other manner as shall be prescribed, to whom at the same time payment or a tender of payment of his expenses shall have been made on the prescribed scale of allowances and who shall refuse or neglect, without sufficient cause, to appear, or to produce any books, papers, or writings required by such summons to be produced, or who shall refuse to be sworn or give evidence, and also every person present in court who shall be required to give evidence, and who shall refuse to be sworn or give evidence, shall forfeit and pay such fine, not exceeding ten pounds, as the judge shall direct; and the whole or any part of such fine, in the discretion of the judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect, and the remainder thereof shall be accounted for by the registrar to the treasurer.

Section 112. A judge in any case where he shall think fit, upon application on an affidavit by either party, may issue an order under his hand and the seal of the court for bringing up before such court any prisoner or person confined in any gaol, prison, or place, under any sentence or under commitment for trial or other-

(*t*) *Ex parte Gittens*, [1892] 1 Q. B. 646.
(*u*) *R.* v. *Lloyd*, 19 Q. B. D. 213.
(*x*) *Ex parte Hawkins*, 23 Q. B. D. 226.
(*y*) 51 & 52 Vict. c. 43.

wise, except under process in any civil action, or matter, to be examined as a witness in any action or matter depending or to be inquired of or determined in or before such court; and the person required by any such warrant or order to be brought before the court shall be so brought under the same care and custody, and be dealt with in like manner in all respects as a prisoner required by any writ of habeas corpus awarded by the High Court to be brought before such court to be examined as a witness in any action or matter pending before such court is by law required to be dealt with: Provided always, that the person having the custody of such prisoner or person shall not be bound to obey such order unless a tender be made to him of a reasonable sum for the conveyance and maintenance of a proper officer or officers and of the prisoner or person in going to, remaining at, and returning from such court (*z*).

Where the witness is beyond the jurisdiction of the court, the summons is sent by the bailiff to the bailiff of the court of the district in which the witness resides.

ATTENDANCE IN MAGISTERIAL PROCEEDINGS.

At common law magistrates may summon any person to attend as a witness on a criminal charge, and, on non-attendance, may issue a warrant for his apprehension (*a*). When the proceeding is in the nature of a civil proceeding, as in settlement cases, it appears that the proper process is by writ of *subpœna* or *subpœna duces tecum*, issuing from the Crown Office (*b*). In cases within the 11 & 12 Vict. c. 43 (as explained by 12 & 13 Vict. c. 103, s. 9), magistrates are empowered by s. 7 either to issue a summons in the first instance and a warrant for the apprehension of the witness in the event of disobedience; or, if the magistrate be satisfied that it is probable the witness will not attend, he may issue his warrant in the first instance. On indictable charges magistrates have similar statutory

(*z*) The County Court Rules as to evidence will be found in the Appendix.

(*a*) *Evans* v. *Rees*, 12 A. & E. 55. (*b*) *R.* v. *Orton*, 7 Q. B. 120.

powers to enforce the attendance of witnesses (*c*). The Summary Jurisdiction Act, 1879 (*d*), empowers a court of summary jurisdiction to summon witnesses who are in any place in England which is not within the jurisdiction of such court.

ATTENDANCE IN THE WINDING UP OF A COMPANY FOR THE PURPOSE OF GIVING INFORMATION AS TO THE AFFAIRS OF THE COMPANY.

Sections 115 and 117 of the Companies Act, 1862 (*e*), give the court, after it has made an order to wind up a company, power to summon before it and examine upon oath, *vivâ voce* or by interrogatories, concerning the affairs, dealings, estate or effects of the company, any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court may deem capable of giving information concerning the trade, dealings, estate or effects of the company; and the court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company. An order under s. 115 may be obtained by the liquidator of the company, or by a contributory, on notice to the liquidator, as the latter has the prior right to the order. The making or refusing of the order is entirely in the discretion of the judge (*f*). The witness can refuse to answer questions on the ground that his answers would incriminate him or would involve a breach of professional confidence, and he can appeal to the judge, before whom the examination takes place, against

(*c*) 11 & 12 Vict. c. 42, s. 16.
(*d*) 42 & 43 Vict. c. 49. (*e*) 25 & 26 Vict. c. 89. See Appendix.
(*f*) *Re Imperial Continental Water Corporation*, 33 Ch. D. 314.

unnecessary or irrelevant questions; the decision of the judge in such a matter is final (*g*).

The examination under this section is a private one, although the court can authorise any particular person to attend (*h*). The depositions are not evidence against other persons (*i*). But s. 8 of the Companies (Winding-up) Act, 1890 (*k*), provides for a public examination on oath, before the court which has made an order for winding up a company, on a day appointed for the purpose, of any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as director or officer of the company. A person so examined is to answer all questions which the court may put or allow to be put to him, and the court may put such questions as it deems expedient. The notes of the examination are to be read over to, or by, and signed by, the person examined, and may be afterwards used in evidence against him. But it would seem that the statements made by the person examined, even though the notes of his examination are not read over to, or by him, and signed by him, may be proved against him by the evidence of a shorthand writer, or any other person who was present (*l*).

But no person can be directed to attend to be examined under this section until the official receiver has made his further report (if any) under sub.-s. (2) of the section, stating the manner in which the company was formed, and whether in his opinion any fraud has

(*g*) *Re London Gas Meter Co., Limited, Ex parte Webber*, 41 L. J. Ch. 145; and *Whitworth's Case*, 19 Ch. D. 118.

(*h*) *Re Grey's Brewery Co.*, 25 Ch. D. 400; *cf. Re Norwich Equitable Fire Insurance Co.*, 27 Ch. D. 515.

(*i*) *Re Norwich Equitable, etc. Co., ubi supra.*

(*k*) 53 & 54 Vict. c. 63. See Appendix.

(*l*) See *R.* v. *Erdheim*, [1896] 2 Q. B. 260, a decision upon the Bankruptcy Act, 1883.

been committed by any person in the promotion or formation of the company, or by any director or officer of the company in relation to the company since the formation thereof. It is only upon consideration of such further report that the court has jurisdiction to direct any person to attend to be examined, and obviously it can only direct a person to attend who is stated in such report to have committed fraud (*m*). In addition the report must state facts showing a basis for the official receiver's opinion sufficient to warrant a judge in calling upon the person who has in the opinion of the official receiver committed a fraud to undergo a public examination (*n*). The order can be made *ex parte* (*o*). It should be noticed that by sub-s. (7) of the section, it is the "duty" of the person examined "to answer all such questions as the court may put or allow to be put to him"; and, by sub-s. (6), the court may put such questions as it deems expedient. The question then arises,—can the person examined refuse to answer a question which the court puts or allows to be put to him on the ground of privilege, *e.g.*, that the answer would criminate him? It is the view of Lord HALSBURY (*p*) that he cannot; but it is submitted that this is an erroneous construction of the section. If the legislature had intended to take away the protection of privilege they would undoubtedly have done so expressly, as has been done in several statutes (*q*).

ATTENDANCE IN OTHER CASES.

Revising barristers may summon by writing any person, assessor, or collector of taxes, to attend before them and give evidence on oath (*r*). The attendance

(*m*) *Ex parte Barnes*, [1896] A. C. 146.
(*n*) *Re Civil, Naval, and Military Outfitters*, [1899] 1 Ch. 215.
(*o*) *Re Trust and Investment Corporation of South Africa*, [1892] 3 Ch. 332.
(*p*) *Ex parte Barnes*, [1896] A. C. 150. (*q*) See p. 97.
(*r*) Parliamentary and Municipal Registration Act, 1878, s. 36.

of witnesses before arbitrators is enforced by subpœna (*s*). A witness may be brought from a lunatic asylum on a writ of *habeas corpus ad testificandum*, on an affidavit that he is fit to be brought up and is not dangerous (*t*). In the House of Lords, the summons is by an Order of the House, signed by the Clerk of the Parliaments; but in select committees attendance is generally secured by notice from the clerk attending the committee; in the House of Commons, by an Order of the House, signed by the Clerk; in select committees, by an order of the chairman. But if a witness does not attend on such Order he will be summoned to the Bar of the House (*u*). Provision is made for the summoning, examination, expenses of and indemnity to witnesses on Election Petitions by 31 & 32 Vict. c. 125, ss. 31, 32 and 34; and 46 & 47 Vict. c. 51, s. 59.

WHERE A WITNESS IS BEYOND THE JURISDICTION OF THE COURT.

In this case the process of the courts does not, as a general rule, reach a witness; and the examination must be by means of a Commission, or Letter of Request, the proceedings upon which will be regulated by the law of the country to which it issues (*x*). Where the Commission issues to a part of the realm which is subject to different laws from that part in which the Commission issues, the commissioner may, by a written notice, signed by him, require the attendance of a witness, and, on his refusing to attend, may apply to the local courts for an order to compel attendance; and the witness will then be subject to the ordinary penalty for disobeying a subpœna, or a writ in

(*s*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 8.
(*t*) *Fennell* v. *Tait*, 1 C. M. & R. 584.
(*u*) See May's Parliamentary Practice, 10th ed., pp. 401 *et seq.*
(*x*) *Cf.* Part III., Chap. VI.; *Lumley* v. *Gye*, 3 El. & Bl. 114.

the nature of a subpœna (*y*). This extends to the examination of witnesses in any of his Majesty's dominions, colonies, or possessions (*z*).

But, by 17 & 18 Vict. c. 34, s. 1, the judges, or a judge of the superior courts of common law at Westminster or Dublin or the Court of Session of Exchequer in Scotland, may, at discretion, in any action pending in any such court, issue a *subpœna ad testificandum*, or *duces tecum*, or warrant of citation, commanding a witness in any part of the United Kingdom to attend the trial; and in default of attendance, after due service of the writ and tender of travelling expenses, the court from which the writ issued may certify the default to the other superior courts, and so render the defaulting witness liable to all the penalties which he would have incurred by disobeying a similar writ issued within the jurisdiction in which he resides. This Act is not to affect the power of courts to issue commissions, and its operation is confined to process from the superior courts of common law. Under this section a rule has been granted to compel a plaintiff resident in Ireland to appear as a witness for the defendant (*a*). The jurisdiction can by virtue of s. 16 of the Judicature Act, 1884, be now exercised by a judge in chambers whether the High Court is sitting or not.

WHEN A WITNESS IS IN PRISON.

An application may be made to a judge of the High Court at chambers, on affidavit, stating the imprisonment of the witness if detained on civil process, that his evidence is material to the applicant, and that he cannot proceed safely to trial without securing his attendance. The judge, if satisfied with the substance

(*y*) 6 & 7 Vict. c. 82, ss. 5, 6.
(*z*) 22 Vict. c. 20, s. 1.
(*a*) *Harris* v. *Barber*, 25 L. J. Q. B. 98.

of the application, will then grant the applicant a writ of *habeas corpus ad testificandum* directed to the governor of the gaol in which the prisoner is confined, and commanding him to bring up the prisoner for examination at the trial (*b*). A Secretary of State or a judge of the High Court or of a county court has power, on a similar application, to issue a warrant, or order to bring up, as a witness in any civil or criminal proceeding, any prisoner in custody on a criminal charge (*c*). An order ought not to be drawn up until the case is in the paper for trial (*d*). By the Prisons Act, 1898, s. 11, a Secretary of State on proof to his satisfaction that the presence of a prisoner at any place is required in the interest of justice or for the purpose of any public inquiry may, by writing under his hand, order the prisoner to be taken thither.

MANNER AND TIME OF SERVICE.

The service must be on the witness personally (*e*); and is effected by delivering a copy of the writ, and at the same time producing the original. The service must be a reasonable time before trial; and, generally, service on the day of trial, even when the witness resides in the town, is insufficient (*f*); unless the witness receives the service without objection (*g*).

During his attendance the witness is privileged from arrest on civil process, and he is allowed a reasonable time in going and returning from court (*h*). If he is arrested during that time, it is a contempt of court (*i*).

(*b*) *Graham* v. *Glover*, 5 El. & Bl. 591; *Marsden* v. *Overbury*, 18 C. B. 34.
(*c*) 16 & 17 Vict. c. 30, s. 9. (*d*) *Jenks* v. *Dillon*, 76 L. T. 591.
(*e*) *In re Pyne*, 1 D. & L. 703.
(*f*) *Barber* v. *Wood*, 2 M. & R. 172.
(*g*) *Maunsell* v. *Ainsworth*, 8 Dowl. P. C. 869.
(*h*) *Montague* v. *Harrison*, 3 C. B. (N.S.) 292.
(*i*) *Kimpton* v. *London and North Western Rail. Co.*, 9 Ex. 766.

The privilege does not extend to an arrest on criminal process (*k*), nor where the witness is retaken by his bail, after he has finished his evidence. The privilege exists whether the witness's attendance be compulsory or voluntary (*l*), but not in cases in which the witness attends rather as an unprofessional adviser than as a solicitor or witness (*m*).

A witness may be arrested for a contempt of court if the contempt is in its nature or by its incidents criminal, but not where the contempt consists in the breach of an order of a personal description if the breach is not accompanied by criminal incidents, *i.e.*, where the arrest is mere process privilege exists, where it is punitive or disciplinary privilege does not exist (*n*). So, as a process of commitment for non-payment of rates is a mere civil process to enforce payment, a witness cannot be arrested thereunder (*o*).

EXPENSES OF WITNESSES.

By 5 Eliz. c. 9, s. 6, a witness is substantially rendered liable to penalties if he does not attend at the trial, after having been served with process out of a court of record, and having tendered to him, according to his countenance or calling, such reasonable sum of money for his costs and charges, as with regard to the distance of the place is necessary to be allowed; he not having a lawful and reasonable cause to the contrary. Therefore, in civil proceedings, no witness, although served with a subpœna, is bound to attend at trial unless his reasonable expenses are tendered to him

(*k*) *In re Douglas*, 3 Q. B. 825.
(*l*) *Meekins* v. *Smith*, 1 H. Bl. 636.
(*m*) *Jones* v. *Marshall*, 2 C. B. (N.S.) 615.
(*n*) See *Re Freston*, 11 Q. B. D. 545, approving *Long Wellesley's Case*, 2 R. & M. 639.
(*o*) *Hobern* v. *Fowler*, 62 L. J. Q. B. 49.

when he is served, or a reasonable time before trial. The sum tendered should be a reasonable compensation for his travelling expenses and subsistence during the attendance (*p*). A witness will be entitled to his expenses, although a party to the cause, if he is a material and necessary witness (*q*). If the witness is a married woman her expenses should be tendered to her and not to her husband. If a witness is subpœnaed by both parties he is entitled to be paid all his expenses by the party calling him before giving evidence (*r*). The witness may waive his right to demand payment of his expenses either expressly or by implication (*s*). The amounts which will be allowed on taxation for the expenses of witnesses are at present entirely in the discretion of the taxing masters under Order LXV., Rule 27 (9) of the R. S. C. 1883, and the old common law scale of allowances of 1853 is not binding on them even in actions in the King's Bench Division (*t*). In criminal cases a witness for the prosecution is not entitled absolutely to his expenses, and he cannot refuse to attend or give evidence on the ground that his expenses have not been tendered or paid; but in courts of final jurisdiction they are generally allowed by the court under various Acts. When the witness lives out of the jurisdiction of the court, and in a distant part of the United Kingdom, as in Scotland or Ireland, by the 45 Geo. 3, c. 92, s. 3, he is not bound to appear to give evidence in a criminal prosecution unless his reasonable expenses are paid or tendered to him at the time when he is served with the subpœna (*u*). In any other case

(*p*) *Dowdell* v. *Australian Royal Mail Co.*, 3 El. & Bl. 902; *Brocas* v. *Lloyd*, 23 Beav. 129.
(*q*) *Howes* v. *Barber*, 18 Q. B. 588.
(*r*) *Per* PARKE, B.: *Allen* v. *Foxall*, 1 C. & K. 316.
(*s*) See *Newton* v. *Harland*, 1 M. & G. 956.
(*t*) See *East Stonehouse Local Board* v. *Victoria Brewery Co.*, [1895] 2 Ch. 514. See also notes to O. 65, r. 27 (9) in the Yearly Practice, 1904, p. 689.
(*u*) *R.* v. *Brownell*, 1 A. & E. 602.

a witness, subpœnaed on a criminal trial, is bound to attend without any tender of expenses, and will be liable to attachment for non-attendance; although if it appeared that he could not defray the expenses of his journey, the court would probably refuse to attach him.

If a witness appears on his subpœna in a civil proceeding, he will not be compellable to give evidence until his reasonable expenses have been paid, or tendered by the party who subpœnas him (*x*). If he does not arrive before a cause has been referred, he will be entitled to costs in the reference, but not in the cause (*y*).

A successful party may pay a witness his costs, and recover them from the defeated party (*z*); but an immaterial witness who has been rejected by a judge or arbitrator, cannot claim his costs as between party and party (*a*). The reasonable expenses of qualifying a witness to give evidence may now be allowed (*b*). If the witness, after being subpœnaed, is not required to attend, and has incurred no expense, he must refund the money paid to him (*c*).

(*x*) *Newton* v. *Harland*, 1 M. & G. 956.
(*y*) *Fryer* v. *Sturt*, 16 C. B. 218.
(*z*) *Hale* v. *Bates*, E. B. & E. 575.
(*a*) *Galloway* v. *Kenworth*, 15 C. B. 228.
(*b*) *Mackley* v. *Chillingworth*, 2 C. P. D. 273.
(*c*) *Martin* v. *Andrews*, 7 El. & Bl. 1.

CHAPTER II.

THE EXAMINATION OF WITNESSES.

When a witness has been placed in the witness box, and no objection is taken or sustained against his competency by the adverse party, he must be sworn by the officer of the court, or, when an affirmation is allowed, he may declare on affirmation (*a*). He may then be submitted to three distinct kinds of examination as to his knowledge of the facts which he is called to prove. (1) He may be examined in chief by the party who calls him. (2) He may be cross-examined by the adverse party. (3) He may then be re-examined by the party who calls him. Although it is obvious that the regulation of the examination of the witnesses in any given trial must be left mainly to the discretion of the presiding judge, yet certain general rules have been established for the conduct of such examination, and it is the purpose of this chapter to state and explain them.

THE EXAMINATION-IN-CHIEF.

The object of the examination-in-chief is to elicit from the witness all the material facts which tend to prove the case of the party who calls the witness. In such a case, as the presumption and the ordinary fact are that the witness, having been chosen by the party who calls him, is favourable to his cause, and therefore likely to overstate or misstate the circumstances which

(*a*) *Vide supra*, p. 24.

conduce to establish the party's case, it is a principal rule that—

On an examination-in-chief, a witness must not be asked leading questions.

The simple meaning of this rule is that a party, who calls a witness to prove a case, must not suggest answers to the witness, nor frame his questions in such a manner that the witness by answering merely "Yes," or "No," shall give the reply and the evidence which the party wishes to elicit. A question is said to be leading when the words which the witness is expected and required to utter are put into his mouth, or when it suggests to the witness the answer which the examiner wishes or expects to have; and such a question is inadmissible, because the object of calling witnesses and examining them *vivâ voce* in open court is, that the judge and jury may hear them tell their own unvarnished tale of the circumstances which they are called to attest. If, therefore, a party or his counsel were allowed to put a question to their own witness which the latter might answer by a mere affirmative or negative, it is apparent that the evidence would be the statement of the party, and not that of the witness. Such a course would strike radically at the credibility of all oral evidence, and therefore it is a sound and established rule that, on the examination-in-chief, leading questions must not be asked.

The rule may be exemplified thus: A. B. is charged with stealing a watch the property of C. D. E. F. saw A. B. take the watch from the counter in C. D.'s shop. Now, if the counsel for the prosecution, in order to prove the theft, were to call E. F., and ask him whether at such time he saw A. B. enter C. D.'s shop, and take the watch from the counter, it is plain that such a

question would be leading, because it would at once suggest to the witness the answer which he was expected to make, and the prisoner would be convicted by an answer simply in the affirmative. The answer to the latter branch of the question involves the whole question of guilt, and the substance of the charge. The witness ought, therefore, to be asked, not whether he saw the prisoner commit the offence, but what he saw the prisoner do at the time when and at the place where it is alleged that the offence was committed. It is also to be noticed that questions are not objectionable as leading questions while the examination is only introductory to what is material. Thus, in the above example, it would be quite proper, for the purpose of saving the time of the court, to ask the witness whether at a specified time he entered C. D.'s shop, and even whether at that time he saw the prisoner there, and near the counter. Such questions are quite immaterial, and may therefore be put in the shortest and most direct manner possible, because the answer cannot inculpate the prisoner in any proximate degree, nor even at all; but when the real issue is approached, and when it is sought to fix guilt on the prisoner, the witness must be asked, not whether he saw the prisoner do a certain act, but what he saw the prisoner do. Such a course of examination is clearly necessary to prevent, at least in some measure, the possibility of collusion between a prosecutor, or a party, and his witness.

It may be observed, that where an adverse party has reason to suspect collusion between his opponent's witnesses, or even where he is without any ground of reasonable suspicion, he may apply to the court, in any civil or criminal proceeding, to order all such witnesses, or any of them, with the exception of the one under examination, to leave the court; and such an order,

although apparently not absolutely a matter of right, is never refused to the applicant (*b*). The order does not usually extend to a witness who is also a party, nor to a solicitor in the action, nor to scientific witnesses. If a witness remains in court after such an order, it seems that he may be attached; but his evidence will be received although subject to strong observation (*c*). Witnesses are only excluded while evidence is being given *vivâ voce*, and not while affidavits are being read (*d*).

The rule that leading questions must not be asked on an examination-in-chief is neither inflexible nor universal. The conduct of all *vivâ voce* examination is at all times subject to the discretion and direction of the judge: and, although he will enforce vigilantly the general rule, yet there are also various cases in which he will suffer it to be relaxed. The foundation of the rule is, that the witness is favourable to the party who calls him. Whenever, therefore, it appears that the witness is hostile, or that his evidence cannot be extracted by general questions as to his knowledge of material facts, the judge may, and will, permit the party, or his counsel, to put a leading question to him point blank as to a material fact, and require him to answer it in the affirmative or negative. In such a case an examination-in-chief generally assumes the form of a cross-examination; but it is in the absolute discretion of the judge to allow this or not (*e*). A party who calls his opponent as a witness, is not entitled to treat him as hostile, and cross-examine him without the leave of the court (*f*). Again, where a question from its nature cannot be put except in a leading form,

(*b*) *Southey* v. *Nash*, 7 C. & P. 632; *R.* v. *Murphy*, 8 C. & P. 307; *cf. R.* v. *Cook*, 13 How. St. Tr. 348.
(*c*) *Chandler* v. *Horne*, 2 M. & R. 423.
(*d*) *Penniman* v. *Hill*, 24 W. R. 245.
(*e*) *Price* v. *Manning*, 42 Ch. D. 372.
(*f*) *Price* v. *Manning*, *ubi supra*.

the judge will allow it to be put. Thus, where an offence is proved, a prisoner may be pointed out to a witness, and the latter may be asked whether the prisoner was the man whom the witness saw commit the offence (*g*). So where a witness has manifestly or apparently forgotten a circumstance, and all indirect attempts to recall it to his mind have failed, the circumstance may be put to him in a leading form, and he may be asked whether he remembers it. Thus, where a witness stated that he could not remember the names of certain persons, but that he should remember and be able to identify them if they were read to him, Lord ELLENBOROUGH allowed this to be done (*h*).

On this principle it is allowable to hand a witness a memorandum in his own writing, containing an account of the disputed facts, and to ask him to peruse it and give his evidence from his memory, as refreshed by his own memorandum. Where such a memorandum is used, the opposite counsel has a right to inspect it, and to cross-examine the witness on it (*i*).

The next important rule, under the head of the examination-in-chief, is that:

A witness must be asked only questions of fact which are relevant and pertinent to the issue; and he cannot be asked irrelevant questions, or questions as to his own inferences from, or personal opinion of, facts.

The latter part of this rule, and the exception to it in the case of skilled or scientific witnesses, was considered in the sixth chapter of the first part of this treatise; and it is sufficient in this place to refer to it.

(*g*) *R.* v. *Watson*, 2 Stark. 128.
(*h*) *Acerro* v. *Petroni*, 1 Stark. 100.
(*i*) *Doe* v. *Perkins*, 3 T. R. 749; and see Part II., Chap. IV.

THE RIGHT OF A PARTY TO DISCREDIT HIS OWN WITNESSES.

Sections 3 and 4 of the Criminal Procedure Act, 1865 (*k*), determine the conditions under which a party to a civil proceeding may contradict by other evidence the statement of a witness who has proved unexpectedly adverse to the party who calls him.

Section 3.—A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

Section 4.—If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

In order that a party may have the benefit of these sections, the evidence of the witness must not only be unfavourable but hostile to the party who calls him. In other words, the judge must hold not only that the result of the evidence is unfavourable to the party who calls the witness, but that the mode and tone in which the evidence is given indicate that the witness has a hostile feeling towards the party who has called him, believing the witness to be friendly (*l*). The two statements need not be directly contradictory (*m*). These provisions apply to every civil and criminal court in England and Ireland.

(*k*) 28 Vict. c. 18.
(*l*) *Greenhough* v. *Eccles*, 5 C. B. (N.S.) 786.
(*m*) *Jackson* v. *Thomason*, 1 B. & S. 745.

THE CROSS-EXAMINATION.

When a witness has been examined in chief by the party who calls him, the opposite party, or his counsel, has a right to cross-examine him. This right is discretionary, and when the examination-in-chief has resulted in clear, conclusive, or unimpeachable evidence, it will be prudent for the adverse party not to claim his privilege; for cross-examination in such a case, instead of weakening the evidence, generally strengthens and confirms it. So, where the adverse party does not dispute the truth of his opponent's case, but relies on a justification or an excuse, he will not think it desirable, generally, to cross-examine a witness.

Objects of cross-examination. — As the object of the examination-in-chief is to lay all the material evidence of a case before the court, so the objects of cross-examination are to impeach the accuracy, credibility, and general value, of that evidence; to sift, detect, and expose discrepancies, or to elicit suppressed facts, which weaken or qualify the case of the examining party, and support the case of the cross-examining party. It is therefore, generally, a rule that on cross-examination an adverse witness may be asked leading questions (*n*).

The reason for excluding leading questions on the examination-in-chief, on which the witness is generally favourable to the examiner, does not usually apply to cross-examination, on which the witness is as generally hostile to the cross-examiner. Accordingly, on cross-examination, a witness may be asked in direct words as to the truth or falsehood of a matter which bears substantially on the issue. Thus, in debt for goods, when the defence is an unexpired term of credit, a witness who proves the sale and the debt cannot properly be

(*n*) *R.* v. *Hardy*, 24 How. St. Tr. 755.

asked in chief whether he sold a particular description of goods to the defendant at a certain price and for present payment; but he should be asked separately whether he sold any goods at all, and, if so, what they were, and what were the terms of payment. On the other hand, in cross-examination he may be asked about the goods specifically and by name, and whether it was not understood between the parties that the purchaser was to have a specific time, such as a year, of credit; but the rule under consideration appears to be, and is practically, subject to the restriction that a witness, even on cross-examination, can be asked leading questions only if he is, or appears to be, adverse to the cross-examiner; and where the witness appears to be favourable to him, the court will sometimes, and even frequently, not suffer even a cross-examiner to lead his opponent's witness. Thus, on Hardy's trial, a witness for the prosecution, on evincing a favourable disposition towards the prisoner, was asked by his counsel, whether, at a meeting, certain persons had not used certain specified expressions which, if uttered, would have been favourable to the defence; but the court held that in such a case counsel could not put words into the witness's mouth; and BULLER, J., said:

"You may lead a witness upon a cross-examination to bring him directly to the point as to the answer; but you cannot go the length of putting into the witness's mouth the very words which he is to echo back again" (*o*).

In examining in chief, the object of the party should be to elicit from the witness all the material facts which he is called to prove, and to take especial care that the witness does not stand down before the latter has proved that part of the case which he is expected to prove. Generally, it is desirable and proper to ask him only such questions as will confine him to the

(*o*) 24 How. St. Tr. 659.

matter in issue, and such as will elicit his own personal and independent account of it. Unless he deviates into hearsay or other inadmissible kinds of evidence, or unless he rambles into utterly irrelevant matters, it is always the right, as it is generally the prudent, course not to interrupt a witness when examining him in chief. If he is hostile or dishonest, a more stringent style of examination may be adopted; but if he is favourable, or even adverse, but honest, a party will seldom lose anything by suffering a witness to give his own ungarbled version of a circumstance; and such a course will always be most satisfactory to the court, and most conducive to the administration of justice. In criminal cases, especially where a prisoner is not defended, it is the practice, and probably the duty, of a prosecuting counsel, to ask a witness questions which are favourable in their object to the prisoner; for the duty of a prosecuting counsel is to lay all material evidence impartially before the court, and not to press for a conviction. In all such cases, and in cross-examination as on the examination-in-chief, the court will exercise its discretion as to how far it is desirable and consistent with the ends of justice to allow a question to be put in a leading form. It has been stated, however, by ALDERSON, B., that the right to lead on cross-examination exists whether the witness be favourable or not (*p*).

Great latitude is allowed as to the questions which a party is permitted and entitled to ask on cross-examination, and he will seldom be stopped by the court unless the question is manifestly irrelevant to the case, and calculated neither to qualify the examination-in-chief nor to impeach the credit of the witness. It is manifest that questions, which would be clearly irrelevant on the examination-in-chief, may be of the

(*p*) *Parkin* v. *Moon*, 7 C. & P. 408.

highest importance when asked on cross-examination. Generally speaking, in cross-examination a witness may be asked any question, the answer to which may have a tendency to affect his credit; but he will not always be obliged to answer such questions; and, generally, he may be asked questions which affect his veracity or his memory, such as, whether he has been convicted on a trial on a criminal charge; whether he is a relation, or intimate friend, or under any special obligation, to the party who calls him; whether he is not identified or connected with him in interest; whether he has not been on terms of enmity with the adverse party; and whether his memory is not defective generally, or as to the particular transaction. Such questions are within the circumference of the issue, although not within that inner circle to which the examination-in-chief is confined.

By the R. S. C. 1883, Order XXXVI., Rule 38—

"The judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be inquired into in the cause or matter."

This provision was new; but the court had always power to stop a rambling, prolix, or irrelevant cross-examination. Where the questions appear to be irrelevant, but the cross-examiner undertakes to show that they are material, they will not be disallowed (*q*).

Generally speaking, a cross-examination will be held irrelevant where it tends neither to contradict nor to qualify the result of the examination-in-chief, nor to impeach the credit of the witness. It is also irrelevant in civil proceedings, when it is sought to infer an act of a party from his dealings with a third party. Thus, in an action for a nuisance, the defendant's witness cannot be asked on cross-examination

(*q*) *Haigh* v. *Belcher*, 7 C. & P. 389.

whether compensation for a similar nuisance has not been paid by the defendant to a third person in the same position as the plaintiff (*r*). So, evidence of the mode in which a party has contracted with third parties is no evidence of the mode in which he contracted with the adverse party in a similar transaction; and the latter cannot ask a witness on cross-examination as to the terms on which the party contracted with such third parties (*s*). Again, a witness cannot be asked as to the statement or admission of a third person to show that a liability belongs to such third person, and not to the party charged, for such evidence would be hearsay (*t*); but he may be asked whether such a third person is not the person to whom a credit was given, or who was dealt with as the party originally liable, and it seems that he may be asked such a question as the foregoing, in order to test his memory or credibility (*s*).

If a witness, after being sworn, is not examined in chief, the counsel of the other party has a right to cross-examine, unless the witness has been called under a mistake, *e.g.*, under the mistaken idea that he knew something of the transaction he was called to prove, when in fact he knew nothing (*u*).

A witness who has been called by neither party may be called and examined by the judge, and then he is the witness of the judge and not of either of the parties. The rules as to the cross-examination of such a witness have thus been stated by Lord ESHER, M.R.:

"The counsel of neither party has a right to cross-examine him without the permission of the judge. The judge must exercise his discretion whether he will allow the witness to be cross-examined. If what the witness has said in answer to the questions

(*r*) *Tennant* v. *Hamilton*, 7 C. & F. 122.
(*s*) *Hollingham* v. *Head*, 4 C. B. (N.S.) 388.
(*t*) *Watts* v. *Lyons*, 6 M. & G. 1047.
(*u*) *Wood* v. *Mackinson*, 2 Moody & Rob. 273.

put to him by the judge is adverse to either of the parties, the judge would no doubt allow, and he ought to allow, that party's counsel to cross-examine the witness upon his answers. A general fishing cross-examination ought not to be permitted" (*x*).

When a prisoner calls a witness who criminates another prisoner, the latter has a right to cross-examine; but it seems there is no such right when the evidence is not criminatory (*y*). When a prisoner elects to give evidence on his own behalf under the Criminal Evidence Act, 1898, and in so doing incriminates a fellow prisoner, the latter has a right to cross-examine (*z*).

IMPEACHING THE CHARACTER OF A WITNESS.

In order to impeach the character of a witness, he may be asked, on cross-examination, whether he has committed any crime, or been guilty of other immoral conduct; but generally, if he answers in the negative, the fact cannot be proved by the cross-examiner unless it be material to the issue. In other cases the answer of the witness is conclusive (*a*). Generally, evidence of bad character cannot be given; but an exception to this general rule in civil proceedings was instituted by the Common Law Procedure Act, 1854, and now by the Criminal Procedure Act, 1865 (*b*), s. 6, which applies in all courts, criminal as well as civil, it is enacted that—

"A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect

(*x*) *Coulson* v. *Disborough*, [1894] 2 Q. B. 316.
(*y*) *R.* v. *Burdett*, Dears. C. C. 431, followed *R.* v. *Hadwen*, [1902] 1 K. B. 886.
(*z*) *R.* v. *Hadwen*, *ubi supra*.
(*a*) *Feret* v. *Hill*, 15 C. B. 207.
(*b*) 28 Vict. c. 18.

only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same."

It has been held that a party to a cause, who gives evidence on his own behalf, may be asked in cross-examination if he has ever been convicted of any felony or misdemeanor, and that if he denies or refuses to answer, the opposite party may prove the conviction, although the fact of the conviction may be altogether irrelevant to the matter in issue in the cause (*c*).

If a witness is asked on cross-examination whether he ever made a former verbal statement, as to matters connected with the issue, different to that which he has made at the trial, and he answers in the negative, evidence may be given that he has made such a former statement; but it is necessary to lay a foundation for such evidence by first stating to the witness all the circumstances under which he is supposed to have made such a former and contradictory statement, in order that he may have an opportunity of refreshing his memory, and explaining the discrepancy (*d*). In the words of ALDERSON, B.:

"A witness may be asked any question which, if answered, would qualify or contradict some previous part of that witness's testimony, given on the trial of the issue, and, if that question is put to him and answered, the opposite party may then contradict him. . . . You may ask him any question material to the issue, and if he denies it you may prove that fact, as you are at liberty to prove any fact material to the issue" (*e*).

This principle has also been extended by s. 4 of the Criminal Procedure Act, 1865 (*f*), which is

(*c*) *Ward* v. *Sinfield*, 49 L. J. C. P. 697.
(*d*) *Crowley* v. *Page*, 7 C. & P. 791.
(*e*) *Attorney-General* v. *Hitchcock*, 1 Ex. 102.

applicable in all courts, civil and criminal, and enacts that—

"If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

A witness may be recalled for the purpose of proving an inconsistent statement made by a subsequent witness (*g*).

In other cases, where a witness is asked on cross-examination a question which is not material to the subject-matter of the case, and which is intended merely to impeach his veracity, it was long doubted, and is still doubtful in some measure, how far evidence can be given to contradict an answer to such an immaterial question. There are authorities both ways; but the modern doctrine appears to be that, although such evidence cannot be received to disprove a statement of the witness as to an irrelevant fact, it may be given in some cases to contradict an answer to a question which tends to impeach his general veracity.

When it is sought to impeach the veracity of a witness, evidence cannot be given of any particular acts of falsehood or dishonesty, because it is presumed that a witness does not attend prepared to rebut particular charges nor to justify the whole course and details of his private life. A witness, therefore, who is called, as is allowable, to impeach the veracity of another witness, cannot be asked as to particular acts in the life of the impeached witness, but generally only whether he would believe him on his oath (*h*).

(*f*) 28 Vict. c. 18.
(*g*) *Sykes* v. *Haig*, 44 L. T. (N.S.) 57.
(*h*) *R.* v. *Brapham*, 4 C. & P. 392; *R.* v. *Brown*, 36 L. J. M. C. 59.

In such a case the party calling the impeached witness may re-establish his character by calling witnesses to his general good character (*i*). Questions may be put to a witness which have a direct tendency to show that he is not impartial, and his answers may be contradicted by other witnesses; and therefore a witness may be asked if he has accepted a bribe, and if he denies it the acceptance of the bribe may be proved *aliunde* (*k*); but if he is asked whether he has said that he has been *offered* a bribe, and he denies it, evidence to contradict him is inadmissible (*l*).

When it is proposed to contradict a former statement in writing by a witness, the existing rule for all courts, civil and criminal, is, under the Criminal Procedure Act, 1865, s. 5 (*m*), the following :

"A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit" (*n*).

In criminal cases, where a prisoner calls witnesses only to character, it is not usual for the prosecuting counsel to cross-examine them, although strictly he has the right to do so, and he may adduce evidence to rebut such evidence of good character (*o*).

In concluding the subject of impeaching a witness, the remarks of Lord HERSCHELL on this subject, in

(*i*) *Annesley* v. *Lord Anglesea*, 17 How. St. Tr. 1430.
(*k*) See *R.* v. *Langhorn*, 7 How. St. Tr. 446.
(*l*) *Attorney-General* v. *Hitchcock*, 1 Ex. 91.
(*m*) 28 Vict. c. 18.
(*n*) See *Darby* v. *Ouseley*, 1 H. & N. 1.
(*o*) *R.* v. *Rowton*, L. & C. 520.

the case of *Browne* v. *Dunn* (*p*), may be appropriately quoted:

"I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to be suggested that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as possibly he might be able to do, the circumstances which, it is suggested, indicate that his story is not to be believed, to argue that he is a witness unworthy of credit. I have always understood that if you intend to impeach a witness, you are bound, while he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses. Sometimes complaint has been made of excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth: I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story he is telling. Of course, I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakeably given, and the point on which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is, that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted."

THE RE-EXAMINATION.

When the cross-examination of the witness is concluded, the party who called him has the right to re-examine him on all matters arising out of the cross-examination, for the purpose of reconciling any discrepancies that may exist between the evidence on the examination-in-chief, and that which has been

(*p*) 6 The Reports, 67.

given on cross-examination, or for the purpose of removing, or diminishing, any suspicion that the cross-examination may have cast on the evidence-in-chief; but the re-examining counsel cannot ask the witness as to new matter; or, in other words, the questions which may be asked must be exclusively such as are connected with, and arise out of, the cross-examination; and no questions can be asked on re-examination tending to introduce new evidence which might have been given on the examination-in-chief (*q*). Thus, in *The Queen's Case* (*q*), Lord TENTERDEN, in delivering the judgment of the court, said:

"I think that counsel has a right upon re-examination to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but I think he has no right to go further, and to introduce matter new in itself, and not wanted for the purpose of explaining either the expressions or the motives of the witness."

It is therefore held that a witness who has been cross-examined as to a conversation with a party, cannot be re-examined as to parts of the conversation not connected with the portion to which the cross-examination referred (*r*); but where a party has omitted to put a question on the examination-in-chief, a judge will usually put it, if requested to do so by counsel. The judge has also a discretionary power to recall a witness at any time for the purpose of putting a question to him. The re-examination practically closes the examination of a witness; although occasionally witnesses are called to justify the character of an impeached witness, or to impeach the character of an impeaching witness.

(*q*) *The Queen's Case*, 2 B. & B. 297.
(*r*) *Prince* v. *Samo*, 7 A. & E. 627.

The party who calls a witness, or who produces any kind of evidence, gives the adverse party the right of reply, and he will have no right to re-examine a witness if the adverse party declines to cross-examine.

Privileges of Witnesses.—It may be noticed before concluding this chapter, that no action will lie against a witness for what he says or does in giving evidence before a court of justice; public policy requiring that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice (*s*). This privilege has been held to extend to a witness compellable and required to attend and give evidence before a military court of inquiry, held under the Queen's Regulations (*t*), and to a witness examined before a Select Committee of the House of Commons (*u*). Now, by the Witnesses (Public Inquiries) Protection Act, 1892 (*x*), s. 2:

"Every person who commits any of the following acts, that is to say, who threatens, or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure, any person for having given evidence upon any inquiry, or on account of the evidence which he has given upon any such inquiry, shall, unless such evidence was given in bad faith, be guilty of a misdemeanor, and be liable upon conviction thereof to a maximum penalty of one hundred pounds, or to a maximum imprisonment of three months";

and by s. 1:

"In this Act the word 'inquiry' shall mean any inquiry held under the authority of any Royal Commission, or by any committee of either House of Parliament, or pursuant to any statutory authority, whether the evidence at such inquiry is or is not given on oath, but shall not include any inquiry by any court of justice."

(*s*) *Seaman* v. *Netherclift*, 2 C. P. D. 53.
(*t*) *Dawkins* v. *Lord Rokeby*, L. R. 7 E. & I. 744.
(*u*) *Goffin* v. *Donnelly*, 6 Q. B. D. 307.
(*x*) 55 & 56 Vict. c. 64.

What a man says before he enters, or after he has left the witness box is not privileged ; and if a man when in the witness box takes advantage of his position to utter something having no reference to the cause or matter of inquiry, in order to assail the character of another, as if he were asked, " Were you at York on a certain day? " and he were to answer " Yes, and A. B. picked my pocket there," it certainly might well be said in such a case that the statement was altogether *dehors* the character of witness, and not within the privilege (*y*).

(*y*) *Per* COCKBURN, C.J. : *Seaman* v. *Netherclift*, *ubi supra*.

CHAPTER III.

THE SUBSTANCE OF THE ISSUE.

IT is enough if only the substance of the issue is proved.

In other words, a party will have sufficiently proved his case if he substantially establishes his allegations; and he will not be prejudiced by failing to prove matter which is unnecessary to support his claim, and may therefore be disregarded as surplusage. Generally speaking, allegations which are introductory and explanatory may be treated as matter of mere inducement, and consequently as surplusage (*a*); but it is not every unnecessary allegation which may be treated as surplusage, for irrelevant matter may be so connected and incorporated with essential matter, as to render them legally inseparable; and where this is so the irrelevant matter must be proved.

If words which are without meaning, or which have been introduced by mistake, are inserted in pleadings, they could be struck out as surplusage at common law (*b*). Thus, in tort involving a claim for a sum certain, it is immaterial that the sum due, as proved, is less than the sum claimed; but where a contract is set out by the plaintiff in his pleadings he cannot recover, unless it is correctly stated; and if he professes to set out a title, he must do so correctly (*c*). These principles are best illustrated by the leading case of *Bristow* v. *Wright* (*d*), which was an action by a landlord against sheriffs, for taking in execution the

(*a*) *Ricketts* v. *Salway*, 3 B. & Ald. 323.
(*b*) *King* v. *Pippett*, 1 T. R. 235.
(*c*) *Gwinnett* v. *Phillips*, 3 T. R. 643. (*d*) Doug. 665

goods of his tenant without paying a year's rent, which was due to him; and the declaration stated a demise for a year on reservation of a rent payable quarterly; but there was no evidence of the times of payment. It was urged that the contract was not the gist of the action, and that the plaintiff was entitled to a verdict, on showing that a year's rent was in arrear; but the court directed a non-suit, and Lord MANSFIELD, although he had at first thought the plaintiff's case established, said:

"I am convinced that it is better for the sake of justice that the strict rule should in this case prevail. I have always thought, and often said, that the rules of pleading are founded on good sense. Their objects are precision and brevity. It is easy for a party to state his cause of action. If it is founded on a deed, he need not set forth more than that part which is necessary to entitle him to recover. . . . The distinction is between that which may be rejected as surplusage, and what cannot. When the declaration contains impertinent matter, foreign to the cause, and which the master on a reference to him would strike out (irrelevant covenants for instance), that will be rejected by the court, and need not be proved. But if the very ground of the action is misstated, as where you undertake to recite that part of a deed on which the action is founded, and it is misrecited, that will be fatal; for then the case declared on is different from that which is proved, and you must recover *secundum probata et allegata*. . . . In the present case the plaintiff undertakes to state the lease, and states it falsely."

This doctrine has been further stated by Lord ELLENBOROUGH:

"With respect to what averments are necessary to be proved, I take the rule to be that, if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it, but otherwise if the whole cannot be struck out without getting rid of a part essential to the cause of action, for then, though the averment may be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover" (*e*).

A plea of tender is proved by evidence of tender of a larger sum than is alleged (*f*); but if the plaintiff

(*e*) *Williamson* v. *Allison*, 2 East, 542.
(*f*) *Dean* v. *James*, 4 B. & Ad. 546.

replies that, after the cause of action accrued, but before tender, he demanded the sum, a demand of the precise sum tendered must be proved (*g*). So, a plea of payment in accord and satisfaction is proved by proof of payment of a sum sufficient to cover the plaintiff's real demand (*h*).

In slander it is enough to prove the material words on the record: and where there are several actionable words, it is enough to prove some of them (*i*); but it is not enough to prove merely equivalent words (*k*).

In an action for disturbing the plaintiff's commonable rights by putting cattle on the land, the defendant pleaded common appurtenant, and the plaintiff replied that all the said cattle were not commonable, and it was held that the plea was supported by proof that some of the defendant's cattle on the land were commonable, and that the plaintiff could not insist on a surcharge (*l*). Where, in an action of trespass, the defendant pleaded a licence to erect and maintain a wall on the *locus in quo*, and proved a licence to erect but not to maintain, the verdict was directed against him (*m*).

In an action for an account, it is only necessary to prove that the defendant is an accounting party, without any evidence as to the items of the account (*n*); and in seeking to reopen a settled account, proof of one fraudulent item is sufficient to entitle a plaintiff to reopen the whole account. Where an important error is proved, which is not fraudulent, the court will not reopen the whole account, but will give leave to surcharge and falsify (*o*).

(*g*) *Rivers* v. *Griffiths*, 5 B. & Ald. 630.
(*h*) *Falcon* v. *Benn*, 2 Q. B. 314.
(*i*) *Compagnol* v. *Martin*, 2 W. Bl. 790.
(*k*) *Per* LAWRENCE, J.: *Williamson* v. *Allison*, 2 East, 447.
(*l*) *Brown* v. *Jenkins*, 6 A. & E. 911.
(*m*) *Alexander* v. *Bonin*, 4 Bing. N. C. 799.
(*n*) *Law* v. *Hunter*, 1 Russ. 100.
(*o*) See the judgment of JESSEL, M.R.: *Gething* v. *Keighley*, 9 Ch. D. 547.

The powers of amendment of the pleadings which the courts now possess, and which are discussed in the next chapter, render the question now under consideration of far less importance than it formerly was.

The rule that it is enough to prove the substance of the issue holds still more strongly in criminal than in civil cases. Thus, where the defendant was indicted for composing, printing, and publishing a libel, and only publication was proved, Lord ELLENBOROUGH said that this warranted a conviction, and added:

"If an indictment charges that a defendant did, and caused to be done, a particular act, it is enough to prove either. This distinction runs through the whole of the criminal law, and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified" (*p*).

So, on an indictment for two connected felonies, the prisoner may be acquitted of one and convicted of the other; as, where he is charged with burglary and stealing, he may be acquitted of the burglary and convicted of the stealing, or *vice versâ* (*q*); and on a charge of murder, he may be convicted of manslaughter, for the unlawful killing is the substance of the charge, and the malice is only matter of aggravation (*r*). So, if a prisoner is charged with killing with a dagger, it will be sufficient if the evidence proved a killing with a stick; and so it will if he is charged with killing with one kind of poison, and the evidence prove a killing with another. If, however, the charge is one of killing by poison, and the evidence proves death by a weapon or a blow, this will be a fatal variance; for a prisoner cannot be expected to be prepared with evidence to refute a charge totally distinct from that which is laid in the indictment. So, where A. is charged with giving a mortal blow; and B. and C. are charged, having been

(*p*) *R.* v. *Hunt*, 2 Camp. 583.
(*q*) 2 Hale, P. C. 302.
(*r*) *Mackalley's Case*, 9 Rep. 676.

present, with aiding and abetting, the indictment will warrant a conviction, although the evidence proves B. to have given the blow, and A. and C. to have been present, aiding and abetting, since they all are principals, and the blow is the blow of them all; but if two are charged as principals, and one appears to be only an accessory, he must be acquitted, for the legal offences in this case are different. If an averment is essentially descriptive of the substantial charge, it must be proved. Thus, on an indictment for stealing live turkeys, a prisoner cannot be convicted of stealing dead turkeys (*s*); and on an indictment for obtaining money or goods by false pretences, the pretence which really operated on the prosecutor's mind must be alleged in the indictment (*t*).

See further on this point, and also as to amendments in criminal cases, *infra*, Chapter IV.

(*s*) *R.* v. *Edwards*, R. & R. 497.
(*t*) *R.* v. *Bulmer*, L. & C. 476.

CHAPTER IV.

VARIANCES AND AMENDMENTS.

THE case proved must be substantially the same as that stated on the record.

When this rule is violated, the party on whom the burden of proof lies must submit to an adverse decision; for in such a case there is a variance between the matter alleged and the matter proved. Now, almost unlimited powers of amendment have been given to the judges whenever they are of opinion that the justice of the case requires it.

Amendments of pleadings are now governed by Order XXVIII. of the R. S. C. 1883, the first six Rules of which Order are as follows:

Rule 1. The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Rule 2. The plaintiff may, without any leave, amend his statement of claim, whether indorsed on the writ or not, once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared.

Rule 3. A defendant who has set up any counterclaim or set-off may, without any leave, amend such counterclaim or set-off at any time before the expiration of the time allowed him for answering the reply and before such answer, or in case there be no reply then at any time before the expiration of twenty-eight days from defence.

Rule 4. Where any party has amended his pleading under either of the last two preceding rules, the opposite party may, within eight days after the delivery to him of the amended pleading apply to the court or a judge to disallow the amendment, or any part thereof, and the court or judge may, if satisfied that the

justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may be just.

Rule 5. Where any party has amended his pleading under Rules 2 or 3, the opposite party shall plead to the amended pleading, or amend his pleading, within the time he then has to plead or within eight days from the delivery of the amendment, whichever shall last expire ; and in case the opposite party has pleaded before the delivery of the amendment, and does not plead again or amend within the time above-mentioned, he shall be deemed to rely on his original pleading in answer to such amendment.

Rule 6. In all cases not provided for by the preceding rules of this Order, application for leave to amend may be made by either party to the court or a judge or to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may be just.

The Court of Appeal has, by virtue of Order LVIII., Rule 4, the same powers of amendment as the High Court.

Under these provisions, the court will allow any pleading to be amended at any stage of the action, including the trial or hearing, unless the amendment changes the whole nature of the action (*a*), or unless the party applying has been acting *malâ fide*, or by his blunder has done some injury to the other side which cannot be compensated by costs or otherwise (*b*). The case of *Laird* v. *Briggs* (*c*) is an instructive one on this subject. It was an action to restrain the removal of shingle from, and the placing of bathing machines upon, a part of the foreshore of the sea at M., the plaintiff claiming to be tenant in possession of the *locus in quo* under a building agreement granted to him by the lord of the manor, who was tenant for life of the property. By his statement of defence, the defendant set up a forty years' uninterrupted user and enjoyment of the *locus in quo* by himself and his predecessors in title for the purposes complained of, and denied that

(*a*) *Newby* v. *Sharpe*, 8 Ch. D. 39.
(*b*) *Per* BRAMWELL, L.J. : *Tildesley* v. *Harper*, 10 Ch. D. 396; *cf. Steward* v. *North Metropolitan Tramways Co.*, 16 Q. B. D. 556.
(*c*) 19 Ch. D. 22.

the plaintiff was, or ever had been, in possession of the foreshore in question, "save subject to the right of the defendant"; the defendant claimed by paragraph 11 of his defence, a right on behalf of himself and his trustees, who were entitled to an estate in fee simple in possession of certain property, to enter upon the foreshore fronting that property, and to place and keep bathing machines thereon, and to carry away therefrom such quantities of sand, shingle and chalk as might be necessary for the purpose of keeping such foreshore in order for the purpose of sea bathing, and for the beneficial enjoyment of the said property. At the trial the defendant asked leave to amend his defence by striking out the above-mentioned words between inverted commas, and also by making the claim of the defendant and his trustees, in paragraph 11, a claim "to be owners of and to enter upon the foreshore." FRY, J., refused both amendments. On appeal, the court held that the amendment of paragraph 11 was rightly refused, but that the other amendment must be allowed. BRETT, L.J., said:

"I think the decision in *Newby* v. *Sharpe* (*d*) is a strong authority against the second amendment which was asked for, but was no authority against the first, which, I think, ought to have been allowed."

The court is bound to allow any amendment which would tend to the determination of the real question in controversy, but not for the purpose of enabling a purely technical objection to be raised (*e*).

AMENDMENTS IN CRIMINAL CASES.

The day and year on which facts are stated in an indictment to have occurred, are not in general

(*d*) 8 Ch. D. 39.
(*e*) *Collette* v. *Good*, 7 Ch. D. 842; *cf. Australian Steam Navigation Co.* v. *Smith*, 14 App. Cas. 318.

material: and the facts may be proved to have occurred upon any other day previous to the finding of the bill by the grand jury. So it is not generally necessary to prove the offence to have been committed at the place named in the indictment, but it is enough to show that it was committed within the county, or within the jurisdiction of the court. Such, at least, is the rule where the offence is of a transitory nature, *e.g.*, in murder, larceny, treason, and even, it is said, in highway robbery.

If, however, time or place are of the essence of the offence, they must be strictly proved. Thus, burglary may be proved to have been committed on any day prior to that which is charged in the indictment; but it must be proved to have been committed between the hours of 9 p.m. and 6 a.m. (*f*). So, where place is stated as matter of local description, and not merely as venue, a variance will be fatal at common law. Thus, on indictments for burglary, housebreaking, setting fire to a dwelling-house, stealing from a dwelling-house, place is of the essence of the offence and must be proved; and, on an indictment against a parish for not repairing a road, the part of the road out of repair must be proved to be within the parish.

When there is a material variance between the offence charged and the offence proved, it is fatal unless amended; but if the variance is only a matter of value or aggravation, and does not vary the species of the charge, the variance is, in many cases, immaterial, either at common law or by statute. Thus, in murder, the homicide is the substance of the crime; and the malice, which distinguishes it from manslaughter and justifiable or excusable homicide, is merely matter of aggravation, which does not vary the essence of the charge, and cannot mislead a prisoner in his defence;

(*f*) 24 & 25 Vict. c. 96, s. 1.

and therefore, on an indictment for the higher offence, he may be convicted of either of the lower offences. So, in larceny, it is sufficient to prove the species of the goods stolen to correspond with the description in the indictment, without proving the amount or the value to be the same. On an indictment, for stealing eight pairs of shoes of the value of £4, two waistcoats of the value of 30*s*., and three coats of the value of £5, it is not necessary, in either case, to prove the value of any of the articles to be more than nominal, nor to prove the number of the goods assigned to each species, nor the accumulative number of the different species. A conviction will be warranted by evidence that any one article, of any value, of any one distinct species, has been stolen; but a prisoner charged with one kind of felony or misdemeanor cannot be convicted of another kind of felony or misdemeanor; still less, when he is indicted for a felony, can he be convicted of a misdemeanor; nor when indicted for a misdemeanor can he be convicted of a felony. Thus, a prisoner charged with housebreaking cannot be convicted of burglary. When charged with stealing boots or a coat, he cannot be found guilty of stealing shoes or a waistcoat. So, when there is a variance in the name of the person against whom the offence is committed, it is fatal at common law, unless the name be *idem sonans*.

Although the variances, which are fatal at first sight, in criminal cases are still numberless, practically their amount is reduced to a very narrow compass by the extensive powers of amendment which, as in civil cases, have been vested in the judge at trial. The most recent statute, and the only one which need be considered here, as it virtually includes many which preceded it, is the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), which enacts as follows:

Section 1. "Whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between

the statement . . . in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence, or in the christian name or surname, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea, and returned together with the record and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer; and in all other cases the order for the amendment shall either be indorsed on the indictment, or shall be engrossed on parchment, and filed, together with the indictment, among the records of the court: Provided that in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly; in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: Provided also, that where any such trial shall be to be had before another jury, the Crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury were sworn."

Section 2. "Every verdict and judgment, which shall be given after the making of any amendment under the provisions of this Act, shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made."

By the interpretation clause of this Act (s. 30), the word "indictment" is declared to include an "information," "inquisition," "presentment," and "also any plea, replication or other pleading, and any Nisi Prius record," and therefore in all these cases amendments will be allowed.

Under s. 1 of this Act, the ownership of property in larceny may be altered at trial. Where the indictment was for stealing the goods of C., and the proof was that D. was a special bailee of similar property belonging to C. and B. severally, and had delivered by mistake the goods in question to the prisoner as belonging to C., although they really belonged to B., the court supported an amendment which laid the property in D. (*g*). It is doubtful, however, whether, in every case, the power of amendment at trial extends so far as to allow a charge of stealing goods from A. B. to be converted into a charge of stealing them from C. D. In an Irish case (*h*), such an amendment has been allowed even after the prisoner's counsel had addressed the jury; and the ruling of WILLIAMS, J., in *R.* v. *Rymers* (*i*) was disapproved. Where such an amendment was not made, the court, without deciding whether it might have been made, held that an acquittal on a charge of stealing goods from A. B. would not sustain a plea of *autrefois acquit* on a charge against the prisoner of stealing the same goods from C. D. (*k*).

In perjury alleged to have been committed on the trial of B. "for setting fire to the barn of P.," the

(*g*) *R.* v. *Vincent*, 2 Den. 464.
(*h*) *R.* v. *Fullarton*, 6 Cox, C. C. 194.
(*i*) 3 C. & K. 326.
(*k*) *R.* v. *Green*, 1 D. & B. 113.

certificate of the trial and conviction of B. stated it to be "for setting fire to a stack of barley." It appeared that the barn and stack of barley were burning at the same time; and WILLIAMS, J., directed the indictment to be amended according to the certificate, considering the case within the words of s. 1, "in the name or description of any matter or thing whatsoever," and observing that this was one of the very cases for which the statute was passed (*l*); but where a prisoner was charged with obtaining money on a false pretence, that he had served an order of affiliation on A., which he had not served, and the evidence proved only a statement by him that he had left it with a third person for A., it was held that this was a material variance which could not be amended (*m*). So, where the indictment charged the concealment of a birth by placing the body in and among a heap of carrots, and the evidence was that it was placed on the back of the heap, CROMPTON, J., held the variance material, and refused an amendment (*n*). A material omission in an indictment cannot be supplied. Thus, on a charge of perjury, an omission to state a material allegation in the indictment is a defect of substance, and not of form, which ought not to be amended (*o*).

If the evidence proves a variance as to the christian name of a person named in an indictment as matter of description, the court may amend by striking out all the names; but not by striking out merely some of the names which have been inserted, and not proved. Where the indictment charged an assault on a gamekeeper of George William Frederic Charles, Duke of Cambridge, and the first two names alone were proved, it was held that the court of quarter sessions might have amended by striking out all the names except that

(*l*) *R.* v. *Nerille*, 6 Cox, C. C. 69.
(*m*) *R.* v. *Bailey*, 6 Cox, C. C. 29. (*n*) 6 Cox, C. C. 391.
(*o*) *Per* BYLES, J.: *R.* v. *Harrey*, 8 Cox, C. C. 99.

of "Duke of Cambridge," but that they were not bound so to amend; and that therefore the allegations, although unnecessary, ought to have been proved (*p*). Where, however, the prisoner was indicted for forgery as a statutable *felony*, but the offence proved was holden to be a *misdemeanor*, HILL, J., refused an amendment, on the ground that the Statute does not permit an alteration of the nature or quality of the offence charged (*q*).

Section 9 of the Act enacts that a prisoner charged with a felony may be convicted of an attempt to commit a felony, if it shall appear on the evidence that he did not complete the offence charged; and in like manner, if charged with a misdemeanor, he may be convicted of an attempt to commit a misdemeanor. Section 12 enacts, that if on a trial for misdemeanor the evidence proves a felony, the prisoner may either be convicted of the misdemeanor, and prove the conviction in bar of a subsequent trial for the same offence, on a charge of felony, or the court may discharge the jury from giving a verdict, and direct the prisoner to be indicted for the felony.

This Act is intended to apply to all cases where amendments may be made in furtherance of justice, and where the defendant cannot be prejudiced in his defence, on the merits, by such amendment (*r*).

It has been ruled that an amendment will not be allowed after the counsel for the prisoner has addressed the jury. The proper course is that, where the counsel for the prosecution has given all the evidence that he means to give, he should, if he wishes for an amendment, ask for it before he closes his case; and then, if the amendment is allowed, the counsel for the prisoner will address the jury on the indictment as amended (*s*).

(*p*) *R.* v. *Frost*, 1 Dears. 474. (*q*) *R.* v. *Wright*, 2 F. & F. 320.
(*r*) *Per* Lord CAMPBELL; *R.* v. *Sturge*, 3 E. & B. 734.
(*s*) *R.* v. *Rymers*, 3 C. & K. 326.

The effect of the Criminal Procedure Act, 1851, has been virtually to abolish the multitude of technical subtleties, which were formerly the means of defeating justice, and procuring unreasonable verdicts of acquittal after the substance of the charge had been proved. The responsibility of letting loose on society a criminal, of whose guilt no reasonable auditor has entertained a doubt, no longer rests on the shortcomings of the legislature, but on the discretion of the judge; but, as it is his duty to amend a defective indictment, when the prisoner cannot fairly complain that he is required suddenly to meet a charge for which he is not prepared, so it is equally the duty of a judge not to endanger the liberty of the subject, nor to encourage the carelessness of prosecutors, by permitting the form of an indictment to be altered substantially from what it was when the prisoner was called on to plead to it. On this head, it has been said by a learned writer, that no general rule can be laid down for the guidance of the court in all cases. It is possible that an amendment, which in one case would not prejudice a prisoner, might in another case prejudice him materially. The inclination of the court will still be *in favorem vitæ*. The court will look at all the circumstances of the case to ascertain whether the transaction would be changed by the amendment, and will not forget that the protection of the weak from oppression, and of the presumptively innocent from injustice, are higher objects, even in the estimation of positive law, than the detection and punishment of the guilty.

CHAPTER V.

THE RELEVANCY OF EVIDENCE.

SINCE it is the object of pleading to reduce the case of each litigating party to one or more substantial issues which involve the merits of the question, and since, for this purpose, none but material allegations which tend to the raising of such issues are admissible, so it is the object of evidence to provide that, when such allegations have been made, and such issues selected, they shall be supported by strictly relevant proof. The rule is that—

The evidence must correspond with the allegations, and be confined to the points in issue.

Or as it is sometimes stated that—

The evidence must be relevant to the issue—

On this subject the Judicial Committee of the Privy Council once said:

"This case is one of considerable importance, and their lordships desire to take advantage of it for the purpose of pointing out the absolute necessity that the determination in a cause should be founded upon a case either to be found in the pleadings, or involved in or consistent with the case made thereby" (*a*).

Evidence may be rejected as irrelevant for one of two reasons: 1st, that the connection between the principal and evidentiary facts is too remote and conjectural; 2nd, that it is excluded by the state of the pleadings, or what is analogous to the pleadings; or

(*a*) *Eshenchunder Singh* v. *Shamachurn Bhutto*, 11 Moo. Ind. App. 20.

is rendered superfluous by the admissions of the party against whom it is offered (*b*).

As to the second of these reasons, it is by Order XIX., Rule 4, of the rules of the Supreme Court, 1883, provided that every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved. Any facts on which a party can rely at the trial are material within the meaning of this rule (*c*). No evidence can be received to prove facts alleged by a party to be material but not stated or referred to in his pleadings (*d*).

For the first of the above reasons, no presumption as to the conduct, intention, or course of dealing between two parties arises from evidence of the conduct, intention, or course of dealing between one of them and a third party. Such evidence is said to be *res inter alios acta*, and will be rejected as irrelevant to the issue, unless, indeed, it is part of the *res gestæ*, and so tends to throw any light upon the question at issue (*e*). The fact that A. contracted, or dealt in a particular manner with B., is no evidence that he meant to contract, or deal in the same manner with C. Thus, in an action for goods sold and delivered, in which the defence is that the plaintiff sold them to the defendant on certain terms, the defendant cannot show that the plaintiff had sold the same quality of goods to other persons on the same terms, for the fact that a man has once or more acted in a particular way does not make it probable that he so acted on a given occasion; and the admission of such evidence would be fraught with the greatest inconvenience (*f*). But

(*b*) See Best on Evidence, 7th ed., 253.
(*c*) *Millington* v. *Loring*, 6 Q. B. D. 190.
(*d*) *Scott* v. *Sampson*, 8 Q. B. D. 491.
(*e*) *Milne* v. *Leisler*, 7 H. & N. 786.
(*f*) *Hollingham* v. *Head*, 4 C. B. (N.S.) 388; *cf. Howard* v. *Sheward*, L. R. 2 C. P. 148.

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

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

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

Hence, where the issue was whether the plaintiff, a tradesman, had given credit to A.'s father, evidence that other tradesmen had given credit to the father was rejected (*i*). So, in an action for slander alleging maltreatment of boys at a school, evidence of the treatment of boys at other schools, offered to prove what is proper treatment, was rejected (*j*); and where the action was for withdrawing scholars without a quarter's notice, according to a prospectus of terms, which the defendant was proved to have received, it was held that a witness might state that she had never received any prospectus while her children had been at the school, because this evidence bore on the usual course of the plaintiff's dealing, but that she could not prove that she had taken her children away without notice, and without being called on to pay a quarter's salary; apparently because this might have been merely a matter of peculiar arrangement (*k*). So, the terms on which one tenant holds are no evidence of the terms

(*g*) *Woodward* v. *Buchanan*, L. R. 5 Q. B. 285.
(*h*) *Holcombe* v. *Hewson*, 2 Camp. 391.
(*i*) *Smith* v. *Wilkins*, 6 C. & P. 180.
(*j*) *Boldron* v. *Widdows*, 1 C. & P. 65.
(*k*) *Delamotte* v. *Lane*, 9 C. & P. 261.

on which another tenant holds under the same landlord (*l*); and an award in favour of a party to a former action is not evidence for a party to a subsequent action, claiming by paramount title, as against a party claiming through the person against whom the award was made (*m*); and in an action to recover money paid to a third party, the receipt given by the latter to the plaintiff is not *per se* evidence against the defendant (*n*).

Where, however, the extraneous transaction contains the principle of a reasonable and credible inference as to the motive or conduct of the party, the judge, in his discretion, will admit evidence of it. Thus, where a letter from the defendant, in answer to a letter written on the plaintiff's behalf, was proved to have been seen by the plaintiff, it was admitted in evidence against the latter (*o*). But, in an action for false imprisonment on a charge of felony, where the defence was a *bonâ fide* belief that the plaintiff had committed the felony, the defendant was not allowed to give in evidence the record of a conviction of another person for a similar felony which he had not seen, although if he had seen it it would have been admissible as evidence of *bona fides* (*p*). In an action against a company to recover a sum of money obtained by them from the plaintiff through a fraud of the defendant's agent, committed with their knowledge and for their benefit, evidence of similar frauds committed on persons other than the plaintiff, by the same agent, in the same manner, with the knowledge and for the benefit of the defendant, is admissible on behalf of the plaintiff (*q*).

(*l*) *Carter* v. *Pryke*, Peake, 95.
(*m*) *Lady Wenman* v. *Mackenzie*, 5 E. & B. 447.
(*n*) *Carmarthen and Cardigan Rail Co.* v. *Manchester and Milford Rail. Co.*, L. R. 8 C. P. 685.
(*o*) *Carne* v. *Steer*, 5 H. & N. 628.
(*p*) *Thomas* v. *Russell*, 9 Ex. 764.
(*q*) *Blake* v. *Albion Life Assurance Society*, 4 C. P. D. 94; *Barnes* v. *Merritt*, 15 T. L. R. 419.

The customs of one manor are not evidence of the customs of another manor (*r*), unless a connection between them is first established, as by showing that they belong to the same lord, that the same description of tenants has existed in each, and that their leases have been granted in the same terms. In such a case, the usage which has prevailed in one part, and which is therefore evidence to explain the meaning of a grant there, is evidence to explain a grant expressed in similar terms as to any other part of the district (*s*); but the unity or original identity of the manors must be clearly shown, and the mere fact of their being in the same leet, or parish, is not sufficient (*t*).

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

When the issue involves a question of manorial right as between a lord and an adverse claimant, evidence of the exercise of such right over part of a waste has been held to be evidence of title to other parts which, from their local situation, may be deemed to belong to it.

(*r*) *Marquis of Anglesea* v. *Lord Hatherton*, 10 M. & W. 233.
(*s*) *Per* BAYLEY, J.: *Rowe* v. *Brenton*, 8 B. & C. 764.
(*t*) *Per* Lord ABINGER: 10 M. & W. 236.
(*u*) *Noble* v. *Kennaway*, 2 Doug. 510.
(*x*) *Fleet* v. *Murton*, L. R. 7 Q. B. 126.
(*y*) *Cooper* v. *Ward*, 6 C. B. (N.S.) 50.

Thus, on a question whether a piece of waste land, between a highway and the plaintiff's inclosure, belonged to the plaintiff, or to the lord of the manor, it was held that the latter might support his claim by evidence of grants of similar pieces between the same road and the inclosure of other persons. Lord DENMAN, C.J., said:

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

In all these cases it will be observed that the act between third parties, which has, nevertheless, been received, has been either connected presumptively with the party who is to be affected by it, or has been invested with a *primâ facie* credibility by evidence of an original unity of nature or title. It seems to be a safe general rule that transactions with third parties are inadmissible, unless their privity or connection with the party against whom they are tendered is first proved extrinsically, so as to make such intermediate transactions operate in the nature of an admission or estoppel (*a*).

(*z*) *Doe* v. *Kemp*, 2 Bing. N. C. 102; *cf. Denby* v. *Simpson*, 18 C. B. 831.

(*a*) *Per* MAULE and BOSANQUET, JJ.: *Taylor* v. *Parry*, 1 M. & G. 614; *Petrie* v. *Nuttal*, 11 Ex. 569.

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

Evidence of good or bad character is generally irrelevant and inadmissible in civil cases, unless character is of the substance of the issue (*c*). In actions for seduction, evidence of the real plaintiff's bad character is admitted in reduction of damages; but the evidence must refer to a time prior to that when the seduction took place. In divorce suits the court will receive evidence of adultery committed after the latest act charged in the petition, to show the character and tendency of the earlier acts of familiarity (*d*).

In actions for defamation, evidence of the plaintiff's general good character is held irrelevant, even on a plea of justification (*e*). In such cases, however, the

(*b*) *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135.
(*c*) *Elsam* v. *Faucett*, 2 Esp. 563.
(*d*) *Boddy* v. *Boddy*, 30 L. J. P. M. & A. 23.
(*e*) *Cornwall* v. *Richardson*, R. & M. 305.

plaintiff may give in evidence any words, as well as any act, of the defendant, to show the malice or *animus* of the words which are the subject of the action (*f*); but the mere abandonment of a plea of justification ought not to weigh with a jury, where the actual defence sets up only a privileged communication (*g*). Where the libel charged the plaintiff with incompetency as a surveyor, he was not allowed to travel out of the record by showing that he had, at other times, acted competently in that capacity (*h*).

The defendant in an action for defamation can give general evidence of the plaintiff's bad character, subject to the provisions of Order XXXVI., Rule 37, of the R. S. C. 1883, which is as follows:

"In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence-in-chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence."

Although general evidence of reputation is admissible, evidence of rumours and suspicions to the same effect as the defamatory matter complained of is not admissible; nor is evidence of particular facts or circumstances tending to show the disposition of the plaintiff (*i*).

Section 29 of the Patents, Designs and Trade Marks Act, 1883 (*j*), enacts that:

"(1) In an action for infringement of a patent, the plaintiff must deliver with his statement of claim, or by order of the court or the judge, at any subsequent time, particulars of the breaches complained of. (2) The defendant must deliver with his statement of defence, or, by order of the court or a judge, at any

(*f*) *Pearson* v. *Lemaitre*, 5 M. & G. 700.
(*g*) *Wilson* v. *Robinson*, 7 Q. B. 68.
(*h*) *Brine* v. *Bazalgette*, 3 Exch. 692.
(*i*) *Scott* v. *Sampson*, 8 Q. B. D. 491.
(*j*) 46 & 47 Vict. c. 57.

subsequent time, particulars of any objections on which he relies in support thereof. (3) If the defendant disputes the validity of the patent, the particulars delivered by him must state on what grounds he disputes it, and if one of those grounds is want of novelty must state the time and place of the previous publication or user alleged by him. (4) At the hearing no evidence shall, except by leave of the court or a judge (*k*), be admitted in proof of any alleged infringement or objection of which particulars are not so delivered. (5) Particulars delivered may be from time to time amended, by leave of the court or a judge" (*l*).

Evidence cannot be given by a party to an infringement action of any fact not referred to in his particulars, although such fact may have come to his knowledge after the delivery of his particulars (*m*). His proper course in such a case is to apply to amend his particulars. When, however, evidence is within the literal meaning of the words of the particulars, however general the statement, the evidence will be received at the trial (*n*). Section 26 of the last-mentioned Act makes similar provisions as to particulars of objections on a petition for revocation of a patent.

By the Rivers Pollution Prevention Act, 1876 (*o*), s. 2, it is for the purposes of the Act provided that in proving interference with the due flow of any stream, or in proving the pollution of any stream, evidence may be given of repeated acts which, together, cause such interference or pollution, although each act taken by itself may not be sufficient for that purpose.

In criminal cases the strict rule is that no evidence can be admitted which does not tend directly to the proof, or disproof, of the matter in issue; and therefore, as a general rule, evidence that a prisoner has committed a similar crime before, or that he has a

(*k*) Leave was given in *Hill* v. *Adams*, 10 R. P. C. 102.
(*l*) The Court of Appeal can give leave (*Shoe Machinery Co.* v. *Cutlan*, [1896] 1 Ch. 108.
(*m*) *Daw* v. *Eley*, L. R. 1 Eq. 38.
(*n*) *Per* POLLOCK, C. B.: *Hull* v. *Bollard*, 1 H. & N. 134.
(*o*) 39 & 40 Vict. c. 75.

disposition to commit such crimes, is inadmissible (*p*). *A fortiori*, evidence that a prisoner charged with felony of one kind has committed a felony of another kind is inadmissible (*q*). On a charge of burglary and larceny on a particular day, evidence of a larceny in the same house on a previous day was rejected (*r*); and on a charge of obtaining money under false pretences, evidence that the prisoner had within a week previously obtained another sum of money under the same false pretence was rejected (*s*). In the last case the question seems to have been as to the prisoner's authority to obtain the money. If the question had been as to his knowledge of the falseness of the pretence, the decision would doubtless have been different; for where a man was indicted for attempting to obtain an advance from a pawnbroker by falsely asserting that a certain ring contained diamonds, evidence of a similar attempt two days before was held to have been rightly admitted as proof of his knowledge that the pretence was false (*t*). So where a brewer was charged with applying a false trade description to goods, under the Merchandise Marks Act, 1887, the offence consisting in delivering six barrels of beer, invoiced as such, when one of such barrels was of the capacity of thirty-four gallons, in lieu of thirty-six, as it should have been, evidence of previous deliveries of casks of beer of less than thirty-six gallons capacity, with invoices describing them as barrels, was held admissible (*u*). When the *animus* or intent of an act has to be shown, previous and subsequent conduct will be evidence of it. Thus, the *animus* or intent in uttering counterfeit coin may be proved by evidence of

(*p*) *R.* v. *Cole*, 1 Phil. Ev. 508.
(*q*) *R.* v. *Oddy*, 2 Den. C. C. 265.
(*r*) *R.* v. *Vandercomb*, 2 Leach, 816.
(*s*) *R.* v. *Holt*, Bell, 280.
(*t*) *R.* v. *Francis*, L. R. 2 C. C. R. 128; *cf. R.* v. *Roebuck*, D. & B. 24.
(*u*) *Budd* v. *Lucas*, [1891] 1 Q. B. 408.

previous or subsequent utterings (*v*); and the possession alone of several pieces of counterfeit coin is evidence of guilty knowledge (*x*). On an indictment for knowingly and unlawfully having possession of coining instruments, proof is admissible that the prisoner had previously uttered counterfeit coin (*y*); and the strictness of the rule is also, as previously stated, relaxed in cases of false pretence, where the prisoner's guilty knowledge or intent is in question (*z*). In *R.* v. *Geering* (*a*), on a charge of murder, by administering arsenic in food, evidence that two other members of the same family, for whom also the prisoner cooked, had died of poison, was admitted (*a*), inasmuch as it tended to show whether the taking of the arsenic was accidental. This case was approved by the Judicial Committee in *Makin* v. *Attorney-General for New South Wales* (*b*), where, on an indictment for murder of an infant by baby farmers, evidence that several other infants had been received on similar terms from their mothers, and that the bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the prisoners, was held admissible. So, too, where a prisoner was charged with obtaining credit by fraud and false pretences, and it was proved that he hired apartments from the prosecutrix and left after three days without paying for them or for food supplied to him, evidence was held admissible to prove that a short time before the commission of the offence the prisoner had done the same thing at other lodging-houses (*c*).

In this case Lord ALVERSTONE, L.C.J., quoted the following statement of the law by Lord HERSCHELL

(*v*) *R.* v. *Foster*, 1 Dears. C. C. 456.
(*x*) *R.* v. *Jarvis*, Dears. C. C. 552.
(*y*) *R.* v. *Weeks*, L. & C. 18.
(*z*) *R.* v. *Francis*, L. R. 2 C. C. R. 128.
(*a*) 18 L. J. M. C. 215.
(*b*) [1894] A. C. 57.
(*c*) *R.* v. *Wyatt*, [1904] 1 K. B. 188.

in *Makin* v. *Attorney-General for New South Wales* (*d*):

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

Where a prisoner was tried for obtaining a cheque from R. by false pretences by means of a cheque which was dishonoured, and he was acquitted, and subsequently was tried for obtaining money from other persons by false pretences on three other cheques which were dishonoured, R. gave evidence at the second trial of the facts as to the dishonouring of the first cheque. This evidence was the same as that which he gave at the first trial. It was held that the evidence was admissible on the second trial, notwithstanding that it had been used on the first trial, because it was not used at the second trial to get the prisoner convicted of the offence for which he had been already acquitted, but as showing a course of conduct by the prisoner and his belief that the cheques in question on the second trial would not be met (*e*).

Again, when several felonies are so connected as to form one transaction, evidence of all may be given in order to convict of one. Thus, where the indictment charged stealing from the prosecutor's till, and the evidence showed different takings, by which the whole deficit was caused, it was held that the fact might be

(*d*) [1894] A. C. 57.

(*e*) *R.* v. *Ollis*, [1900] 2 Q. B. 758.

shown by proof of the results of different inspections of the till (*f*). So, in conspiracies, since the act of one is in law the act of all, when complicity has been proved, the act of one conspirator is evidence on an indictment against another.

The most important exceptions, however, to the last-stated general rule arise under s. 19 of the Prevention of Crimes Act, 1871 (*g*), which provides, that—

"Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him. Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen ; provided that not less than seven days' notice in writing shall have been given to the person accused that proof is intended to be given of such previous conviction ; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused."

"Found," in the first part of the section, means found at the same time as the property the subject of the indictment (*h*). When a person is charged with an offence under s. 7 of this Act, a previous conviction is an ingredient of the offence, and such previous conviction must be put in evidence by the prosecution at starting (*i*).

(*f*) *R.* v. *Ellis*, 6 B. & C. 145.
(*g*) 34 & 35 Vict. c. 112.
(*h*) *R.* v. *Carter*, 12 Q. B. D. 522.
(*i*) *R.* v. *Penfold*, [1902] 1 K. B. 547.

In larceny, to prove the identity of the prisoner, it may be shown that other goods not included in the indictment, which were stolen at the same time, were found in his possession; and on the same principle, on a trial for riot and conspiracy, resolutions passed at a meeting, prior and avowedly preliminary to that named in the indictment, were held to be relevant evidence to show the objects of the second meeting; and the general conduct of the members on their way to it, their military order and threatening language to people on the road, were held strictly relevant to show the character of the meeting. On the other hand, it was held that the defendant could not go into evidence of the conduct of the military who dispersed the meeting, because that could have no bearing upon the intention and object of the assembly, as these must have existed before the dispersion, and were in their nature perfectly distinct from the conduct of those who dispersed the assembly (*k*).

(*k*) *R* v. *Hunt*, 3 B. & Ald. 566.

CHAPTER VI.

DEPOSITIONS.

WE propose to consider first—

DEPOSITIONS IN CRIMINAL CASES.

The admissibility of these depositions is subject to the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 17, by which it is enacted, that in all cases where any person shall be charged before any justice of the peace with any indictable offence—

"Such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

Before a deposition can be received under this section it must therefore appear: (1) That it was taken in the

presence of the magistrate and of the prisoner (*a*), and that the latter either cross-examined, or had an opportunity of cross-examining, the deponent. (2) That it has been signed by the witness and also by the magistrate. The christian name of the witness may be proved by any one who saw the witness sign (*b*). (3) That it was made on oath by the witness, or on affirmation, in such cases only in which an affirmation is allowed. (4) That the deponent is either dead (*c*), or so ill as not to be able to travel.

Only the first and last of these conditions are required to be distinctly proved, and the last is usually proved first. The signatures, purporting to be authentic, are presumed to be so until proved to be otherwise; and the deposition is declared on the face of it to be taken on oath. It is not enough to show that the deposition purports to be signed by the magistrate, but it must also be shown affirmatively by the prosecutor that the deposition was taken in the presence of the prisoner, and that he or his counsel or attorney had a full opportunity of cross-examining the witness; and when the prisoner is not attended by counsel or attorney, it ought also to appear that the magistrate had asked him whether he would like to cross-examine, and that he had allowed the prisoner sufficient time to consider what questions he would put (*d*).

As to the last condition, it is to be observed that it does not contain all the circumstances in which a deposition is generally admissible. Thus, before the statute, the deposition was received at common law, not merely on proof that the deponent was either dead, or so ill as to be unable to travel, but if he was proved to have become permanently insane (*e*), or to be actually

(*a*) *R.* v. *Watts*, L. & C. 339; *R.* v. *Holloway*, 65 J. P. 712.
(*b*) *R.* v. *Foote*, 26 L. J. M. C. 79.
(*c*) *R.* v. *Butcher*, 64 J. P. 808.
(*d*) *Per* PLATT, B.: *R.* v. *Day*, 19 L. T. 35.
(*e*) *R.* v. *Eriswell*, 3 T. R. 707.

insane at the time of trial with a possibility of recovery (*f*). It neither was nor is necessary to show that the illness under which a deponent is suffering is of a permanent, or of more than a temporary, nature; but where the illness of the witness is proved not to be serious, the judge may and will, in his discretion, postpone the trial until he has recovered; and this is the proper course whenever such postponement does not clearly clash with public convenience.

The illness must be real and serious, and there must either be a physical incapability of locomotion, or a probability that it might dangerously affect the witness's health (*g*). It is desirable, when it is possible, to prove this fact by a medical attendant, but it may be proved by any one who has seen and examined the deponent recently. The court will inquire scrupulously and even suspiciously into all these circumstances before receiving the deposition; and will reject it when the alleged illness appears to be not dangerous or serious enough to excuse the absence of the deponent. It is for the court, in its discretion, to determine whether the alleged illness brings the case within the Act of Parliament (*h*). Pregnancy may or may not be a source of such illness (*i*): insanity obviously is. Where a witness had an attack of paralysis, his deposition was read, although it would not have endangered his life to come into court. In that case, however, the deponent could neither hear nor speak (*k*). The fact that a female witness was seventy-four years of age, and nervous, and (in the opinion of a medical witness) likely to faint under cross-examination, has been held not to amount to such inability to travel as to make her deposition admissible (*l*).

(*f*) *R.* v. *Marshall*, C. & M. 147.
(*g*) *R.* v. *Day*, 19 L. T. 35.
(*h*) *R.* v. *Wellings*, 3 Q. B. D. 416.
(*i*) *R.* v. *Wellings*, *ubi supra*. (*k*) *R.* v. *Cockburn*, D. & B. 202.
(*l*) *R.* v. *Farrell*, L. R. 2 C. C. R. 116.

It is also settled that a deposition will be received if the deponent is proved to have been kept out of the way and prevented from appearing at the trial by the act of the prisoner or his agents, or by collusion with him or his friends (*m*). It is necessary to create by evidence a reasonable presumption that the prisoner's agents have been authorised or sanctioned by him to procure the absence of the witness. In such a case the deposition is evidence only against the prisoner who procured the absence of the deponent, and not against other prisoners in the same indictment who are not implicated in the collusion (*n*). Unless the absence of the witness is accounted for in some one of these ways, his deposition cannot be received, because it will retain all its original and unsatisfactory incidents as hearsay evidence. When the deponent is in a foreign country, his deposition cannot be read (*o*).

Each deposition must be separately signed by the committing magistrate (see s. 17 of 11 & 12 Vict. c. 42), but it is sufficient if the signature or signatures be placed at the end of the depositions, even though they are written on different sheets of paper, which are only connected by a pin (*p*). The depositions must be taken in the presence both of the magistrate and of the prisoner (*q*); and nothing should be returned as a deposition against the prisoner unless the prisoner had an opportunity of knowing what was said, and an opportunity of cross-examining the persons making the deposition.

Section 6 of the 30 & 31 Vict. c. 35, providing for cases of witnesses dangerously ill and unable to travel, enacts that:

"Whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and in the

(*m*) *R.* v. *Gutteridge*, 9 C. & P. 471; *R.* v. *Scaife*, 2 Denison, 281.
(*n*) *R.* v. *Scaife*, *ubi supra*.
(*o*) *R.* v. *Austin*, Dears. C. C. 612.
(*p*) *R.* v. *Parker*, L. R. 1 C. C. R. 225. (*q*) *R.* v. *Watts*, L. & C. 339.

opinion of some registered medical practitioner not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said Act [*i.e.* 11 & 12 Vict. c. 42, s. 17] of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof, and, if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same with the said addition to the proper officer of the court for trial at which such accused person shall have been so committed or bailed ; and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough in which he shall have taken the same, who is hereby required to preserve the same, and file it of record ; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give evidence, it shall be lawful to read such statement in evidence, *either for or against the accused*, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person (*whether prosecutor or accused*) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same."

If the depositions are lost without fraud or gross negligence before trial, and cannot be found after diligent search, they may be proved by a copy produced and certified by the magistrate's clerk (*r*) ; and, probably, under 14 & 15 Vict. c. 99, s. 14, any duly examined copy would be admissible. Every deposition against a prisoner ought to be taken down in writing, whether any case is made out or not ; and it has been declared to be "a practice quite illegal and highly improper"

(*r*) *R.* v. *Shellard*, 9 C. & P. 277.

not to take down in writing every such deposition. Accordingly, the court will require distinct evidence that it has not been so taken down, before it will admit secondary parol evidence of anything that was said on an examination before a magistrate (*s*).

The prisoner's statement will be limited, as to its admissibility in the first instance, by the principles laid down in the chapter on Confessions, and the statutory provisions which are there mentioned (*t*). A voluntary statement made by a prisoner before a magistrate ought to be reduced into writing, and read as evidence against or for him by the counsel for the prosecution at the trial. It is desirable, but not necessary, that the prisoner should sign the statement; and it is said not to be necessary that the magistrate should sign it, if the prisoner signs or admits the statement to be true when it is read over to him; but a statement not signed by the magistrate, and neither signed nor admitted by the prisoner, is clearly inadmissible (*u*). If it is clearly proved that the prisoner made a statement before the magistrate which was not taken down in writing, it may be proved by any one who heard it (*x*).

A prisoner's statement is only evidence against himself, and not against others who are implicated in the same charge (*y*). It has been held that a statement will not be inadmissible because a magistrate has not given the prisoner the statutory caution that he has nothing to hope from any promise of favour, or to fear from any threat of punishment (*z*).

Section 3 of 30 & 31 Vict. c. 35, provides, that if an accused person calls, or desires to call witnesses, the

"Justice or justices shall, in the presence of such accused person, take the statement on oath, both examination and cross-examination, of those who shall be so called as witnesses by such

(*s*) *Per* JERVIS, C.J.: *Parsons* v. *Brown*, 3 C. & K. 295.
(*t*) *Supra*, p. 246.
(*u*) *Lambe's Case*, 2 Leach, 625.
(*x*) *R.* v. *Jacobs*, 1 Leach, 309.
(*y*) *R.* v. *Appleby*, 3 Stark. 33.
(*z*) *R.* v. *Sansome*, 1 Den. 545.

accused person, and who shall know anything relating to the facts and circumstances of the case, or anything tending to prove the innocence of such accused person, and shall put the same into writing; and such depositions of such witnesses shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same, and transmitted in due course of law with the depositions."

The depositions of a child may, under the Prevention of Cruelty to Children Act, 1894, be taken, in certain proceedings thereunder, when its attendance is proved by the evidence of a registered medical practitioner to involve serious danger to its life or health, in manner prescribed by the Act, and can be used in evidence as mentioned in the Act (*a*).

DEPOSITIONS BEFORE CORONERS.

These are not within the 11 & 12 Vict. c. 42, but are practically admissible under similar restrictions. It is not necessary that they should have been taken in the presence of the prisoner (*b*); but they must be signed by the coroner, and the handwriting must be proved (*c*).

A coroner's inquisition is admissible between third parties to show that there has been such a judicial inquiry into the matters to which it refers (*d*).

DEPOSITIONS IN CIVIL CASES.

These are now governed by Order XXXVII. of the R.S.C., 1883. Before the Judicature Acts the practice, so far as the Court of Chancery was concerned, was that provided by the 15 & 16 Vict. c. 86, s. 28, and Rule 11 of the Order of February 5th, 1861 (which

(*a*) 57 & 58 Vict. c. 41, ss. 13, 14.
(*b*) Bull. N. P. 248. (*c*) *R.* v. *England*, 2 Leach, 770.
(*d*) *R.* v. *Gregory*, 15 L. J. M. C. 38.

was made in pursuance of that Act, and of 23 & 24 Vict. c. 128). This Order provided:

"Notwithstanding any of these rules the court or the judge in chambers may direct that the oral examination and cross-examination of any witness (whether a party or not), or the cross-examination of any person who has been examined *ex parte* before an examiner, or made an affidavit, shall be taken before an examiner of the court or a special examiner in the manner prescribed by the statute 15 & 16 Vict. c. 86, as if these rules had not been made, in case it shall appear to the judge that owing to the age, infirmity or absence out of the jurisdiction of such witness or person, or for any other cause which to the judge shall appear sufficient, it is expedient that such direction should be given. Such direction may be obtained on application to the court or the judge in chambers on notice."

In practice, all examinations of witnesses who were old, ill, or out of the jurisdiction were taken before examiners.

At common law, whenever a witness was beyond the jurisdiction of the courts, or likely to be so at the time of trial, or when he was likely to be unable to attend the trial, owing to approaching dissolution, or permanent infirmity, the courts had power to grant a commission to examine such witness, either in Great Britain or abroad, at any time after the commencement of the action (*e*); and to permit his written deposition, as certified by the commissioner, to be read in evidence at the trial, on proof that the deponent was at that time beyond the jurisdiction of the court, or dead, or unable from permanent sickness, or other permanent infirmity, to attend the trial.

The present practice is regulated by Rules 5 to 25 of Order XXXVII. of the R.S.C., 1883. Rule 5 is as follows:

"The court or a judge may, in any cause or matter (*f*) where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the court or judge or any

(*e*) *Fynney* v. *Beasley*, 17 Q. B. 86.

(*f*) This does not include an arbitration under an agreement (*In re Shaw and Ronaldson*, [1892] 1 Q. B. 91).

officer of the court, or any other person and at any place of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court or a judge may direct."

Under this rule (and the corresponding Rule 4 of the R.S.C., 1875) it has been held that orders will be made where "necessary for the purposes of justice," *i.e.*, in the interests of all parties to the litigation, and not merely in the interest of the applicant (*g*); and therefore orders can be made to examine witnesses *de bene esse*, including the parties to the proceedings (*h*), when they are going abroad, or when from age, illness, or other infirmity they are likely to be unable to attend at the trial (*i*). The order may be made *ex parte*, but in such a case it is liable to be discharged if it can be shown to be improper as not being necessary for the purposes of justice (*k*). When the ground for the application is the age of the witnesses, those above seventy-five will be examined as a matter of course; as to those between seventy and seventy-five, it will depend on the nature of the evidence they can give, and the number of other witnesses who can give similar evidence (*l*), but age alone is not a sufficient ground where the witness is under seventy. If there is only one witness who can depose to an important fact, an order will, following the practice of the Court of Chancery, be made to examine such witness (*m*). It should be observed, that Rule 5 of Order XXXVII. does not apply to cases in which the parties have agreed that the evidence in an action shall be taken by affidavit, and it afterwards transpires that one of the proposed witnesses will not make an affidavit (*n*).

(*g*) *Berdan* v. *Greenwood*. 20 Ch. D. 764 n.
(*h*) *Nadin* v. *Bassett*, 25 Ch. D. 21.
(*i*) *Per* JESSEL. M.R.: *Warner* v. *Moses*, 16 Ch. D. 103.
(*k*) *Bidder* v. *Bridges*, 26 Ch. D. 1.
(*l*) *Ibid.*
(*m*) *Shirley* v. *Earl Ferrers*, 3 P. Wms. 77.
(*n*) *Nadin* v. *Bassett*, 25 Ch. D. 21

Rule 18 is as follows:

"Except where by this Order otherwise provided, or directed by the court or a judge, no deposition shall be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the court or judge is satisfied that the deponent is dead, or beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence saving all just exceptions without proof of the signature to such certificate."

The very extensive power of ordering depositions to be given in evidence without the consent of the party against whom they are to be used conferred by this rule, is one which ought seldom, if ever, to be exercised, except in the cases specially mentioned, viz., where the deponent is dead or out of the jurisdiction, or unable from sickness or other infirmity to attend at the trial. Still there are possible cases in which it might properly be exercised, *e.g.*, where the deposition is that of a witness to prove *pro formâ* a relevant fact, and also when the consent of the opposite party is withheld *malâ fide*. It will be noticed that the sickness or infirmity mentioned in the rule is not necessarily permanent or incurable (*o*).

Where the witness is in England it is, by Rule 39 of Order XXXVII., provided that his examination shall, in any cause or matter in any division of the High Court, unless the court or a judge shall otherwise direct, be taken before one of the examiners of the court; provided that nothing in the rule is to interfere with the practice as to examinations in the Admiralty Division.

In cases where the witness is not examined before one of the examiners of the court, a special examiner has to be appointed, who is usually, though not necessarily, a barrister. All persons interested have a

(*o*) See *Duke of Beaufort* v. *Crawshay*, L. R. 1 C. P. 699.

right to be heard on the question who shall be appointed special examiner, and if they cannot agree the judge appoints (*p*). A mere witness, however, has no voice in the matter (*q*).

When the witness is to be examined abroad (and a letter of request is not resorted to) a special examiner has of course to be appointed (*r*); and such special examiner need not be a barrister. In one case the British Minister at Teheran was appointed (*s*), and, as previously stated, a commission may issue to the judges of a foreign court, if willing to act. Rule 6A of Order XXXVII. authorises the court or a judge to issue a letter of request to the judges of a foreign court to examine witnesses for the purposes of an English action. It is as follows:

"If in any case the court or a judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission. The Forms 1 and 2 in the Appendix hereto shall be used for such order and request respectively, with such variation as circumstances may require, and may be cited as Forms 37A and 37B in Appendix K."

This procedure is now very generally adopted, and, in some cases, it is the only procedure that is feasible. An application for a commission to take evidence abroad will be refused where there has been undue delay (*t*), or where it is not made *bonâ fide;* and therefore, where the court was satisfied that the reason alleged for the plaintiff not coming to England was a pretence, and that the real reason was that he desired to avoid cross-examination in court, a commission to take his evidence abroad was refused (*u*). In a later case, however, where the Court of Appeal was of opinion that it

(*p*) *In re Smith, Knight & Co.*, L. R. 8 Eq. 23.
(*q*) *In re Contract Corporation*, L. R. 13 Eq. 27.
(*r*) *Ongley* v. *Hill*, W. N. (1874), 157.
(*s*) *Banque Franco-Egyptienne* v. *Lütscher*, 28 W. R. 133.
(*t*) *Stuart* v. *Gladstone*, 7 Ch. D. 394.
(*u*) *Berdan* v. *Greenwood*, 20 Ch. D. 764 n.

was not necessary for the purposes of justice that the plaintiffs should be examined in court, a commission was granted to examine them in America, where they resided (*x*). In another case the Court of Appeal qualified an order appointing a commission to take the plaintiff's evidence in New Zealand, where he resided, by inserting a proviso that the depositions of the plaintiff were not to be read if the defendant required him to appear at the trial to be examined and cross-examined (*y*). No general rule can be extracted from the cases, but it seems that the court will in each case be guided by the nature of the action, the importance to be attached to the plaintiff's cross-examination, and the circumstances under which it is asked to dispense with the plaintiff's personal attendance in court, in deciding whether it will or will not grant a commission to take his evidence abroad. The matter is entirely one within the discretion of the court (*z*). But an application by a defendant to take his evidence abroad will be more favourably regarded than an application by a plaintiff (*a*).

Here it may be mentioned that when, in a divorce suit, the petitioner, having obtained a commission to examine witnesses in Vienna, which was suspended pending the hearing of the act on the petition, summoned certain witnesses before a court in Vienna to take their evidence for the perpetuation of testimony under the Austrian law, he was restrained by injunction from prosecuting these proceedings before the Vienna court (*b*).

With regard to a proposed witness who is abroad, the court must in all cases be satisfied that he can give material evidence before it will issue a commission (*c*),

(*x*) *Armour* v. *Walker*, 25 Ch. D. 673.
(*y*) *Nadin* v. *Bassett*, 25 Ch. D. 21.
(*z*) *Coch* v. *Allcock*, 21 Q. B. D. 178.
(*a*) *Ross* v. *Woodford*, [1894] 1 Ch. 38.
(*b*) *Armstrong* v. *Armstrong*, [1892] P. 98.
(*c*) *Langen* v. *Tate*, 24 Ch. D. 522.

and the evidence must be directly material to the case and not merely evidence which incidentally might be useful for the purpose of corroborating a witness or the like (*d*). Subject to this the rule is that a commission will issue if the applicant satisfies the court that it is impracticable or unreasonable to bring the witness to England for the trial. In one case the Court of Appeal affirmed a decision refusing a commission to examine a witness in America, on the ground that there was not enough to show that the witness could not be brought or would not come to England (*e*), COTTON, L.J., observing:

"This is not the case of a plaintiff but of a witness, and undoubtedly a most material witness—a witness who is coming to give evidence on the part of the plaintiff to assist the plaintiff in upsetting for fraud a scheme in which the witness had himself been one of the principal actors. It is most desirable that such a witness should be examined in open court. If, however, it could be shown that he could not be induced to come here, or that the plaintiff could not reasonably be expected to bring him here, I think it would be right to give leave to examine him abroad, and it would be for the court or the jury at the trial to determine how far the weight of his evidence was affected by their not having seen or heard him; but I think that in a case of this sort, where it is important that the witness should be examined in court, a heavy burden lies on the party who wishes to examine him abroad to show clearly that he cannot be reasonably expected to come here. On that point the plaintiff has failed. In my opinion there is not sufficient evidence to satisfy me that this witness cannot be brought here or will not come here. It is true we are told he is in the service of some company, but we do not know what is the character of his occupation, or whether he would not be able, at comparatively small expense, to leave for a time his position there and come over to this country."

It may here be observed that of course a commission can be applied for to examine witnesses in a foreign country for the purpose of proving what is the law of that country on any point. The granting of such commission will depend entirely on the question whether

(*d*) *Ehrmann* v. *Ehrmann*, [1896] 2 Ch. 611.
(*e*) *Lawson* v. *Vacuum Brake Co.*, 27 Ch. D. 137.

competent witnesses can be called to prove the law in question at the trial. If they can be called, the commission will be refused (*f*). If they probably cannot, the commission will generally be granted (*g*), but the matter is entirely within the discretion of the court (*h*).

Any objection to the evidence taken before a commission ought to be made at the time the evidence is taken, and not afterwards, and this is especially the case with an objection which could be removed at the time; and therefore, where upon the face of the depositions it appeared that the witness had affirmed, an application to take the depositions off the file, on the ground that the witness's evidence could not under the circumstances have been legally taken on affirmation, no objection having been made thereto at the time, was refused (*i*); and where copies of certain documents and answers of the witnesses with regard to such copies were received by the commissioners without objection by the defendant at the time, and the copies were appended to the depositions, it was held that the defendant could not afterwards object to such copies being used in evidence (*k*).

Where an order has been made for the examination of a witness under Rule 5 of Order XXXVII., it is not an order on him to attend for examination, and therefore if he is unwilling to attend he must be served with a subpœna. If he then fails to attend, or attends and refuses to be sworn, or refuses to answer a lawful question, the party requiring his evidence must apply to the court or a judge under Rule 13 of Order XXXVII. In such a case the court will order a recalcitrant witness to attend at his own expense (*l*), and can make him pay the costs of the order (*m*). A witness who refuses to

(*f*) *The Moxham*, 1 P. D. 116.
(*g*) *Armour* v. *Walker*, 25 Ch. D. 677.
(*h*) *Cock* v. *Allcock*, 21 Q. B. D. 178.
(*i*) *Rickards* v. *Hough*, 51 L. J. Q. B. 361.
(*k*) *Robinson* v. *Davies*, 5 Q. B. D. 26.
(*l*) *Steuart* v. *Balkis Co.*, 32 W. R. 676.
(*m*) Under Order XXXVII., Rule 15.

answer a lawful question when ordered so to do by the court or a judge can be committed for contempt of court, but an examiner has no power to compel a witness to answer. All that he can do is to take down the question and the objection for the purpose of the matter being brought before the court or a judge by the party who desires to have the witness's answer (*n*).

A commission may be issued to the judges of any foreign court if willing to act (*o*). So a commission may issue to the judges of the High Court of Justice in England, and of the Court of Session in Scotland, and of any supreme court in any of her Majesty's colonies or possessions abroad, and to any judge in any such colony or possession appointed for the purpose by Order in Council, with respect to whom it is provided by 22 & 23 Vict. c. 20, s. 1, as follows:

"Where upon an application for this purpose it is made to appear to any court or judge having authority under this Act that any court or tribunal of competent jurisdiction in her Majesty's dominions has duly authorised, by commission, order, or other process, the obtaining the testimony in or in relation to any action, suit, or proceeding pending in or before such court or tribunal of any witness or witnesses out of the jurisdiction of such court or tribunal, and within the jurisdiction of such first-mentioned court, or of the court to which such judge belongs, or of such judge, it shall be lawful for such court or judge to order the examination before the person or persons appointed, and in manner and form directed by such commission, order, or other process as aforesaid, of such witness or witnesses accordingly; and it shall be lawful for the said court or judge by the same order, or for such court or judge, or any other judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear *reasonable* and just; and any such order may be enforced, and any disobedience thereof punished, in like manner as in case of an order made by such court or judge in a cause depending in such court or before such judge."

(*n*) Under Order XXXVII., Rule 14.

(*o*) *Fischer* v. *Sztaray*, E. B. & E. 321. Now, however, the practice is to issue a letter of request, *ante*, p. 465.

Section 2 provides, that every person examined as a witness under any such commission, order, or other process as aforesaid, who shall upon any such examination wilfully and corruptly give any false evidence, shall be deemed and taken to be guilty of perjury. Section 4 provides—

"That every person examined under any such commission, order, or other process as aforesaid, shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness in any cause pending in the court by which, or by a judge whereof, or before the judge by whom the order for examination was made, would be entitled to; and that no person shall be compelled to produce under any such order as aforesaid any writing or other document that he would not be compellable to produce at a trial of such a cause."

Section 5 provides, that her Majesty's superior courts of common law at Westminster and in Dublin respectively, the Court of Session in Scotland, and any supreme court in any of her Majesty's colonies or possessions abroad, and any judge of any such court, and every judge in any such colony or possession who by any order of her Majesty in Council may be appointed for this purpose, shall respectively be courts and judges having authority under the Act.

Under this Act the attendance of witnesses before a special examiner can be enforced by the court having jurisdiction where the examination is to take place; and in such case it is the duty of such court, and not of the court that appoints the special examination, to determine what witnesses are to be summoned, and what documents they are to produce, as well as to decide all questions of privilege on the evidence which may arise in the examination (*p*).

Under s. 2 of the Evidence by Commission Act, 1885 (*q*), it is provided that—

"Where in any civil proceeding in any court of competent jurisdiction an order for the examination of any witness or person

(*p*) *Campbell* v. *Att.-Gen.*, L. R. 2 Ch. 571.
(*q*) 48 & 49 Vict. c. 74.

has been made, and a commission, mandamus, order, or request for the examination of such witness or person is addressed to any court, or to any judge of a court, in India or the colonies, or elsewhere in her Majesty's dominions, beyond the jurisdiction of the court ordering the examination, it shall be lawful for such court, or the chief judge thereof, or such judge, to nominate some fit person to take such examination, and any deposition or examination taken before an examiner so nominated shall be admissible in evidence to the same extent as if it had been taken by or before such court or judge."

Section 5 of 6 & 7 Vict. c. 82 (*r*), provides machinery for the execution in any part of the United Kingdom of commissions issued in any other part (*s*).

DEPOSITIONS IN COUNTY COURTS.

Rule 18 of Order XVIII. of the County Court Rules, 1903 (*t*), provides that the court (which term includes a judge or registrar exercising the powers of the court in chambers as well as in open court)—

"May in any action or matter, where it appears necessary for the purposes of justice, make an order for the examination upon oath before the court or any officer of the court, or any other person, and at any place in England or Wales, of any witness or person, and may empower any party to any such action or matter to give such deposition in evidence therein on such terms, if any, as the court may direct."

DEPOSITIONS UNDER THE EXTRADITION ACTS AND THE FUGITIVE OFFENDERS ACT.

Depositions taken in foreign countries may be used in proceedings taken under the Extradition Act, 1870 (*u*), s. 14 of which provides, that—

"Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign

(*r*) See Appendix.
(*s*) As to the jurisdiction conferred by this Act, see *Burchard* v. *Macfarlane*, [1891] 2 Q. B. 241.
(*t*) See Appendix for the other Rules on the subject.
(*u*) 33 & 34 Vict. c. 52. See Appendix.

certificates of or judicial documents stating the fact of conviction, may, if duly authenticated (*x*), be received in evidence in proceedings under this Act."

It has been held to be unnecessary that the accused should have been present at the taking of the depositions (*y*); and the Extradition Act of 1873 (*z*), s. 4, enables a magistrate of this country, when acting under an order bearing the seal of a Secretary of State, to take evidence for the purpose of any criminal matter pending in a foreign court or tribunal, whether the accused be present or not, but his presence or absence must be stated in the deposition.

For the test whether an offence is "of a political character" within s. 3 (1) of the Extradition Act, 1870, see the judgment of CAVE, J., in *R.* v. *Meunier* (*a*).

By the Fugitive Offenders Act, 1881 (*b*), s. 29, a magistrate may take depositions for the purposes of this Act in the absence of a person accused of an offence, in like manner as he might take the same if such person were present and accused of the offence before him. Depositions (whether taken in the absence of the fugitive or otherwise) and copies thereof, and official certificates of, or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under the Act. Provided that nothing under this Act is to authorise the reception of any such depositions, copies, certificates, or documents in evidence against a person upon his trial for an offence.

(*x*) Authentication is governed by s. 15.
(*y*) See *R.* v. *Ganz*, 9 Q. B. D. 93.
(*z*) 36 & 37 Vict. c. 60. See Appendix.
(*a*) [1894] 2 Q. B. 415.
(*b*) 44 & 45 Vict. c. 69. See Appendix.

CHAPTER VII.

DISCOVERY—INTERROGATORIES.

DISCOVERY at the instance of one litigant of the documents in possession or power of the other, and by means of interrogatories of facts within the other's knowledge, information and belief, and the Rules of Court regulating the same, will be discussed in this and the succeeding chapter. It may here be observed that discovery is not a matter of right, and that the tendency of the judges is to curtail and not to extend the discovery that will be granted.

The Crown is entitled to discovery against a subject, but a subject is not entitled to discovery against the Crown (*a*). A foreign sovereign and a foreign state suing here are on the same footing as regards discovery as a private individual or corporation (*b*).

It is proposed first to deal with interrogatories which were imported into the superior courts of common law from the equity courts, and have been adopted in the new practice. By means thereof a party is able to acquire evidence necessary to enable him to succeed in court, which he can only obtain, or most easily procure, by extracting it from his adversary.

The present practice relative to interrogatories is governed by Order XXXI. of the R. S. C., 1883, which provides :

Rule 1. In any cause or matter the plaintiff or defendant by leave of the court or a judge may deliver interrogatories in writing for the examination of the opposite parties, or any one or

(*a*) *Att.-Gen.* v. *Newcastle-on-Tyne Corporation*, [1897] 2 Q. B. 384.
(*b*) See *South African Republic* v. *La Compagnie Franco Belge du Chemin de Fer du Nord*, [1898] 1 Ch. 190 ; *Prioleau* v. *United States*, L. R. 2 Eq. 659.

more of such parties, and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

Rule 2. On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the court or judge. In deciding upon such application, the court or judge shall take into account any offer, which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents relating to the matter in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the court or judge shall consider necessary either for disposing fairly of the cause or matter or for saving costs.

Rule 5. If any party to a cause or matter be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or to be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, company or body and an order may be made accordingly.

Rule 6. Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

Rule 7. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

Rules 8 and 10 provide that interrogatories shall be answered by affidavit, and that the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the court or a judge on motion or summons.

Rule 11 provides that if any person interrogated omits to answer, or answers insufficiently, an order may be made requiring him to answer, or answer

further, either by affidavit or by *vivâ voce* examination, as the judge may direct.

Rule 20. If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the court or a judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

Interrogatories cannot be delivered without leave. On the application for leave (*c*), the particular interrogatories sought to be delivered must be submitted to the judge, and he is only to give leave to deliver such of them as he considers necessary for disposing fairly of the cause or matter, or for saving costs. He may give leave or refuse leave as to all or any of such interrogatories, or any part of any particular interrogatory, at his discretion, and unless there has been any error of principle on his part the Court of Appeal will not interfere with the exercise of his discretion (*d*). He may also under Rule 20 postpone the decision of the question of giving leave. The leave, when granted, does not preclude any objections by the party interrogated to answer the interrogatories under Rule 6, or prevent any subsequent application to set aside the interrogatories under Rule 7 (*e*).

Object of interrogating.—Interrogatories are used for three purposes—(a) to support the case of the party interrogating; (b) to ascertain the nature of the case of the opponent; (c) to destroy the case of the opponent.

(*c*) When a summons for directions is taken out by the plaintiff under Order XXX., Rule 1, interrogatories are one of the matters which by Rule 2 are to be dealt with upon this summons.
(*d*) See on these points *Peek* v. *Ray*, [1894] 3 Ch. 282.
(*e*) *Oppenheim* v. *Sheffield*, [1893] 1 Q. B. 5.

In order to support his own case a party may (by leave) interrogate for the purpose of getting his opponent to admit on oath any fact which such party would have to prove at the trial (*f*); and thus obtaining admissions which will make it unnecessary to enter into evidence as to the facts admitted (*g*); but leave to interrogate for this purpose only will not now be generally granted, having regard to Rule 2, unless the party seeking leave has first applied to his opponent to admit the facts under Order XXXII., Rule 4, and the latter has neglected or refused to make the admission nor is it permissible to interrogate for the purpose o fishing out a case, but only to establish a case set up; and therefore, as a general rule, a plaintiff cannot deliver interrogatories before delivering his statement of claim, nor can a defendant do so before delivering his defence. Actions for the recovery of land stand on no different footing in this respect to other actions (*h*), and a plaintiff in such an action is entitled to interrogate the defendant (as he would be to call him as a witness) to prove his title.

In order to ascertain what is the nature of the case of his opponent a party may interrogate as to the facts on which he relies, but not as to the evidence by which those facts are to be established (*i*). A party cannot by interrogatories compel his opponent to disclose the names of his witnesses as such; yet, if the name of a person is a relevant fact in the case, the right that would otherwise exist to information with regard to that fact is not displaced by the assertion that such information involves the disclosure of the name of

(*f*) *Tipping* v. *Clarke*, 2 Hare, 391.
(*g*) *Att.-Gen.* v. *Gaskill*, 20 Ch. D. 519.
(*h*) *Lyell* v. *Kennedy*, 8 App. Cas. 217.
(*i*) *Eade* v. *Jacobs*, 3 Ex. D. 335; *cf. Att.-Gen.* v. *Gaskill*, 20 Ch. D. 519.

a witness (*k*). Here may be appropriately quoted the words of Lord LANGDALE in *Storey* v. *Lord Lennox* (*l*):

"The defence here is that the letters may disclose the names of the witnesses and the evidence; and so indeed may every discovery which the defendant may be required to give. In telling the truth, as he is bound to do, he may incidentally disclose to the plaintiff that which will enable the plaintiff to learn the names of the witnesses and the nature of the evidence; and, if this consequence could be used as a ground for resisting a discovery, one of the most extensively useful parts of the jurisdiction of the courts of equity would be lost."

A party may interrogate for the purpose of destroying his opponent's case (*m*), and it has been held that this extends even to enabling a plaintiff to interrogate for the purpose of defeating a case that he anticipates may be made against him by the defendant (*n*).

A party answering an interrogatory must answer not only as to his personal knowledge, but also as to his information and belief (*o*), and when he is bound to state his belief he is bound to state the grounds of it (*p*). In order to answer fully, he is bound, if necessary, to search documents in his possession or power (*q*); and where he has only a right to inspect documents in the possession of others he must either inspect them, or prove that he has been unable to enforce his right to inspection (*r*). Since the knowledge of the agent, in agency matters, is the knowledge of the principal when the acts inquired into are those which would be done by or would be known to the agent of the party interrogated in the ordinary course of business, he is bound to obtain from such agent information to enable

(*k*) See *Marriott* v. *Chamberlain*, 17 Q. B. D. 154. (*l*) 1 Keen, 341.
(*m*) See *Grumbrecht* v. *Parry*, 32 W. R. 558; *Hennessey* v. *Wright*, 24 Q. B. D. 445.
(*n*) *Att.-Gen.* v. *Corporation of London*, 2 Mac. & G. 260.
(*o*) See the judgments in *Lyell* v. *Kennedy*, 9 App. Cas. 81.
(*p*) *Per* Lord WATSON, *ibid.*
(*q*) *Att.-Gen.* v. *Retford*, 2 M. & K. 35.
(*r*) *Taylor* v. *Rundell*, Cr. & Ph. 104.

him to answer the interrogatory, *i.e.*, if the agent is still in his employment, or under his control, and in such a position that the party interrogated might reasonably be required to communicate with him (*s*). But there is a limit to the enforcement of inquiry; and if a party can show that, in order to answer the questions put, it would be wholly unreasonable to require him to make the necessary inquiries, that is to say, that it would cause him an unreasonable expense, or that the questions are such that an unreasonable amount of detail is asked, there might be ground for saying that, although he had not answered specifically every part of the interrogatories, he had nevertheless answered sufficiently (*t*). When a contract has been entered into with an agent of a foreign principal as agent, and the agent brings an action in his own name, the defendant can obtain discovery to the same extent as if the principal were a party to the action, and though the court cannot make an order for discovery on the principle, it can say, and will say, that the nominal plaintiff shall not proceed with the action until the real plaintiff has done that which, if a party to the action, he would have been ordered to do (*u*).

It is, of course, legitimate in answering interrogatories to explain or otherwise qualify any answer; but an answer which introduces irrelevant topics is insufficient (*x*); and if an answer is couched in a form which makes it embarrassing—*i.e.*, which prevents the person interrogating from using it without having thrust upon him irrelevant matter as part of it—such an answer is insufficient (*y*).

A defendant wishing to pay into court in satisfaction of the plaintiff's claim is entitled to interrogate a

(*s*) *Bolcklow* v. *Fisher*, 10 Q. B. D. 161.
(*t*) *Per* BRETT, L.J., *ibid.*
(*u*) *Willis* v. *Baddeley*, [1892] 2 Q. B. 324.
(*x*) See *Pegler* v. *King*, L. R. 9 C. P. 9.
(*y*) *Per* BOWEN, L.J., in *Lyell* v. *Kennedy*, 27 Ch. D. 28.

plaintiff as to actual damage sustained, in order to guide him as to the amount to be paid in (*z*). So, too, in actions for libel or slander, where the defendant has given particulars, under Order XXXVI., Rule 37, of matters as to which he intends to give evidence in mitigation of damages, he will be allowed to interrogate the plaintiff as to such matters (*a*).

Irrelevancy.—Under Rule 6 an objection may be taken to answer an interrogatory on the ground that it is irrelevant, and at the end of Rule 1 is a proviso that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness. This proviso was under consideration by the Court of Appeal in *Re Morgan, Owen* v. *Morgan* (*b*), where the majority of the court (FRY and LOPES, L.JJ.) held that its effect was to confine interrogatories to matters at issue in the action or material to the issues in the action; whereas COTTON, L.J., was of opinion that matters not directly relevant to the issues in the action, but tending to show the defence set up was not a real defence, could be inquired after. The view of COTTON, L.J., seems to be the more correct. The words of the proviso are, "matters in question," not "matters in issue," and the object of the proviso is probably to exclude interrogatories tending solely to impeach the credibility of the person interrogated.

Scandal.—Under Rule 6 objection may be taken to answer an interrogatory on the ground that it is scandalous. Scandal consists in the allegation of anything which it is unbecoming the dignity of the court to hear, or which is contrary to good manners, or

(*z*) *Frost* v. *Brook*, 23 W. R. 260; *Horne* v. *Hough*, L. R. 9 C. P. 135.
(*a*) *Scaife* v. *Kemp*, [1892] 2 Q. B. 319.
(*b*) 39 Ch. D. 316.

some person with a crime not necessary to be shown in the action. Any unnecessary allegation bearing cruelly on the moral character of an individual is scandalous; but nothing that is material is scandalous, and therefore the language of the record is often, though literally scandalous, not legally so (*c*). The sole test is whether the matter alleged to be scandalous has a tendency, or, in other words, would be admissible in evidence, to show the truth of any allegation in the bill that is material with reference to the relief that is prayed (*d*).

Stage of action.—Another ground for objecting to answer an interrogatory is that the subject of inquiry is not sufficiently material at that stage of the action. The court is always unwilling, before the right to relief is established, to make an order for discovery which may be injurious to the defendant, and will only be useful to the plaintiff if he succeeds in establishing his title to relief (*e*). Thus, in an action for an infringement of a patent, where the defendant denied the infringement, he was held not bound to answer any interrogatory inquiring after matters irrelevant to that question (*f*); but where the plaintiff filed a bill to establish that a business carried on by three of the defendants in partnership belonged to the estate of her late husband, and the interrogatories required these defendants to set forth whether they, or any of them, had drawn out of the business any money for their or his account in respect of capital advanced, profits, or otherwise, and to set forth the particulars of the moneys so drawn out, and the third defendant declined to answer this interrogatory, submitting that the plaintiff was not entitled to this discovery till she had

(*c*) *Fisher* v. *Owen*, 8 Ch. D. 645.
(*d*) *Per* Lord SELBORNE: *Christie* v. *Christie*, L. R. 8 Ch. App. 503.
(*e*) *Per* COTTON, L. J., in *Fennessy* v. *Clark*, 37 Ch. D. 187.
(*f*) *Delarue* v. *Dickinson*, 3 K. & J. 388.

established her right to a decree, the Court of Appeal in Chancery held, affirming the decision of the Master of the Rolls, that the interrogatory must be answered (*g*). An executor must, if required, set out his accounts in his answer (*h*), and a mortgagee in possession admitting himself to be redeemable has been held to be bound to answer interrogatories as to the state and particulars of the account which it is one of the objects of the suit to take (*i*). In the same case, the Court of Appeal in Chancery laid down that the true rule is, that in an ordinary suit for accounts, a defendant submitting to answer (even when he altogether denies the plaintiff's title) must answer fully, not only as to other matters, but also as to consequential matters of account; but the court may be trusted to exercise a proper control over any attempt on the plaintiff's part to press for any such minuteness of discovery as would be either vexatious or unreasonable, as, indeed, it can do in every case in which it is satisfied that any kind of discovery is required vexatiously or oppressively. The same court, in a subsequent case (*k*), on the ground that it was vexatious or unreasonable, within the meaning of the above-quoted words, refused, where the plaintiff had filed a bill, founded on the alleged agency of the defendant, which was the question in the suit, to compel the defendant to answer interrogatories as to what appeared to be his private transactions, saying that—

"It would be monstrous that a man, by merely alleging that he had a share in the concern, which allegation was denied and had not been established, and whilst it was doubtful whether it would be established, could get the accounts of the defendant's private business and of his dealings with other people."

(*g*) *Saull* v. *Browne*, L. R. 9 Ch. 364.
(*h*) *Thompson* v. *Dunn*, 18 W. R. 854; *Alison* v. *Alison*, 50 L. J. Ch. 574.
(*i*) *Elmer* v. *Creasey*, L. R. 9 Ch. 69.
(*k*) *Great Western Colliery Co.* v. *Tucker*, L. R. 9 Ch. 376.

The Rules of the Court as to discovery now apply to infant plaintiffs and defendants, and their next friends and guardians *ad litem*, in the same way as to other litigants (*l*).

Of course a person interrogated may refuse to answer on the ground of privilege, for which see *ante*, Part I., Chap. VII.

The answers to interrogatories, although not evidence, may be used against the party answering by way of admissions. The whole of the answers, or any one or more answers, or any part of an answer may be so used; but Rule 24 of Order XXXI. provides that the judge may look at the whole of the answers, and, if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in.

The Rules of the Supreme Court do not (by Order LXVIII., Rule 1 (d) affect the procedure in proceedings for divorce or other matrimonial causes; but the Probate, Divorce and Admiralty Division of the High Court has, by the operation of the Judicature Act, 1873, the same powers as to discovery that were formerly possessed by the courts of law and equity (*m*), and in such matters this Division now follows the analogy of the Rules of the Supreme Court.

The procedure as to interrogatories in county courts is governed by the County Court Rules, 1903 (*n*), and is substantially the same as that in the High Court.

(*l*) Order XXXI., r. 29.
(*m*) See *Harvey* v. *Lorekin*, 10 P. D. 122.
(*n*) See Appendix.

CHAPTER VIII.

PRODUCTION AND INSPECTION OF DOCUMENTS AND NOTICE TO PRODUCE.

WHEN private writings contain a contract, or otherwise embody, or are material to the substance of the issue, they are not only admissible, but also, when producible, indispensable evidence. In such cases a party who relies upon them must either produce them, or account satisfactorily for their non-production. Such writings are frequently in the hands of an adverse party, who will not voluntarily produce them either before or at the trial. The important practical questions, then, on this subject are, how can a party ascertain what documents are in his opponent's possession? how can he get these documents produced for his inspection previous to the trial? and, lastly, how can he get them produced at the trial, or put himself in a position, by reason of their non-production, to give secondary evidence of their contents?

The practice as to discovery of documents, production previous to the trial, and inspection, is now regulated by Order XXXI. of the R. S. C. 1883, the portions of which, material for the present purpose, are as follows:

Rule 12. Any party may, without filing any affidavit, apply to the court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein (*a*). On the hearing of such application the court or judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage

(*a*) This is one of the matters to be dealt with on the plaintiff's summons for directions under Ord. XXX., r. 1.

of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may in their or his discretion be thought fit. Provided that discovery shall not be ordered when and so far as the court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs (*b*).

Rule 13. The affidavit, to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which, if any, of the documents therein mentioned he objects to produce. . . .

Rule 14. It shall be lawful for the court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter as the court or judge shall think right; and the court may deal with such documents, when produced, in such matter as shall appear just.

Rule 15. Every party to a cause or matter shall be entitled, at any time, by notice in writing to give notice to any other party in whose pleadings or affidavits (*c*) reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the court or judge shall deem sufficient for not complying with such notice: in which case the court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the court or judge shall think fit.

Rule 17. The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in Rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of bankers' books or other books of account, or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. . . .

(*b*) See as to this rule, *Attorney-General* v. *North Metropolitan Tramways Co.*, [1892] 3 Ch. 70, and *Re Wills' Trade Marks*, [1892] 3 Ch. 207.

(*c*) An exhibit to an affidavit is, for the purposes of discovery, a part of the affidavit (*Re Hinchliffe*, [1895] 1 Ch. 117).

Rule 18 provides that (1) if the party served with notice under Rule 17 omits to give such notice of a time for inspection, or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the court or judge may make an order for inspection in such place and in such manner as they may think fit; and (2) that any application to inspect documents, except such as are referred to in the pleadings, particulars, or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what document inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.

Rule 19A. (1.) Where inspection of any business books is applied for, the court or a judge may, if they or he shall think fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations, or alterations. Provided that notwithstanding that such copy has been supplied, the court or a judge may order inspection of the book from which the copy was made.

(2.) Where, on an application for an order for inspection, privilege is claimed for any document, it shall be lawful for the court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege (*d*).

(3). The court or a judge may, on the application of any party to a cause or matter at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been in his possession or power; and, if not then in his possession, when he parted with the same, and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the cause or matter, or to some of them.

(*d*) "Privilege" here means any ground on which inspection is sought to be resisted, and the judge is entitled to inspect sealed, as well as unsealed, portions of documents (*Ehrmann* v. *Ehrmann*, [1896] 2 Ch. 826).

The principles embodied in these rules are taken (though with some differences) from those embodied in 15 & 16 Vict. c. 86, s. 18, which regulated the practice in the Court of Chancery, and in 14 & 15 Vict. c. 99, s. 6, and 17 & 18 Vict. c. 125 (Common Law Procedure Act, 1854), s. 50, which regulated the practice of the courts of common law. The decisions on these Acts are, therefore, still of some practical importance; but it must be borne in mind that although now, when there is any conflict between the rules of law and equity with reference to the same matter, the rules of equity are to prevail, this, though true of rules of legal principle, is not considered to be true of mere rules of practice, as to which the more convenient practice will be adopted (*e*).

What documents are producible.—In the first place, then, it has been held that all relevant documents are *primâ facie* producible, but that production of privileged documents cannot be enforced (*f*); and although a party has a right to the production of all documents that relate to his own case alone, or to his case conjointly with that of his adversary, he has no right to the production of documents that are irrelevant to the issue, or that relate exclusively to the title of his adversary (*g*); but it will not be sufficient merely to allege that the documents relate exclusively to the title of the party resisting production, if that conclusion is opposed to the character of the documents. KNIGHT-BRUCE, V.-C., in *Combe* v. *Corporation of London* (*h*), said:

"If it be, with distinctness and positiveness, stated in an answer that a document forms or supports the defendant's title, and is

(*e*) *Newbiggin Gas Co.* v. *Armstrong*, 13 Ch. D. 310.
(*f*) *Clegg* v. *Edmondson*, 22 Beav. 125, 167. As to privilege, see Part I., Chap. VII.
(*g*) *Ingilby* v. *Shafto*, 33 Beav. 31; *cf. Minet* v. *Morgan*, L. R. 8 Ch. 361.
(*h*) 1 Y. & Coll. C. C. 631.

intended to be or may be used by him in evidence accordingly, and does not contain anything impeaching his defence or forming or supporting the plaintiff's title or the plaintiff's case, that document is, I conceive, protected from production, unless the court sees upon the answer itself that the defendant erroneously represents or misconceives its nature ; but where it is consistent with the answer that the document may form the plaintiff's title or part of it, may contain matter supporting the plaintiff's title or the plaintiff's case, or may contain matter impeaching the defence, then I apprehend the document is not protected ; nor I apprehend is it protected if the character ascribed to it by the defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness."

It has been held that a defendant can only avoid production of documents, the possession and relevancy of which he admits, by giving a reason for alleging that the production is unnecessary for the decision of the issue, or that the discovery would be injurious to himself (*i*). Although the court may now inspect any documents or portion of a document, sealed or unsealed (*ante*, p. 485), for which privilege from production is claimed, yet as a general rule the court will accept the oath of a litigant whether documents are relevant or not, and whether they relate exclusively to his own title, unless the court is satisfied from the litigant's own description of the documents, or from other admissions and documents before it, that the litigant has misconceived or erroneously represented the nature of the documents in question, or that the litigant's oath is not to be relied on, and then the court will give effect to its own views (*k*). If a litigant swears that documents relate solely to his own case and do not tend to prove or support his adversary's case, he need not allege that they do not tend to impeach his own case (*l*). According to previous practice a party was held entitled to the production of all relevant

(*i*) *Heugh* v. *Garrett*, 44 L. J. Ch. 365.
(*k*) *Attorney-General* v. *Emerson*, 10 Q. B. D. 191 ; approved in *Frankenstein* v. *Garrin's Cycle Cleaning Co.*, [1897] 2 Q. B. 62.
(*l*) *Morris* v. *Edwards*, 15 App. Cas. 309.

documents except such as were privileged as a matter of course (*m*); but now it has been decided by the Court of Appeal that, under the present Rules of Court, it is in the discretion of the court to make an order for production or not (*n*), and in the case under notice an order was refused.

Relevancy of documents.—Every document which will throw any light on the case is *primâ facie* relevant, and will, therefore, be open to inspection (*o*); and relevant documents for this purpose are not simply those which would be evidence to prove or disprove any matter in question in the action, but they include every document which may (although not necessarily must) either directly or indirectly enable either party to advance his own case or to damage the case of his adversary (*p*).

The right to deal with documents will warrant an order for their production; and therefore a party will be ordered to produce documents of his which are in the possession of his agent or of his solicitor past or present. But in such a case the order will contain liberty to apply in case the party cannot obtain the documents, so that the order may not be made a means of oppression (*q*). That the party makes a claim for negligence against his solicitor causes no difference (*r*): and a solicitor's ordinary lien is no defence to an order for production (*s*). Where a contract has been entered into with an agent of a foreign principal as agent and the latter brings an action in his own name, the defendant can obtain discovery to the same extent as

(*m*) *Bustros* v. *White*, 1 Q. B. D. 423.
(*n*) *Hope* v. *Brash*, [1897] 2 Q. B. 188.
(*o*) *Per* BLACKBURN, J.: *Hutchinson* v. *Glover*, 1 Q. B. D. 141.
(*p*) *Per* BRETT, L.J.: *Compagnie Financière du Pacifique* v. *Peruvian Guano Co.*, 11 Q. B. D. 63.
(*q*) *Lewis* v. *Powell*, [1897] 1 Ch. 678.
(*r*) *Ibid.* (*s*) *Hope* v. *Liddell*, 20 Beav. 438.

if the principal were a party to the action; and though the court cannot make an order for discovery on the principal, it can say, and will say, that the nominal plaintiff shall not proceed with the action until the real plaintiff has done that which, if a party to the action, he would have been ordered to do (*t*). But a party cannot be ordered to produce the private books of his agent (*u*) or solicitor (*x*). Where the documents are in the possession of an agent for the party against whom the application is made jointly with other persons, no order to produce will be made, but the party will be compelled to discover by answer any knowledge he may be able to obtain by inspecting such documents. *A fortiori*, these principles apply to cases where the documents sought are in the possession of the party jointly with others. Lord COTTENHAM, in *Taylor* v. *Rundell* (*y*), said:

"It is true that the rule of court, adopted from necessity, with reference to the production of documents, is, that if a defendant has a joint possession of a document with somebody else who is not before the court, the court will not order him to produce it, and that for two reasons: one is, that a party will not be ordered to do that which he cannot or may not be able to do; the other is, that another party not present has an interest in the document which the court cannot deal with. But that rule does not apply to discovery, in which the only question is, whether as between the plaintiff and the defendant the plaintiff is entitled to an answer to the question he asks; for if he is, the defendant is bound to answer it satisfactorily, or, at least, show the court that he has done so far as his means of information will permit."

When privilege is claimed on this ground the party claiming it must show enough to satisfy the court what the nature of the joint ownership is (*z*). The mere fact that a person not before the court has an interest in

(*t*) *Willis* v. *Baddeley*, [1892] 2 Q. B. 324.
(*u*) *Airey* v. *Hall*, 2 De G. & S. 489.
(*x*) *O'Shea* v. *Wood*, [1891] P. 287.
(*y*) Cr. & Ph. 104; *cf. Clinch* v. *Financial Corporation*, L. R. 2 Eq. 271.
(*z*) *Bovill* v. *Cowan*, L. R. 5 Ch. 495.

documents is no ground for resisting production (*a*); but where a defendant in a suit relating to transactions in which he was engaged on his own account had made entries of such transactions in the books of a partnership, it was held that he could not be compelled to produce such books without the consent of his co-partner, and that the plaintiff should interrogate him so as to compel him to set forth the entries, and then enforce production of the originals at the hearing by serving a *subpœna duces tecum* on the co-partner (*b*).

Production of a mortgagee's deeds.—A mortgagee cannot (except as hereinafter mentioned) be compelled to produce his security (including title deeds deposited with him) except on payment of his principal interest and costs (*c*); nor, if he purchases the equity of redemption, can he be compelled to produce the conveyance to him (*d*). Where, however, a mortgagee purchased the equity of redemption from a trustee, with notice of the trust, he was held not entitled to refuse production of the conveyance to him in a suit by the *cestui que trust* for redemption and reconveyance (*e*). Where a mortgage security is impeached, the security must be produced, although the mere fact of charging a mortgagee with fraud will not entitle a mortgagor to production (*f*); and this applies to all deeds which are impeached, and not only to mortgages (*g*). Where a mortgage has been made since the Conveyancing and Law of Property Act, 1881, came into operation, then s. 16 (1) of that Act applies, which is as follows:

"A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable

(*a*) *Kettlewell* v. *Barstow*, L. R. 7 Ch. 693.
(*b*) *Hadley* v. *M'Dougall*, L. R. 7 Ch. 312.
(*c*) *Chichester* v. *Marquis of Donegal*, L. R. 5 Ch. 502.
(*d*) *Greenwood* v. *Rothwell*, 7 Beav. 291.
(*e*) *Smith* v. *Barnes*, L. R. 1 Eq. 65.
(*f*) *Cf. Republic of Costa Rica* v. *Erlanger*, L. R. 19 Eq. 44.
(*g*) *Bassford* v. *Blakesley*, 6 Beav. 131.

times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee."

Confidential documents.—Letters written to and in the possession of a party to the suit will, if material, be ordered to be produced, although marked "private and confidential," and although the writer objects to their production; but the party claiming their production must enter into an undertaking not to use such letters for any collateral object (*h*). The mere heading "confidential" cannot protect a document from production (*i*). Where documents are confidential, whether so headed or not, it would seem to be the true principle that a *primâ facie* case for production must be made out to justify the court in ordering production, but wherever fraud is pleaded, all documents which would throw any light on the alleged fraud ought to be produced (*k*).

When privilege is claimed for a document as criminating, the objection must be taken on oath, and the objection must be taken to the order for production and not to the order for discovery (*l*).

Sealing up.—When documents contain partly privileged or irrelevant matter and partly unprivileged or relevant, the privileged or irrelevant parts may be sealed up on production. Thus a part of a pedigree was allowed to be sealed up on an affidavit by the defendants that it related to their title and not to the plaintiffs' (*m*); but when the parts which might be

(*h*) *Hopkinson* v. *Lord Burghley*, L. R. 2 Ch. 447.
(*i*) *Per* BOVILL, C.J.: *Mahoney* v. *National Widows' Life Insurance Fund*, L. R. 6 C. P. 256.
(*k*) *Mahoney* v. *National Widows' Life Insurance Fund*, L. R. 6 C. P. 252.
(*l*) *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q. B. 124.
(*m*) *Kettlewell* v. *Barstow*, L. R. 7 Ch. 693.

thus concealed are so interspersed with those parts which are producible that sealing up is impossible, it seems that, except in extraordinary cases, no order to produce will be made (*n*). Where actual sealing up would interfere with the conduct of his business, or be otherwise oppressive, the party producing documents may cover up (in lieu of sealing up) irrelevant portions, provided he states upon oath that no relevant portions have been covered up (*o*).

The order usually made is for the party, his solicitors and agents, to inspect the documents. This form of order has been held to include a confidential agent whose assistance is necessary to carry on the suit, although he was a witness in the cause (*p*), and the usual rule of the Court of Chancery was that witnesses were not allowed to inspect documents before the hearing (*q*). When Y. was named in a bill as the agent of the plaintiffs (a foreign republic) in this country, the defendants were required to produce their documents to S., who was stated in the affidavit of the plaintiffs' solicitor to be their agent for the purposes of the suit (*r*). A special order may be made on special grounds for any other person (besides the solicitor or agent of the party) to inspect (*s*). Thus the assistance of surveyors will be allowed in mining actions (*t*), of scientific persons in patent actions (*u*), and of accountants when complicated accounts are involved (*x*).

Again, it must be observed that, where the plaintiff's title to relief is denied by the defendant, the defendant ought not to be compelled to produce all documents, but only those which are necessary or material to the

(*n*) *Churton* v. *Frewen*, 2 Dr. & Sm. 394.
(*o*) *Graham* v. *Sutton*, [1897] 1 Ch. 761.
(*p*) *Attorney-General* v. *Whitwood Local Board*, 40 L. J. Ch. 592.
(*q*) *Boyd* v. *Petrie*, L. R. 3 Ch. 818.
(*r*) *Republic of Costa Rica* v. *Erlanger*, L. R. 19 Eq. 44.
(*s*) *Boyd* v. *Petrie*, L. R. 3 Ch. 818.
(*t*) *Swansea Rail. Co.* v. *Budd*, L. R. 2 Eq. 274.
(*u*) *Bonnardet* v. *Taylor*, 1 J. & A. 386.
(*x*) *Lindsay* v. *Gladstone*, L. R. 9 Eq. 132.

question to be decided at the hearing or trial. This principle was acted upon by the Court of Chancery, and has been substantially adopted in Rule 20 of Order XXXI. of R. S. C., 1883, and is constantly applied by the High Court (*y*).

A defendant has been held entitled to production of documents, although in contempt (*z*).

A defendant cannot obtain discovery of documents from a co-defendant (*a*); nor, it would appear, can a plaintiff obtain discovery of documents from a third party brought in by the defendants, unless the third party has liberty to oppose the plaintiff's claim (*b*).

The rules of court as to discovery now apply to infant plaintiffs and defendants and their next friends and guardians *ad litem*, in the same way as to other litigants (Order XXXI., Rule 29).

Documents referred to in pleadings and affidavits.—It will be noticed that, as regards documents, other than those referred to in pleadings and affidavits, production before trial can only be obtained by means of an order, but that, as regards documents referred to in a party's pleadings or affidavits, his opponent can, under Rule 15, give a notice for their production, and need only apply for an order for production if such notice is disregarded, or not properly complied with. An important question then is, does the term "pleadings or affidavits" in Rule 15 include an affidavit of documents made under Rule 12? This point cannot even yet be considered as finally settled. Seeing that in Rule 18 the same term clearly does not include an affidavit of documents, because the term affidavit of documents is used in contradistinction thereto, it may be supposed that it was not intended to include it in

(*y*) *Rowcliffe* v. *Leigh*, 6 Ch. D. 256; *Verminck* v. *Edwards*, 29 W. R. 189.
(*z*) *Haldane* v. *Eckford*, L. R. 7 Eq. 425.
(*a*) *Brown* v. *Watkins*, 16 Q. B. D. 125.
(*b*) *Eden* v. *Weardale, etc. Co.*, 34 Ch. D. 223.

Rule 15. The practice of the King's Bench Division is to treat affidavits of documents as included in the word "affidavits" in Rule 15. In the Chancery Division the old form of order is followed, *i.e.*, where an order for an affidavit of documents is made it goes on to order production, so that the question would seldom arise; but in a recent case it was held that Rule 15 does include an affidavit of documents (*c*). Then comes a further question: Is an affidavit in answer to interrogatories within the rule? *Moore* v. *Peachey* (*d*) is an authority that it is. Particulars are "pleadings" within this rule; and an affidavit sworn, but not filed, is an affidavit within the rule (*e*).

All documents coming within Rule 15 must be produced, and an order to inspect them will be made as a matter of course at any stage of the proceedings before the trial, unless good cause to the contrary is shown (*f*), the intention being to give the opposite party the same advantage as if the documents were fully set out in the pleadings (*f*). Of course the claim of privilege is not lost in respect of a document by mentioning or setting it out in a pleading or affidavit (*g*); but if it is claimed and the document is not produced, it cannot be given in evidence at the trial without the leave of the court or judge, unless it falls within one of the exceptions mentioned in Rule 15. The documents need not be referred to with any particularity to come within the rule; a general reference is quite sufficient (*h*). The production of copies of documents referred to in pleadings or affidavits cannot be claimed under this rule, but if the documents referred to are copies their production can be enforced (*f*); and where entries in

(*c*) *Pardy's Mozambique Syndicate* v. *Alexander*, [1903] 1 Ch. 191.
(*d*) [1891] 2 Q. B. 707.
(*e*) *Re Fenner and Lloyd*, [1897] 1 Q. B. 667.
(*f*) *Quilter* v. *Heatly*, 23 Ch. D. 42.
(*g*) *Roberts* v. *Oppenheim*, 26 Ch. D. 724.
(*h*) *Smith* v. *Harris*, 48 L. T. (N.S.) 868.

books are referred to, inspection can be had of such entries only and not of the entire books (*i*). An exhibit is part of an affidavit, and therefore any person entitled to see the affidavit is entitled to see the exhibit (*j*). But where the exhibit is a document brought into existence for the information of the court and for that purpose only, its production cannot be claimed. Therefore, when a plaintiff was suing *in formâ pauperis*, the defendant was held not entitled to inspect the case laid by the plaintiff before counsel under Order XVI., Rule 23, and his opinion thereon, although made exhibits to the affidavit filed in accordance with Order XVI., Rule 24 (*k*).

A party who has made an affidavit of documents under Rule 12 cannot be cross-examined upon it, nor can evidence be adduced to contradict the allegations therein; but if an affidavit be insufficient a further affidavit can be ordered. As an affidavit of documents cannot be contradicted, it ought to be full (*l*), and will be construed strictly. In claiming protection for a document on the ground of privilege the facts upon which the privilege is claimed ought to be set out (*l*). If an affidavit is technically sufficient, but the party seeking discovery believes that the party who has made the affidavit has in his possession documents which are not referred to in the affidavit, the latter may be interrogated as to such documents (*m*); but the interrogatory must be as to specific documents, and must not be general in its terms, and leave to deliver such an interrogatory must be obtained on a special application (*n*). It will hardly be necessary to adopt this

(*i*) *Quilter* v. *Heatly*, 23 Ch. D. 42.
(*j*) *Re Hinchliffe*, [1895] 1 Ch. 117.
(*k*) *Sloane* v. *Britain Steamship Co.*, [1897] 1 Q. B. 185.
(*l*) *Per* COTTON, L.J.: *Gardner* v. *Irvin*, 4 Ex. D. 53.
(*m*) See judgment of BRETT, L.J.: *Jones* v. *Monte Video Gas Co.*, 5 Q. B. D. 556.
(*n*) *Hall* v. *Truman*, 29 Ch. D. 307; but see *Morris* v. *Edwards*, 15 App. Cas. 319.

procedure now that Rule 19A (3) (*ante*, p. 485) can be resorted to. Before that rule was introduced an affidavit of documents was conclusive against the person seeking the discovery unless it could be shown either from the affidavit itself or from the documents therein referred to, or from an admission in the pleading of the party swearing the affidavit, that other documents existed in his possession or power which were material and relevant to the action. The object of the rule is that a litigant who can point to specific documents, which he is able to name and specify in his affidavit, and who is in a position to swear that in his belief they are or have been in the possession of his opponent, and that they relate to the matters in question in the action, shall have a right to discovery of those particular documents. But the key of the position is this, that there must be an affidavit of his belief as to specific documents capable of being named and specified. The rule applies only where these conditions are fulfilled (*o*).

An inspection ought not, of course, to be granted when it appears to be sought, not *bonâ fide* for the pending action, but to assist the applicant in an action against a third person (*p*); nor will a party be permitted to make public, information which he has obtained from the inspection of his opponent's documents (*q*).

The court will not compel a person, not a party to the suit, to produce a document for inspection (*r*), unless he has obtained it from a party to the suit, or holds it in the nature of a trust for such party (*s*). Where such a person holds independently, and by a title paramount to the title of the party, he will not be

(*o*) *White* v. *Spafford & Co.*, [1901] 2 K. B. 241.
(*p*) *Temperley* v. *Willet*, 6 E. & B. 380.
(*q*) *Williams* v. *Prince of Wales' Life Assurance Co.*, 23 Beav. 338; *cf. Hopkinson* v. *Lord Burghley*, L. R. 2 Ch. 447.
(*r*) *Cocks* v. *Nash*, 9 Bing. 721.
(*s*) *Doe* v. *Roe*, 1 M. & W. 207.

subject to an order for inspection (*s*). In one case, STUART, V.-C., refused to order an executor to produce certain cheques of his testator which were at the date of the application in the possession of the banker on whom they were drawn (*t*). The production of documents at a trial (or under Order XXXVII., Rule 20, before an officer of the court, or other person appointed to take evidence) by a person not a party to the action is enforced by issuing a *subpœna duces tecum*. The person subpœnaed is bound to attend with the documents specified, but he can then raise any legal objection to the production of all or any of the documents.

Rule 7 of Order XXXVII. of the R. S. C., 1883, provides that—

> The court or a judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the purpose of producing any writings or other documents named in the order which the court or judge may think fit to be produced: Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial (*u*).

This Rule does not give a litigant the right to obtain discovery which he did not previously possess against persons who are not parties to the action. Its object is to facilitate the production of documents on the hearing of motions, petitions, etc. (*x*). An order under this Rule is in fact equivalent to a *subpœna duces tecum*, and has the same effect; the person on whom it is made must attend with the documents specified, but he can then raise any legal objection to the production of all or any of the documents (*y*). An order under this Rule may be made *ex parte* (*z*).

(*t*) *Bayley* v. *Cass*, 10 W. R. 370.
(*u*) See as to Bankers' Books, *ante*, p. 117.
(*x*) *Elder* v. *Carter*, 25 Q. B. D. 194.
(*y*) See *Williams* v. *Frere*, [1891] 1 Ch. 323.
(*z*) *Williams* v. *Frere*, *ubi supra*.

The County Courts have powers of granting and enforcing inspection and production of documents. The County Court Rules dealing with these subjects will be found in the Appendix.

PRODUCTION AT THE TRIAL AND NOTICE TO PRODUCE.

The court can, under Order XXXI., Rule 14, compel the production by a party of any document at the trial. A party cannot, except by getting an order, compel his opponent to produce any document at the trial; but if he wishes to be in a position to give secondary evidence of the contents of any document in the possession of his opponent, he must, as a general rule, give his opponent written notice to produce such document at the trial. If after proof that such notice has been given, and that the original is in the hands of the adverse party, the latter will not produce it, the party requiring it may resort to secondary evidence of it. Before this can be done, the party tendering it must prove, or raise at least a reasonable presumption, that the original is in the hands of the adverse party, or of a third person in privity with him (*a*). Slight evidence of this fact will be sufficient, when the document naturally, necessarily, or probably, might be expected to be in the custody, or under the control, of such adverse party. Thus, it has been presumed that a bankruptcy certificate came into the hands of a bankrupt who was proved to have applied for it, and to have been charged for it by his solicitor (*b*). Generally, where documents have been traced into a party's possession, it lies upon him to show what has become of them, before he can object, after notice to produce, to

(*a*) *Sharp* v. *Lamb*, 11 A. & E. 805.
(*b*) *Henry* v. *Leigh*, 3 Camp. 502.

the substitution of secondary evidence (*c*); and where there is a privity of title between the adverse party and a third person who holds the original, the former is equally compellable to produce. In such a case the question is, whether the custody was virtually, although not actually, the custody of the adverse party; or whether he had such a control over the holding by the third party as made it virtually a personal holding. Thus, generally, where the holding is by an agent, he may either be served with a *subpœna duces tecum*, or the principal may be served with notice to produce. Where a notice was given to an owner of a vessel to produce a document which appeared to be in the possession of the captain (*d*); where it was given to the drawer to produce a cheque which was proved to have been delivered to the drawer's banker (*e*); and to a sheriff to produce a warrant which had been returned to the under-sheriff (*f*), secondary evidence has been received; but where the possession was independent of the adverse party, as where he had assigned a lease (*g*); or where the writing was held as a security by a third party (*h*); or where it has been traced by a party satisfactorily into the possession of a stranger with whom he is unconnected, and over whom he has no control, a litigant will not be affected by notice unless he has wilfully parted with the document after receiving the notice (*i*).

A party may produce an original document at any time when secondary evidence is tendered; and then the latter becomes inadmissible. If there is any question as to the originality of the document, such question

(*c*) *R.* v. *Thistlewood*, 33 How. St. Tr. 757.
(*d*) *Baldney* v. *Ritchie*, 1 Stark. 338.
(*e*) *Partridge* v. *Coates*, Ry. & M. 156.
(*f*) *Taplin* v. *Atty*, 3 Bing. 164.
(*g*) *Knight* v. *Martin*, Gow, 103.
(*h*) *Parry* v. *May*, 1 M. & R. 279.
(*i*) *Knight* v. *Martin*, Gow, 103.

is for the judge (*k*); but where the existence of a duly stamped document is denied upon the pleadings, and the plaintiff, after giving notice to produce, tenders a copy of it, the judge cannot hear evidence to decide the question of the existence of the stamped original as a question preliminary to that of the admissibility of the copy, because he would be thereby determining an issue which is in the province of the jury (*l*).

A notice to produce might formerly have been given to the adverse party or his agent, either verbally or in writing (*m*); but it must now in civil cases be given in writing (*n*). It must be proved to have been given before secondary evidence is admissible. It may be served either on the party or on his solicitor (*o*), and it will be sufficient to leave it with a servant at the residence of the former, or with a clerk at the office of the latter (*p*). If a new trial is ordered fresh notices to produce are not necessary (*q*).

The notice to produce is (by Order XXXII., Rule 8) required to be in the form given by Appendix B., No. 14, to the R. S. C., 1883, with such variations as circumstances may require. It need not be minutely descriptive, and the courts will not entertain frivolous or technical objections to its validity, if it points out, with general distinctness, to the adverse party the documents which he is required to produce (*r*). Notices to produce "all letters written by the plaintiff to the defendant, relating to the matters in dispute in the action" (*s*); and—

"All letters written to and received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defen-

(*k*) *Boyle* v. *Wiseman*, L. R. 11 Ex. 360.
(*l*) *Stowe* v. *Querner*, L. R. 5 Ex. 155.
(*m*) *Smith* v. *Young*, 1 Camp. 440; *Suter* v. *Burrell*, 2 H. & N. 867.
(*n*) By Order XXXII., r. 8.
(*o*) *Hughes* v. *Budd*, 8 Dowl. 315.
(*p*) *Evans* v. *Sweet*, Ry. & M. 84.
(*q*) *Hope* v. *Beadon*, 17 Q. B. 509.
(*r*) *Lawrence* v. *Clark*, 14 M. & W. 251.
(*s*) *Jacob* v. *Lee*, 2 M. & Rob. 33.

dants, or either of them, or any person on their behalf; and also all books, papers, etc., relating to the subject-matter of this cause" (*t*).

And also "all accounts relating to the matters in question in this cause" (*u*); have been held sufficient notice to produce any document reasonably included in the description. Notice to produce a letter purporting to enclose an account has been held sufficient notice to produce the account (*x*).

The notice ought to be given within a reasonable time before the trial comes on; and it will be for the judge to determine, on the circumstances of the case, whether the notice has been served within a reasonable time previously to the trial (*y*).

In town causes, and also in country causes, where the solicitor lives in the assize town, if the documents are such as from the nature of the case may reasonably be presumed to be in his hands, notice may be served not later than early in the evening of the day preceding the trial (*z*); but if they are not such as are immediately connected with the cause, or are such as would presumably be in the hands of a client or other person, the notice must be proportionately earlier, according to an estimate of the time necessary to obtain them (*a*). In such a case, and especially in country causes, where the adverse solicitor does not live in the assize town, the notice ought to be served on him before the commission day, and within a reasonable time before he is required to leave home for the assize town (*b*); but if he has the document with him at the assize town, service there will be sufficient (*c*).

(*t*) *Morris* v. *Hanser*, 2 M. & Rob. 392.
(*u*) *Rogers* v. *Custance*, 2 M. & Rob. 179.
(*x*) *Engall* v. *Bruce*, 9 W. R. 536.
(*y*) *Per* PARKE, B.: *Lloyd* v. *Mostyn*, 10 M. & W. 483.
(*z*) *Atkyns* v. *Meredith*, 4 Dowl. 658.
(*a*) *Byrne* v. *Harvey*, 2 M. & R. 89.
(*b*) *George* v. *Thompson*, 4 Dowl. 656.
(*c*) *R.* v. *Hawkins*, 2 C. & K. 823.

Where the adverse holder is abroad, or beyond the jurisdiction of the court, and leaves his solicitor to conduct his case, it will be presumed that he has also left with him all papers naturally connected with his case; and the courts, under such circumstances, have been inclined to maintain the validity of a notice to the solicitor (*d*); but the circumstances must be such as to support a supposition that the papers are producible, and the notice must be sufficient. Thus, a three days' notice to produce letters written by a defendant to his partners in New South Wales, was held sufficient, on its appearing that there had been litigation between the same parties some years previously, for the purposes of which it was reasonable to suppose that the letters must have been remitted to England (*e*).

If a party, on being served with notice to produce, states that the document does not exist, secondary evidence will be admissible, and the adverse party cannot object to the lateness of the notice (*f*).

Rule 8 of Order XXXII. provides, that an affidavit of the solicitor, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall, in all cases, be sufficient evidence of the service of the notice, and of the time when it was served. Sufficient evidence in this Rule means *primâ facie* and not conclusive evidence (*g*).

Notice to produce is unnecessary—

(1) Where a party holds a duplicate original, or a counterpart of his adversary's document (*h*).

Such duplicate or counterpart must not be a mere copy, but in all respects of equal and co-extensive character and validity with the adversary's document.

(*d*) *Bryan* v. *Wagstaff*, Ry. & M. 47.
(*e*) *Sturge* v. *Buchanan*, 10 A. & E. 598.
(*f*) *Foster* v. *Pointer*, 9 C. & P. 720.
(*g*) See *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612.
(*h*) *Colling* v. *Treweek*, 6 B. & C. 398.

In such a case it is receivable as being itself primary evidence.

(2) When the nature of the case and proceedings sufficiently inform the adverse party that he will be required to produce the document.

Thus, in an action of trover for a bond or other instrument (*i*), or on an indictment for stealing a writing (*k*), the plaintiff or prosecutor may give secondary evidence without proving notice to produce.

"Where the nature of the action or indictment is such that the defendant must know that he is charged with the possession of the document, and is called upon to produce it, notice is not necessary, and such is the case in an action of trover or on an indictment for stealing; but if the matter is collateral, it is necessary to give notice (*l*). Hence, where on an indictment for perjury, the prisoner having sworn that a certain draft did not exist, and the materiality of its existence depended on its contents and certain alleged alterations in it, it was held that no parol evidence was admissible, either of its existence or of its contents, without notice to produce" (*m*).

The general rule stated above is subject to several special limitations. Thus, in forgery, the prosecutor must give notice to the prisoner to produce the original instrument (*n*); in arson, for setting fire to a dwelling-house with intent to defraud an insurance company, notice must be given to produce the policy (*o*). In civil cases, in an action on a cheque or a bill, if the defendant does not traverse the making or acceptance, but only avoids, the plaintiff need not produce without notice (*p*).

(3) A notice to produce a notice is not required (*q*), *e.g.*, a notice to quit, a notice of action, notice of

(*i*) *Scott* v. *Jones*, 4 Taunt. 865.
(*k*) *R.* v. *Aickles*, 1 Leach, 294.
(*l*) See *R.* v. *Elworthy*, L. R. 1 C. C. R. 103.
(*m*) *R.* v. *Elworthy*, L. R. 1 C. C. R. 103.
(*n*) *R.* v. *Halworth*, 4 C. & P. 254.
(*o*) *R.* v. *Ellicombe*, 5 C. & P. 254.
(*p*) *Goodered* v. *Armorer*, 3 Q. B. 956.
(*q*) *Philipson* v. *Chase*, 2 Camp. 111.

dishonour of a bill, notice to produce a signed solicitor's bill in an action on it (*r*).

The principle of this rule is that the service of the original notice is in itself a sufficient notice to produce it at the trial if required. It does not apply where the notice has been given to one who is not a party to the action, nor where it contains the terms of a contract; as where a carrier, relying upon a notice served on the plaintiff to limit his liability, was held bound to give notice to produce it (*s*).

(4) If a party or his solicitor is shown to have an original with him in court, and refuses to produce it, secondary evidence will be received, notwithstanding the want of a notice to produce (*t*).

(5) Notice will not be required when the adverse party has admitted the loss of the original; or where it is absolutely impossible or highly inconvenient to produce it in court, as in the case of a mural inscription (*u*), but not a removable and portable notice or inscription (*x*).

(6) Merchant seamen (*y*) are permitted to prove orally an agreement with the master of a ship, without producing the original, or giving notice to produce it.

(*r*) *Colling* v. *Treweek*, 6 B. & C. 394.
(*s*) *Jones* v. *Tarleton*, 9 M. & W. 675.
(*t*) *Dwyer* v. *Collins*, 7 Ex. 739.
(*u*) *Bartholomew* v. *Stephens*, 8 C. & P. 728.
(*x*) *Jones* v. *Tarleton*, 9 M. & W. 675.
(*y*) Merchant Shipping Act, 1894, s. 123.

CHAPTER IX.

STAMPS.

In this chapter only the leading principles of the law relating to stamps will be stated, so far as they affect the admissibility in evidence of written documents.

The general rule is, that no instrument executed in any part of the United Kingdom, or relating, whereso-ever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall (except in criminal proceedings) be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

Section 14 of the Stamp Act, 1891 (*a*) (which consolidates the previous enactments), provides that:

"(1) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds. (2) The officer, or arbitrator, or referee receiving the duty and penalty shall give a receipt for the same, and make an entry in a book kept for that purpose of the payment and of the amount thereof, and shall communicate to the commissioners the name or title of the proceeding in which, and of the party from whom, he received the duty and penalty, and the date and description of the instrument, and shall pay over to such person as the commissioners may appoint the money received by him for the duty and penalty. (3) On production to

(*a*) 54 & 55 Vict. c. 39.

the commissioners of any instrument in respect of which any duty or penalty has been paid, together with the receipt, the payment of the duty and penalty shall be denoted on the instrument. (4) Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

It will be noticed that the above provisions only apply to instruments which can legally be stamped after execution.

Section 15 of the Stamp Act, 1891, provides, by sub-s. (1), that:

"Save where other express provision is in this Act made, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of ten pounds, and also by way of further penalty, where the unpaid duty exceeds ten pounds, of interest on such duty, at the rate of five pounds per centum per annum, from the day upon which the instrument was first executed up to the time when the amount of interest is equal to the unpaid duty."

For "other express provision" the Statute must be consulted.

The party who objects to the want or sufficiency of a stamp must prove it (*b*); and the judge will determine the question before the instrument can be shown to the jury (*c*); but by s. 12 of the Stamp Act, 1891, provision is made for taking the opinion of the Commissioners of Inland Revenue on the liability of any instrument to duty, and for stamping such instrument in accordance with such opinion; and it is enacted that—

"Every instrument stamped with the particular stamp denoting either that it is not chargeable with any duty, or is duly stamped, shall be admissible in evidence, and available for all purposes notwithstanding any objection relating to duty."

(*b*) *Doe* v. *Coombs*, 3 Q. B. 687.
(*c*) *Per* Lord TENTERDEN: *Jardine* v. *Payne*, 1 B. & Ad. 670.

If an agreement is no more than a proposal, it does not require a stamp; but when it is either an agreement strictly, or evidence of one, it must be stamped, if the subject-matter is above £5 (*d*). Where an agreement, which appears to be in writing, is in dispute between parties, it must, according to the rule which requires the best evidence, be produced; and, when produced, if it appears to require a stamp, it will be inadmissible unless it be properly stamped. Thus, where it appears in the course of a party's case that there is a written agreement, bearing directly on the points at issue, he must produce it duly stamped (*e*). Such an agreement cannot be treated as a nullity, if it is produced and appears to be unstamped; and therefore it was held in *Delay* v. *Alcock* (*f*), that a county court judge was wrong in allowing parol evidence to be given of an agreement contained in an unstamped writing. Where, however, a party succeeds in establishing his case by oral evidence, the opposite party cannot defeat it by merely producing an unstamped written agreement. Thus, in *Magnay* v. *Knight* (*g*), where the plaintiff closed her case without anything appearing to show that there was a written agreement between her and the defendant as to the subject-matter of the action, the defendant was held not entitled to call for a nonsuit by producing a paper purporting to be an agreement, but unstamped. This case, although apparently contradicted by *Delay* v. *Alcock*, will be reconciled with it by presuming that, in the latter case, the defendant was called as a witness by the plaintiff, and that the existence of the unstamped agreement was disclosed in the course of the plaintiff's case. If that had closed without evidence of an agreement in writing, it appears, on the authority of *Magnay* v.

(*d*) *Cf. Hegarty* v. *Milne*, 14 C. B. 627.
(*e*) *Buxton* v. *Cornish*, 12 M. & W. 426.
(*f*) 4 E. & B. 660.
(*g*) 1 M. & G. 944.

Knight, that the defendant could not have nonsuited the plaintiff by producing an unstamped written agreement.

When it is necessary to produce a writing, or to account for its absence, secondary evidence will not be received if it appears that the original required a stamp, and that it was unstamped (*h*); but a writing requiring a stamp will be presumed to have been properly stamped (*i*); and as against a party refusing to produce a document after notice there is a similar presumption (*k*); but such a presumption may be rebutted by evidence that the writing was not stamped (*l*). If it is shown that a lost document was at one time unstamped, this fact alone will raise a presumption that it continued without a stamp (*m*). The court will not sanction an agreement to waive the objection for want of a stamp (*n*).

When an instrument purports to have been stamped, but no stamp appears, or one partially effaced, the judge may receive the writing, if the want of the stamp or its erasures is satisfactorily explained to him (*o*). Where an instrument, so far as appears on the face of it, is properly stamped, the court is entitled to look outside the instrument in order to settle whether it is properly stamped or not (*p*); except, of course, when it bears a denoting stamp under s. 12 of the Stamp Act, 1891.

An unstamped instrument, inadmissible as an agreement, may yet be admissible to prove a collateral or independent fact. Thus, a cheque, drawn beyond the legal limits, has been received to prove the receipt of

(*h*) *Vide supra*, p. 313.
(*i*) *Hart* v. *Hart*, 1 Hare, 1; *cf. Pooley* v. *Goodwin*, 4 A. & E. 94.
(*k*) *Crisp* v. *Anderson*, 1 Stark. 85.
(*l*) *Crowther* v. *Solomons*, 6 C. B. 758.
(*m*) *Marine Investment Co.* v. *Haviside*, L. R. 5 E. & I. 624.
(*n*) *Owen* v. *Thomas*, 3 M. & K. 353.
(*o*) *Doe* v. *Coombs*, 3 Q. B. 687.
(*p*) *Maynard* v. *Consolidated Kent Collieries Corporation*, [1903] 2 K. B. 121.

money by a holder, but not to discharge the banker (*q*); an unstamped receipt to show that goods were sold to a third person, and not to the defendant (*r*); an unstamped agreement to show an illegal consideration for a debt (*s*); but it cannot be presented to a jury as evidence of any part of the substantial claim of a party (*t*). An unstamped document may be handed to a witness to refresh his memory, or to challenge it (*u*); and a document which requires a stamp for some purposes but not for others, will be strictly admissible for such latter purposes. Where a document is void as a receipt for want of a proper stamp, it may be made evidence of an account stated, or other outstanding accounts (*x*), or of a contract (*y*). An unstamped and unregistered assignment of a debtor's whole property may be given in evidence as an act of bankruptcy, although until stamped it cannot be received for the purpose of giving it effect or supporting any claim under it (*z*). A 10*s*. deed stamp on a mortgage is, however, insufficient to render it admissible as a deed for the purpose of showing that it passed the legal estate in the mortgaged property (*a*); and a promissory note insufficiently stamped with a penny receipt stamp cannot be given in evidence to prove the receipt of the money for which it is given (*b*).

When an instrument is inadmissible by reason of the stamp laws it is allowable to resort to other admissible evidence. Thus, when a promissory note is defectively stamped, a holder may give evidence of the original consideration; as by showing on a count for money

(*q*) *Blair* v. *Bromley*, 11 Jur. 617.
(*r*) *Miller* v. *Dent*, 10 Q. B. 846.
(*s*) *Coppock* v. *Bower*, 4 M. & W. 361.
(*t*) *Jardine* v. *Payne*, 1 B. & Ad. 670.
(*u*) *Birchall* v. *Bullough*, [1896] 1 Q. B. 325.
(*x*) *Matheson* v. *Ross*, 2 H. L. Cas. 301.
(*y*) *Evans* v. *Prothero*, 1 De G. M. & G. 572.
(*z*) *Ex parte Squire*, L. R. 4 Ch. 47.
(*a*) *Whiting to Loomes*, 17 Ch. D. 10.
(*b*) *Ashling* v. *Boon*, [1891] 1 Ch. 568.

lent that the defendant has acknowledged the debt for which the note was given (*c*); and when a receipt is unstamped, payment may be proved by oral evidence (*d*).

APPROPRIATED STAMPS.

Section 10 of the Stamp Act, 1891, provides:

"(1) A stamp which by any word or words on the face of it is appropriated to any particular description of instrument is not to be used, or, if used, is not to be available, for an instrument of any other description. (2) An instrument falling under the particular description to which any stamp is so appropriated as aforesaid is not to be deemed duly stamped, unless it is stamped with the stamp so appropriated."

ALTERATION OF A STAMPED DOCUMENT.

A material alteration in a writing requiring a stamp, after it has been made or executed, avoids the stamp, and renders a fresh stamp necessary; but it is otherwise if the alteration is immaterial, or according to the original intent of the parties (*e*). Thus, when the defect is unintentional, and the alteration makes the writing merely what it was intended originally to have been, it will not require to be restamped (*f*). Where a promissory note was made originally payable to the plaintiff, who complained that it ought to have been payable to order, it was held that, as between the parties to the note, the interlineation of the words, "or to order," did not render a new stamp necessary (*g*). So, when a bill is altered by the consent of parties before the bill has been issued, it will not require to be restamped; but when the bill has been issued, and the

(*c*) *Farr* v. *Price*, 1 East, 56.
(*d*) *Rambert* v. *Cohen*, 4 Esp. 213.
(*e*) *Master* v. *Miller*, 1 Sm. L. C. 796.
(*f*) *Cole* v. *Parkin*, 12 East, 471.
(*g*) *Byron* v. *Thompson*, 1 A. & E. 31.

alteration is material and varies the essential character of the writing, so as to amount to a new contract, a new stamp will be required, notwithstanding the consent of the parties to the alteration (*h*).

TIME OF OBJECTING TO THE WANT OF STAMP.

Where an objection is raised to an instrument for want of a stamp, the objection should be taken as soon as the instrument is tendered, and before it is received in evidence. If the instrument is received, and read without objection, it cannot afterwards be objected to for want of a stamp (*i*). It is doubtful whether a judge has not at least a discretionary power to reject a document which, after being put in, subsequently appears to be unstamped, or insufficiently stamped (*k*). Where a judge rules that a document is inadmissible on account of the insufficiency of the stamp, it was formerly held that his decision is open to review (*l*); but by Order XXXIX., Rule 8, of the R. S. C. 1883, it is provided that a new trial shall not be granted by reason of the ruling of any judge that the stamp on any document is sufficient, or that the document does not require a stamp. No appeal lies to the Court of Appeal from a similar ruling by the judge trying an action without a jury (*m*); nor is there any appeal to the High Court from the ruling of a county court judge that a document tendered in evidence is sufficiently stamped (*n*).

(*h*) *Bowman* v. *Nicholl*, 5 T. R. 537.
(*i*) *Robinson* v. *Lord Vernon*, 7 C. B. (N.S.) 235.
(*k*) *Field* v. *Woods*, 7 A. & E. 114.
(*l*) *Sharples* v. *Rickard*, 2 H. & N. 57.
(*m*) *Blewett* v. *Tritton*, [1892] 2 Q. B. 327.
(*n*) *Mander* v. *Ridgway*, [1898] 1 Q. B. 501.

CHAPTER X.

AFFIDAVITS—NEW TRIALS—APPEALS—PERPETUATING TESTIMONY.

RULE 1 of Order LXVIII. of the R. S. C. 1883, provides that—

"Subject to the provisions of this Order, nothing in these Rules, save as expressly provided, shall affect the procedure or practice in any of the following causes or matters: Criminal proceedings; proceedings on the Crown side of the Queen's Bench Division; proceedings on the revenue side of the Queen's Bench Division; proceedings for divorce or other matrimonial causes."

Rule 2 of the same Order provides that several Orders specified in such rule, including Order XXXVIII., shall, as far as applicable, apply to all civil proceedings on the Crown side and revenue side of the Queen's Bench Division. Section 20 of the Judicature Act, 1875 (*a*), provides, that—

"Nothing in this Act . . . or in any rules of court to be made under this Act, save as far as relates to the power of the court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to jurymen or juries."

Although the principles of evidence are not altered by the Act, nevertheless that considerable alteration has been introduced into procedure, so far as it affects the mode of giving evidence in various cases, will be apparent from the allusions to and quotations from the rules made in other portions of this work.

By Rule 1 of Order XXXVII. (*b*), discretionary powers are vested in the court: (1) to order any

(*a*) 38 & 39 Vict. c. 77. (*b*) For which see the Appendix.

particular fact or facts to be proved by affidavit; (2) to allow the affidavit of any witness to be read at a hearing or trial on such conditions as it may think reasonable, with this proviso, that when the opposite party *bonâ fide* desires to cross-examine a witness, and the witness can be produced, such witness's evidence shall not be allowed to be given by affidavit. The first of these powers, which can be exercised by the court even against the wishes of both parties, can be advantageously employed to the manifest saving of expense in proof of formal matters, even in trials by jury. The second, which, subject to the proviso, can be exercised by the court at the instance of one party, but against the wish of the other, enables, in proper cases, the evidence of an absent witness to be brought before the court without the expensive interposition of a commissioner or examiner.

Subject to these powers, and to the rules that upon any motion, petition or summons (*c*), and in default actions *in rem*, and in references in Admiralty actions (*d*), evidence may be given by affidavit, and subject to any statutory rule creating an exception (*e*), every witness, at the trial of any action or at any assessment of damages, must be examined *vivâ voce* and in open court; although if the solicitors of all parties to an action agree, the evidence therein may be taken by affidavit. That such an agreement ought to be entered into in the majority of actions for partition and the like, as well as in all actions where the object of all the parties is to obtain a judicial decision upon facts as to which there is little if any dispute, is tolerably certain; but in all actions where the parties are at arm's length, it obviously is theoretically right that the witnesses should be examined *vivâ voce* and in open court. That

(*c*) Rule 1 of Order 38. (*d*) Rule 2 of Order 37.
(*e*) *E.g.*, the Bankers' Books Evidence Act, 1879, for which *vide supra*, p. 117.

affidavit evidence has its merits as well as demerits may be conceded; but the latter certainly outweigh the former. The two chief defects in affidavit evidence are, that the court has no opportunity of observing the demeanour of the witness while under examination, and that the version given of the story is too often that of the lawyer who prepares the affidavit rather than that of the deponent. The agreement to take the evidence by affidavit must be a formal one, and cannot be gathered from correspondence (*f*). If one of the parties to the agreement finds himself afterwards unable to procure affidavits by reason of the reluctance of his witnesses to make them, or from any other good cause, he must take out a summons to be relieved from the agreement, and the court can make an order that the reluctant witnesses be examined at the trial, or at the option of the other party discharge the agreement, and direct all the evidence to be taken *vivâ voce* (*g*). In one case where the agreement was that the evidence should be taken by affidavit, but the word "only" was not used, the plaintiffs gave notice to cross-examine some of the deponents, and failed to cross-examine one of them, the defendant's counsel claimed and was allowed to examine such deponent *vivâ voce* (*h*). Where the opposite party is entitled to cross-examine a witness his affidavit cannot be used for any purpose if the cross-examining party objects (*i*). An affidavit once filed cannot be withdrawn for the purpose of preventing the deponent's cross-examination thereon (*k*). Even where the parties have agreed that the evidence shall be taken by affidavit, the court can, if it thinks it necessary for the purposes of justice, decide that the evidence shall be taken *vivâ voce* (*l*).

(*f*) *New Westminster Brewery Co.* v. *Hannah*, 1 Ch. D. 278.
(*g*) *Warner* v. *Mosses*, 16 Ch. D. 100.
(*h*) *Glossop* v. *Heston Local Board*, 26 W. R. 433.
(*i*) *Blackburn Guardians* v. *Brooks*, 7 Ch. D. 68.
(*k*) *Ex parte Young*, 21 Ch. D. 642.
(*l*) *Lovell* v. *Wallis*, 53 L. J. Ch. 494.

Affidavits must (according to Rule 3 of Order XXXVIII.) be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, *with the grounds thereof*, may be admitted. The words in italics have been very frequently disregarded in practice, but unless they are acted upon, statements on information and belief ought to be disregarded *in toto* (*m*). In a recent case in the Court of Appeal (*n*), RIGBY, L.J., dealing with this subject, stated that he never paid the slightest attention to such defective affidavits, and said:

"In the present day, in utter defiance of the order, solicitors have got into a practice of filing affidavits in which the deponent speaks not only of what he knows, but also of what he believes, without giving the slightest intimation with regard to what his belief is founded on. Or he says, 'I am informed' without giving the slightest intimation where he has got his information. Now every affidavit of that kind is utterly irregular, and, in my opinion, the only way to bring about a change in that irregular practice is for the judge, in every case of the kind, to give a direction that the costs of the affidavit, so far as it relates to matters of mere information or belief, shall be paid by the person responsible for the affidavit."

NEW TRIALS AND APPEALS.

It is open to a defeated party (1) to appeal in all cases; (2) to move for a new trial, or to set aside the verdict, finding, or judgment (*o*).

It is, however, provided by the Rules (*p*), that—

"A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in

(*m*) *Cf.* judgment of JESSEL, M.R., in the *Quartz Hill, etc. Co.* v. *Beall*, 20 Ch. D. 508.
(*n*) *Young* v. *Young Manufacturing Co., Limited*, [1900] 2 Ch. 753.
(*o*) Order 39, r. 1.
(*p*) *Ibid.*, r. 6.

the trial (*q*); and if it appear to such court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the court may give final judgment as to part thereof, or some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties."

When inadmissible evidence is left to the jury their verdict is vitiated both in civil and criminal cases (*r*).

Where an appeal is preferred, it is provided by the R. S. C. 1883 (*s*), that—

"The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the court."

On this subject, JESSEL, M.R., in delivering judgment in the Court of Appeal in *Sanders* v. *Sanders* (*t*), said:

"The appellant has applied for leave to adduce fresh evidence, but I am of opinion that it ought not to be granted. The application is for an indulgence. He might have adduced the evidence in the court below. That he might have shaped his case better in the court below is no ground for leave to adduce fresh evidence before the Court of Appeal. As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in court. The exact point on which evidence is wanted having thus been discovered, to allow fresh evidence to be introduced at that stage would offer a strong temptation to perjury."

As a general rule, the Court of Appeal will not give leave to adduce any fresh evidence on an appeal which

(*q*) See on this point *Bray* v. *Ford*, [1896] A. C. 44.
(*r*) *Cf. R.* v. *Gibson*, 18 Q. B. D. 537.
(*s*) Order 58, r. 4.
(*t*) 14 Ch. D. 381.

the party applying for leave might, if he had thought fit, and could, if he had used due diligence, have adduced in the court below (*u*). Of course, the Court of Appeal can admit fresh evidence by the consent of both parties (*x*).

The R. S. C., 1883, also provide (*y*) that—

"When any question of fact is involved in an appeal, the evidence taken in the court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows: (a) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed; (b) as to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the court may deem expedient."

It is also provided, that—

"Where evidence has not been printed in the court below, the court below or a judge thereof, or the Court of Appeal or a judge thereof, may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court of Appeal or a judge thereof shall otherwise order" (*z*).

Finally, it is provided, that—

"If, upon the hearing of an appeal, a question arise as to the ruling or direction of the judge to a jury or assessors, the court shall have regard to verified notes or other evidence, and to such other materials as the court may deem expedient" (*a*).

(*u*) See *Evans* v. *Benyon*, 37 Ch. D. 345, in which leave was given.
(*x*) *Saccharin Corporation* v. *Wild*, 20 R. P. C. 243.
(*y*) Order 58, r. 11.
(*z*) Order 58, r. 12. (*a*) *Ibid.*, r. 13.

PERPETUATING TESTIMONY.

When there was a danger that testimony might be lost before the question to which it related could be made the subject of judicial investigation, the Court of Chancery, following the practice of the civil law, lent its aid to preserve and perpetuate such testimony. A bill was filed, stating the matter respecting which the plaintiff desired to take evidence, and showing that he had an interest in the matter which could not be barred by the defendant, that the defendant claimed an interest adverse to the plaintiff in the matter, and that the matter could not be made the subject of present judicial investigation (*b*). An affidavit of the circumstances by which the evidence desired to be preserved was in danger of being lost was filed with the bill. The plaintiff could only require an answer from the defendant as to the facts and circumstances alleged by the bill as entitling him to examine the witnesses (*c*); and the bill could not be set down for hearing. The witnesses were examined before an examiner, according to the provisions of ss. 31—33 of 15 & 16 Vict. c. 86, and by the defendant as well as by the plaintiff (*d*). An order might be obtained to use the depositions so taken, either after the death of the witness (*e*), or in case he were too infirm (*f*), or could not be compelled to attend (*f*). A case for the perpetuation of testimony is not confined to aged and infirm witnesses, or to a single witness who can alone speak to the matter; but Lord ROMILLY said (*g*):

"You may examine everybody, and all the evidence is sealed up and only brought out when occasion requires it, and if the witnesses are alive it cannot be used, and the evidence must be taken all over again."

(*b*) *Earl Spencer* v. *Peek*, L. R. 3 Eq. 415.
(*c*) *Ellice* v. *Roupell*, 32 Beav. 308.
(*d*) *Earl of Abergavenny* v. *Powell*, 1 Meri. 434.
(*e*) *Barnsdale* v. *Low*, 2 R. & M. 142.
(*f*) *Biddulph* v. *Lord Camoys*, 20 Beav. 402.
(*g*) *Earl Spencer* v. *Peek*, L. R. 3 Eq. 415.

Actions to perpetuate testimony are now governed by Order XXXVII., Rules 35—38, of the R. S. C., 1883. They are as follows:

"35. Any person who would under the circumstances alleged by him to exist become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing such right or claim.

"36. In all actions to perpetuate testimony touching any honour, title, dignity, or office, or any other matter or thing in which the Crown may have any estate or interest, the Attorney-General may be made a defendant, and in all proceedings in which the depositions taken in any such action, in which the Attorney-General was so made a defendant, may be offered in evidence, such depositions shall be admissible notwithstanding any objection to such depositions upon the ground that the Crown was not a party to the action in which such depositions were taken.

"37. Witnesses shall not be examined to perpetuate testimony unless an action has been commenced for the purpose.

"38. No action to perpetuate the testimony of witnesses shall be set down for trial."

The practice under these Rules is, the plaintiff having commenced his action in the ordinary way, and having in his statement of claim set out the facts which entitle him to commence the action under Rule 35, and the pleadings having been closed or the defendant having made default in delivering a defence (*h*), an order (*i*) will be made for the examination of the witnesses before an examiner of the court, and the depositions will be filed in the ordinary way. These depositions will not be sealed up, as was the former practice, but copies will be obtainable in the ordinary way as soon as they are filed; and they will be admissible in evidence in any subsequent action against the parties to the original action or their privies if the attendance of the witnesses themselves cannot

(*h*) *Marquess of Bute* v. *James*, 33 Ch. D. 157.
(*i*) As to the form of the order, see *Burton* v. *North Staffordshire Rail. Co.*, 35 W. R. 536.

be procured. A defendant can, as stated above, examine witnesses in an action to perpetuate testimony, as well as the plaintiff. The making of an order is a matter in which the court has a discretion, and, therefore, where the matter in controversy was the legitimacy of the plaintiff, and this could be at once disposed of by an action under the Legitimacy Declaration Act, 1858, the court refused to make an order in an action to perpetuate testimony (*k*).

(*k*) *West v. Lord Sackville*, [1903] 2 Ch. 378.

APPENDIX.

DOCUMENTARY EVIDENCE ACT, 1845.

(8 & 9 Vict. c. 113.)

An Act to facilitate the Admission in Evidence of certain Official and other Documents. [8th August 1845.]

[1]. Whenever by any Act now in force or hereafter to be in force any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, byelaw, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either house of parliament, or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence.

2. All courts, judges, justices, masters in Chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document.

3. All copies of private and local and personal Acts of Parliament, not public Acts, if purporting to be printed by the

Queen's printers, and all copies of the journals of either house of parliament, and of royal proclamations, purporting to be printed by the printers to the Crown or by the printers to either house of parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others without any proof being given that such copies were so printed.

4. Provided always, that if any person shall forge the seal, stamp, or signature of any such certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or of any certified copy of any document, byelaw, entry, in any register or other book, or other proceeding as aforesaid, or shall tender in evidence any such certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, byelaw, entry in any register or other book, or of any other proceeding, with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, whether such seal, stamp, or signature be those of or relating to any corporation or company already established, or to any corporation or company to be hereafter established, or if any person shall forge the signature of any such judge as aforesaid to any order, decree, certificate, or other judicial or official document, or shall tender in evidence any order, decree, certificate, or other judicial or official document, with a false or counterfeit signature of any such judge as aforesaid thereto, knowing the same to be false or counterfeit, or if any person shall print any copy of any private Act or of the journals of either house of parliament, which copy shall falsely purport to have been printed by the printers to the Crown, or by the printers to either house of parliament, or by any or either of them, or if any person shall tender in evidence any such copy, knowing that the same was not printed by the person or persons by whom it so purports to have been printed, every such person shall be guilty of felony, and shall upon conviction be liable to transportation for seven years: Provided also, that whenever any such document as before mentioned shall have been received in evidence by virtue of this Act, the court, judge, commissioner, or other person officiating judicially who shall have admitted the same, shall, on the request of any party against whom the same is so received, be authorised, at its or at his own discretion, to direct that the same shall be impounded, and be kept in the custody of some officer of the court or other proper person, until further order touching the same shall be given, either by such court, or the court to which such master or other officer belonged, or by the persons or person who constituted such court, or by some one of the equity or common law judges of the superior courts at Westminster on application being made for that purpose.

DOCUMENTARY EVIDENCE ACT, 1868.

(31 & 32 VICT. C. 37.)

An Act to amend the Law relating to Documentary Evidence in certain cases. [25th June 1868.]

* * * * *

2. Primâ facie evidence of any proclamation, order or regulation issued before or after the passing of this Act by her Majesty, or by the Privy Council, also of any proclamation, order, or regulation issued before or after the passing of this Act by or under the authority of any such department of the Government or officer as is mentioned in the first column of the schedule hereto, may be given in all courts of justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned; that is to say:

(1.) By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation.

(2.) By the production of a copy of such proclamation, order, or regulation, purporting to be printed by the Government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession.

(3.) By the production, in the case of any proclamation, order, or regulation issued by her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the clerk of the Privy Council, or by any one of the lords or others of the Privy Council; and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connection with such department or officer.

Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing. No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, or regulation.

3. Subject to any law that may be from time to time made by the legislature of any British colony or possession, this Act shall be in force in every such colony and possession.

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6. The provisions of this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing statute, or existing at common law.

SCHEDULE (*a*).

COLUMN 1. *Name of Department or Officer.*	COLUMN 2. *Names of Certifying Officers.*
The Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the office of Lord High Admiral.	Any of the Commissioners for executing the office of Lord High Admiral, or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under Secretary of State.
Committee of Privy Council for Trade.	Any Member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Committee.
The Poor Law Board.	Any Commissioner of the Poor Law Board, or any Secretary or Assistant Secretary of the said Board.

(*a*) The Board of Agriculture has been in effect added to the schedule by the Documentary Evidence Act, 1895 (58 Vict. c. 9).

DOCUMENTARY EVIDENCE ACT, 1882.

(45 & 46 VICT. c. 9.)

An Act to amend the Documentary Evidence Act, 1868, *and other Enactments relating to the Evidence of Documents by means of Copies printed by the Government Printers.*

[19th June 1882.]

WHEREAS by the Documentary Evidence Act, 1868, and enactments applying that Act, divers proclamations, orders, regulations, rules, and other documents may be proved by the production of copies thereof purporting to be printed by the government printer, and the government printer is thereby defined to mean and include the printer to her Majesty:

And whereas divers other enactments provide that copies of Acts of Parliament, regulations, warrants, circulars, gazettes, and other documents shall be admissible in evidence if purporting to be printed by the government printer, or the Queen's printer, or a printer authorised by her Majesty, or otherwise under the authority of her Majesty:

And whereas it is expedient to make further provision respecting the printing of the copies aforesaid:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Documentary Evidence Act, 1882.

2. Where any enactment, whether passed before or after the passing of this Act, provides that a copy of any Act of Parliament, proclamation, order, regulation, rule, warrant, circular, list, gazette, or document shall be conclusive evidence, or be evidence, or have any other effect, when purporting to be printed by the government printer, or the Queen's printer, or a printer authorised by her Majesty, or otherwise under her Majesty's authority, whatever may be the precise expression used, such copy shall also be conclusive evidence, or evidence, or have the said effect (as the case may be) if it purports to be printed under the superintendence or authority of her Majesty's stationery office.

3. If any person prints any copy of any Act, proclamation, order, regulation, royal warrant, circular, list, gazette, or document which falsely purports to have been printed under the superintendence or authority of her Majesty's stationery office

or tenders in evidence any copy which falsely purports to have been printed as aforesaid, knowing that the same was not so printed, he shall be guilty of felony, and shall, on conviction, be liable to penal servitude for a term not exceeding seven years, or to be imprisoned for a term not exceeding two years, with or without hard labour.

4. The Documentary Evidence Act, 1868, as amended by this Act, shall apply to proclamations, orders, and regulations issued by the Lord Lieutenant, either alone or acting with the advice of the Privy Council in Ireland, as fully as it applies to proclamations, orders, and regulations issued by her Majesty.

In the same Act, the term "the Privy Council" shall include the Privy Council in Ireland, or any committee thereof.

In the same Act, and in this Act, the term "the Government Printer" shall include any printer to her Majesty in Ireland and any printer printing in Ireland under the superintendence or authority of her Majesty's stationery office.

CRIMINAL PROCEDURE ACT, 1865.

(28 & 29 VICT. c. 18.)

An Act for amending the Law of Evidence and Practice on Criminal Trials. [9th May 1865.]

* * * * *

3. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

4. If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

5. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.

6. A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.

7. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness thereto.

8. Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

9. The word "counsel" in this Act shall be construed to apply to attorneys in all cases where attorneys are allowed by law or by the practice of any court to appear as advocates.

10. This Act shall not apply to Scotland.

EVIDENCE ACT, 1851.

(14 & 15 VICT. c. 99.)

An Act to amend the Law of Evidence. [7th August 1851.]

WHEREAS it is expedient to amend the law of evidence in divers particulars: Be it therefore enacted as follows:

1. [*Repealed.*]

2. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either vivâ voce or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.

3. But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.

4. [*Repealed.*]

5. Nothing herein contained shall repeal any provision contained in the Wills Act, 1837.

6. Whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts of common law at Westminster or Dublin, such court may, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which previous to the passing of this Act a discovery might

have been obtained by filing a bill or by any other proceeding in a court of equity at the instance of the party so making application as aforesaid to the said court.

7. All proclamations, treaties, and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court; and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

8. Every certificate of the qualification of an apothecary which shall purport to be under the common seal of the society of the art and mystery of apothecaries of the city of London shall be received in evidence in any court of justice, and before any person having by law or by consent of parties authority to hear, receive, and examine evidence, without any proof of the said seal or of the authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has been from the date of the said certificate duly qualified to practise as an apothecary in any part of England or Wales.

9. Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in England or Wales without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in Ireland, or before any person having in Ireland by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

10. Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

11. Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in England or Wales or Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice of any of the British colonies, or before any person having in any of such colonies by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

12. [*Repealed.*]

13. And whereas it is expedient, as far as possible, to reduce the expense attendant upon the proof of criminal proceedings; be it enacted, that whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such

person, or a copy thereof; but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.

14. Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

15. If any officer authorised or required by this Act to furnish any certified copies or extracts shall wilfully certify any document as being a true copy or extract, knowing that the same is not a true copy or extract, as the case may be, he shall be guilty of a misdemeanor, and be liable, upon conviction, to imprisonment for any term not exceeding eighteen months.

16. Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.

17. If any person shall forge the seal, stamp, or signature of any document in this Act mentioned or referred to, or shall tender in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall upon conviction be liable to transportation for seven years, and whenever any such document shall have been admitted in evidence by virtue of this Act, the court or the person who shall have admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer

of the court or other proper person for such period and subject to such conditions as to the said court or person shall seem meet; and every person who shall be charged with committing any felony under this Act, or under the Act of the eighth and ninth years of her present Majesty, chapter one hundred and thirteen, may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed, in the county, district, or place in which he shall be apprehended or be in custody; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence laid and charged to have been committed, in any county, district, or place in which the principal offender may be tried.

18. This Act shall not extend to Scotland.

19. The words "British colony" as used in this Act shall apply to the islands of Guernsey, Jersey, Alderney, Sark, and Man, and to all other possessions of the British crown, wheresoever and whatsoever.

EVIDENCE AMENDMENT ACT, 1853.

(16 & 17 VICT. c. 83.)

An Act to amend an Act of the Fourteenth and Fifteenth Victoria, Chapter Ninety-nine. [20th August 1853.]

WHEREAS the law touching evidence requires further amendment: Be it therefore declared and enacted as follows:

1. [*On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either viva voce or by deposition according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.*]

2. Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her

husband, in any criminal proceeding [*or in any proceeding instituted in consequence of adultery*].

3. No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.

4. [*Repealed.*]

5. In citing this Act in other Acts of Parliament, or in any instrument, document, or proceeding, it shall be sufficient to use the expression, "the Evidence Amendment Act, 1853."

6. *This Act shall commence on the 11th day of July*, 1853.

N.B.—The portions of this Act printed in *italics* were repealed by 32 & 33 Vict. c. 68, s. 1, and by 38 & 39 Vict. c. 66.

EVIDENCE FURTHER AMENDMENT ACT, 1869.

(32 & 33 VICT. C. 68.)

An Act for the further Amendment of the Law of Evidence.
[9th August 1869.]

WHEREAS the discovery of truth in courts of justice has been signally promoted by the removal of restrictions on the admissibility of witnesses, and it is expedient to amend the law of evidence with the object of still further promoting such discovery: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. [*Repealed.*]

2. The parties to any action for breach of promise of marriage shall be competent to give evidence in such action: Provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise.

3. The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of

adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

4. [*Repealed.*]

5. This Act may be cited for all purposes as the Evidence Further Amendment Act, 1869.

6. This Act shall not extend to Scotland.

EVIDENCE BY COMMISSION ACT, 1843.

(6 & 7 VICT. c. 82.)

An Act . . . for amending the Law relating to Commissions for the Examination of Witnesses. [22nd August 1843.]

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5. And whereas there are at present no means of compelling the attendance of persons to be examined under any commission for the examination of witnesses issued by the courts of law or equity in England or Ireland, or by the courts of law in Scotland, to be executed in a part of the realm subject to different laws from that in which such commissions are issued, and great inconvenience may arise by reason thereof: Be it therefore enacted, that if any person, after being served with a written notice to attend any commissioner or commissioners appointed to execute any such commission for the examination of witnesses as aforesaid (such notice being signed by the commissioner or commissioners, and specifying the time and place of attendance), shall refuse or fail to appear and be examined under such commission, such refusal or failure to appear shall be certified by such commissioner or commissioners, and it shall thereupon be competent, to or on behalf of any party suing out such commission, to apply to any of the superior courts of law in that part of the kingdom within which such commission is to be executed, or any one of the judges of such courts, for a rule or order to compel the person or persons so refusing or failing as aforesaid to appear before such commissioner or commissioners, and to be examined under such commission, and it shall be lawful for the court or a judge to whom such application shall be made by rule or order to command the attendance and examination of any person to be named or the production of any writings or documents to be mentioned in such rule or order.

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BANKERS' BOOKS EVIDENCE ACT, 1879.

(42 VICT. c. 11.)

An Act to amend the Law of Evidence with respect to Bankers' Books. [23rd May 1879.]

1. This Act may be cited as the Bankers' Books Evidence Act, 1879.

2. The Bankers' Books Evidence Act, 1876, shall be repealed as from the passing of this Act, but such repeal shall not affect anything which has been done or happened before such repeal takes effect.

3. Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as primâ facie evidence of such entry, and of the matters, transactions, and accounts therein recorded.

4. A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.

Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.

5. A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct.

Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.

6. A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a judge made for special cause.

7. On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section

may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs.

8. The costs of any application to a court or judge under or for the purposes of this Act, and the costs of anything done or to be done under an order of a court or judge made under or for the purposes of this Act shall be in the discretion of the court or judge, who may order the same or any part thereof to be paid to any party by the bank where the same have been occasioned by any default or delay on the part of the bank. Any such order against a bank may be enforced as if the bank was a party to the proceeding.

9. In this Act the expressions "bank" and "banker" mean any person, persons, partnership, or company carrying on the business of bankers and having duly made a return to the Commissioners of Inland Revenue, and also any savings bank certified under the Acts relating to savings banks, and also any post office savings bank.

The fact of any such bank having duly made a return to the Commissioners of Inland Revenue may be proved in any legal proceeding by production of a copy of its return verified by the affidavit of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue; the fact that any such savings bank is certified under the Acts relating to savings banks may be proved by an office or examined copy of its certificate; the fact that any such bank is a post office savings bank may be proved by a certificate purporting to be under the hand of Her Majesty's Postmaster-General or one of the secretaries of the post office.

Expressions in this Act relating to "bankers' books" include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank.

10. In this Act—

The expression "legal proceeding" means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration;

The expression "the court" means the court, judge, arbitrator, persons or person before whom a legal proceeding is held or taken;

The expression "a judge" means with respect to England a judge of the High Court, and with respect to Scotland a lord ordinary of the Outer House of the Court of Session, and with respect to Ireland a judge of the High Court in Ireland;

The judge of a county court may with respect to any action in such court exercise the powers of a judge under this Act.

11. Sunday, Christmas Day, Good Friday, and any bank holiday shall be excluded from the computation of time under this Act.

REVENUE, FRIENDLY SOCIETIES, AND NATIONAL DEBT ACT, 1882.

(45 & 46 VICT. c. 72.)

An Act for amending the Laws relating to Customs and Inland Revenue, and Postage and other Stamps, and for making further provision respecting the National Debt and charges payable out of the public revenue or by the Commissioners for the Reduction of the National Debt, and for other purposes.

[18th August 1882.]

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11.—(2.) The expressions "bank" and "bankers" in the Bankers' Books Evidence Act, 1879, shall include any company carrying on the business of bankers to which the provisions of the Companies Acts, 1862 to 1880, are applicable, and having duly furnished to the registrar of joint stock companies a list and summary with the addition specified by this Act, and the fact of such list and summary having been duly furnished may be proved in any legal proceedings by the certificate of the registrar or any assistant registrar for the time being of joint stock companies.

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CRIMINAL EVIDENCE ACT, 1898.

(61 & 62 VICT. c. 36.)

An Act to Amend the Law of Evidence. [12th August 1898.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings (*a*), whether the person so charged is charged

(*a*) A person charged cannot give evidence before the grand jury (*R.* v. *Rhodes*, [1899] 1 Q. B. 77). Proceedings for extradition have been held within the Act (*R.* v. *Kams*, Times, 28th April, 1900). It has been held by DARLING, J., that a prisoner after plea of guilty cannot give evidence on oath in mitigation of sentence (*R.* v. *Hodgkinson*, 64 J. P. 808).

solely or jointly with any other person (*b*). Provided as follows :

(a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application (*c*) :

(b) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution (*d*) :

(c) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged :

(d) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage :

(e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged :

(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged (*e*) ; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given

(*b*) Where a person charged has given evidence before the committing magistrate his deposition is evidence against him at the trial : see *R.* v. *Bird*, 79 L. T. 359. This is on the principle that in criminal proceedings any statement made by a party thereto may be given in evidence against him except where the statement is not voluntary, or is made on oath improperly administered : see *R.* v. *Erdheim*, [1896] 2 Q. B. at p. 270.

(*c*) No time is fixed for making this application. It can therefore be made at any time before the evidence for the defence is closed. If other witnesses besides the person charged are called for the defence, such person need not be called as the first witness, but it is proper, and in most cases desirable in his own interest, that he should be called first.

(*d*) But any evidence given may be commented on by the prosecution ; see *ante*, p. 33 ; and the failure to give evidence may be commented on by the presiding judge or magistrate : *R.* v. *Rhodes*, [1899] 1 Q. B. 77.

(*e*) See *ante*, p. 450.

evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution (*f*); or

(iii) he has given evidence against any other person charged with the same offence (*g*):

(g) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses give their evidence:

(h) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn.

2. Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution (*h*).

3. In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

(*f*) In the latter part of this sub-section "conduct of the defence" means not only the method of conducting by the advocate of the person charged, but includes statements made by the person charged himself. "Character" does not apparently include credibility, but means moral character in other respects. Therefore the mere fact of its being stated by the person charged or his advocate that the evidence of the prosecutor or any of his witnesses is not to be believed is not an "imputation" within the sub-section. To say of a witness "He is a liar," does not "involve an imputation" (*R.* v. *Rouse*, [1904] 1 K. B. 184), but for the prisoner to suggest that a witness for the Crown had himself committed the offence with which the prisoner was charged, has been held to "involve an imputation" within the meaning of the sub-section (*R.* v. *Marshall*, 63 J. P. 36). As this sub-section (f) is inserted in favour of the person charged, it ought, as far as ambiguous, to be construed in his favour. It is important to observe that the earlier statutes (now superseded, though not repealed, by the present Act), under which a person charged could give evidence, contained no provisions limiting his cross-examination. But by s. 6 of the Act of 1898 it is provided that it shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act, except that it is not to affect the Evidence Act, 1877. The right of cross-examination is therefore regulated by this section, even in cases covered by the earlier statutes (*Charnock* v. *Merchant*, [1900] 1 Q. B. 474).

(*g*) If a prisoner in giving evidence incriminates a fellow prisoner, the latter has the right to cross-examine (*R.* v. *Hadwen*, [1902] 1 K. B. 886).

(*h*) In such a case counsel for the prosecution is entitled to sum up for the prosecution after the person charged has given evidence: *R.* v. *Gardner*, [1899] 1 Q. B. 150. When other witnesses are called for the defence, see *ante*, note (*c*).

4.—(1.) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.

(2.) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person (*i*).

5. In Scotland, in a case where a list of witnesses is required, the husband or wife of a person charged shall not be called as a witness for the defence, unless notice be given in the terms prescribed by section thirty-six of the Criminal Procedure (Scotland) Act, 1887.

6.—(1.) This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act (*k*), except that nothing in this Act shall affect the Evidence Act, 1877 (*l*).

(2.) But this Act shall not apply to proceedings in courts martial unless so applied—

(a) as to courts martial under the Naval Discipline Act, by general orders made in pursuance of section sixty-five of that Act; and

(b) as to courts martial under the Army Act by rules made in pursuance of section seventy of that Act.

7.—(1.) This Act shall not extend to Ireland.

(2.) This Act shall come into operation on the expiration of two months from the passing thereof.

(3.) This Act may be cited as the Criminal Evidence Act, 1898.

SCHEDULE.

ENACTMENTS REFERRED TO.

Session and Chapter.	Short Title.	Enactments referred to.
5 Geo. 4, c. 83.....	The Vagrancy Act, 1824.	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family.
8 & 9 Vict. c. 83.....	The Poor Law (Scotland) Act, 1845.	Section eighty.
24 & 25 Vict. c. 100	The Offences against the Person Act, 1861.	Sections forty-eight to fifty-five.
45 & 46 Vict. c. 75..	The Married Women's Property Act, 1882.	Section twelve and section sixteen.
48 & 49 Vict. c. 69..	The Criminal Law Amendment Act, 1885.	The whole Act.
57 & 58 Vict. c. 41..	The Prevention of Cruelty to Children Act, 1894.	The whole Act.

(*i*) See *ante*, p. 37. (*k*) See *ante*, p. 33. (*l*) For which see *ante*, p. 33.

MERCHANT SHIPPING ACT, 1894.

(57 & 58 VICT. c. 60.)

An Act to consolidate Enactments relating to Merchant Shipping.
[25th August 1894.]

* * * * *

64.—(1.) A person, on payment of a fee not exceeding one shilling, to be fixed by the Commissioners of Customs, may on application to the registrar at a reasonable time during the hours of his official attendance, inspect any register book.

(2.) The following documents shall be admissible in evidence in manner provided by this Act; namely,—

(a) Any register book under this part of this Act on its production from the custody of the registrar or other person having the lawful custody thereof;

(b) A certificate of registry under this Act purporting to be signed by the registrar or other proper officer;

(c) An indorsement on a certificate of registry purporting to be signed by the registrar or other proper officer;

(d) Every declaration made in pursuance of this part of this Act in respect of a British ship.

(3.) A copy or transcript of the register of British ships kept by the Registrar-General of Shipping and Seamen under the direction of the Board of Trade shall be admissible in evidence in manner provided by this Act, and have the same effect to all intents as the original register of which it is a copy or transcript.

* * * * *

239.—(6.) Every entry made in an official log-book in manner provided by this Act shall be admissible in evidence.

* * * * *

256.—(1.) All superintendents and all officers of customs shall take charge of all documents which are delivered or transmitted to or retained by them in pursuance of this Act, and shall keep them for such time (if any) as may be necessary for the purpose of settling any business arising at the place where the documents come into their hands, or for any other proper purpose, and shall, if required, produce them for any of those purposes, and shall then transmit them to the Registrar-General of Shipping and Seamen, and he shall record and preserve them, and they shall be admissible in evidence in manner provided by this Act, and they shall, on payment of a moderate fee fixed by the Board of Trade, or without payment if the Board so direct, be open to the inspection of any person.

(2.) The documents aforesaid shall be public records and documents within the meaning of the Public Record Offices Acts, 1838 and 1877, and those Acts shall, where applicable, apply to those documents in all respects, as if specifically referred to therein.

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695.—(1.) Where a document is by this Act declared to be admissible in evidence, such document shall, on its production from the proper custody, be admissible in evidence in any court or before any person having by law or consent of parties authority to receive evidence, and, subject to all just exceptions, shall be evidence of the matters stated therein in pursuance of this Act or by any officer in pursuance of his duties as such officer.

(2.) A copy of any such document or extract therefrom shall also be so admissible in evidence if proved to be an examined copy or extract, or if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original document was entrusted, and that officer shall furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words, but a person shall be entitled to have—

(a) a certified copy of the particulars entered by the registrar in the register book on the registry of the ship, together with a certified statement showing the ownership of the ship at the time being; and

(b) a certified copy of any declaration, or document, a copy of which is made evidence by this Act, on payment of one shilling for each copy.

(3.) If any such officer wilfully certifies any document as being a true copy or extract knowing the same not to be a true copy or extract, he shall for each offence be guilty of a misdemeanor, and be liable on conviction to imprisonment for any term not exceeding eighteen months.

(4.) If any person forges the seal, stamp, or signature of any document to which this section applies, or tenders in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall for each offence be guilty of felony, and be liable to penal servitude for a term not exceeding seven years, or to imprisonment for a term not exceeding two years, with or without hard labour, and whenever any such document has been admitted in evidence, the court or the person who admitted the same may on request direct that the same shall be impounded, and be kept in the custody of some officer of the court or other proper person, for such period or subject to such conditions as the court or person thinks fit.

696.—(1.) Where for the purposes of this Act any document is to be served on any person, that document may be served—

(a) in any case by delivering a copy thereof personally to the person to be served, or by leaving the same at his last place of abode; and

(b) if the document is to be served on the master of a ship, where there is one, or on a person belonging to a ship, by leaving the same for him on board that ship with the person being or appearing to be in command or charge of the ship; and

(c) if the document is to be served on the master of a ship, where there is no master, and the ship is in the United Kingdom, on the managing owner of the ship, or, if there is no managing owner, on some agent of the owner residing in the United Kingdom, or where no such agent is known or can be found, by affixing a copy thereof to the mast of the ship.

(2.) If any person obstructs the service on the master of a ship of any document under the provisions of this Act relating to the detention of ships as unseaworthy, that person shall for each offence be liable to a fine not exceeding ten pounds, and, if the owner or master of the ship is party or privy to the obstruction, he shall in respect of each offence be guilty of a misdemeanor.

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719. All documents purporting to be made, issued, or written by or under the direction of the Board of Trade, and to be sealed with the seal of the Board, or to be signed by their secretary or one of their assistant secretaries, or, if a certificate, by one of the officers of the Marine Department, shall be admissible in evidence in manner provided by this Act.

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COMPANIES ACT, 1862.

(25 & 26 VICT. c. 89.)

An Act for the Incorporation, Regulation, and Winding-up of Trading Companies and other Associations. [7th August 1862.]

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18. . . . A certificate of the incorporation of any company given by the registrar shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with.

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31. A certificate, under the common seal of the company, specifying any share or shares or stock held by any member of a company, shall be primâ facie evidence of the title of the member to the share or shares or stock therein specified.

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37. The register of members (*a*) shall be primâ facie evidence of any matters by this Act directed or authorised to be inserted therein.

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61. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company into whose affairs they have made inspection, shall be admissible in any legal proceeding, as evidence of the opinion of the inspectors in relation to any matter contained in such report.

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67. Every company under this Act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company, in cases where there are directors or managers, to be duly entered in books to be from time to time provided for the purpose; and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting, shall be received as evidence in all legal proceedings; and until the contrary is proved, every general meeting of the company or meeting of directors or managers in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened, and all resolutions passed thereat, or proceedings had, to have been duly passed and had; and all appointments of directors, managers, or liquidators shall be deemed to be valid, and all acts done by such directors, managers, or liquidators shall be valid notwithstanding any defect that may afterwards be discovered in their appointments or qualifications (*b*).

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106. Any order made by the court in pursuance of this Act upon any contributory shall, subject to the provisions herein contained for appealing against such order, be conclusive evidence that the moneys, if any, thereby appearing to be due or ordered to be paid are due; and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons, and in all proceedings whatsoever,

(*a*) Kept under s. 25 of this Act.

(*b*) All acts done, etc., means done before the invalidity is shown, and does not cover subsequent acts (*Re Bridport Old Brewery Co.*, L. R. 2 Ch. 194.)

with the exception of proceedings taken against the real estate of any deceased contributory, in which case such order shall only be primâ facie evidence for the purpose of charging his real estate, unless his heirs or devisees were on the list of contributories at the time of the order being made.

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115. The court may, after it has made an order for winding up the company, summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company; and the court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company; and if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the court at the time appointed, having no lawful impediment (made known to the court at the time of its sitting, and allowed by it), the court may cause such person to be apprehended, and brought before the court for examination; nevertheless, in cases where any person claims any lien on papers, deeds, or writings or documents produced by him, such production shall be without prejudice to such lien, and the court shall have jurisdiction in the winding up to determine all questions relating to such lien.

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117. The court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before them in manner aforesaid concerning the affairs, dealings, estate, or effects of the company, and may reduce into writing the answers of every such person, and require him to subscribe the same.

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154. Where any company is being wound up, all books, accounts, and documents of the company and of the liquidators shall, as between the contributories of the company, be primâ facie evidence of the truth of all matters purporting to be therein recorded (*c*).

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192. A certificate of incorporation given at any time to any company registered in pursuance of this part of this Act, shall be conclusive evidence that all the requisitions herein contained in respect of registration under this Act have been complied with, and that the company is authorised to be registered under

(*c*) *Re Great Northern Salt, etc. Works*, 44 Ch. D. 472.

this Act as a limited or unlimited company, as the case may be; and the date of incorporation mentioned in such certificate shall be deemed to be the date at which the company is incorporated under this Act.

COMPANIES ACT, 1877.

(40 & 41 VICT. c. 26.)

An Act to amend the Companies Acts of 1862 *and* 1867. [23rd July 1877.]

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6. And whereas it is expedient to make provision for the reception as legal evidence of certificates of incorporation other than the original certificates, and of certified copies of, or extracts from, any documents filed and registered under the Companies Acts, 1862 to 1877: Be it enacted, that any certificate of the incorporation of any company given by the registrar or by any assistant registrar for the time being shall be received in evidence as if it were the original certificate; and any copy of or extract from any of the documents or part of the documents kept and registered at any of the offices for the registration of joint stock companies in England, Scotland, or Ireland, if duly certified to be a true copy under the hand of the registrar or one of the assistant registrars for the time being, and whom it shall not be necessary to prove to be the registrar or assistant registrar, shall, in all legal proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as of equal validity with the original document.

COMPANIES (WINDING UP) ACT, 1890.

(53 & 54 VICT. c. 63.)

An Act to amend the Law relating to the Winding up of Companies in England and Wales. [18th August 1890.]

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8.—(1.) Where the court has made an order for winding up a company, the official receiver shall, as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the court—

(a) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities; and

(b) if the company has failed, as to the causes of the failure; and

(c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

(2.) The official receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the court.

(3.) The court may, after consideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the court on a day appointed by the court for that purpose, and be publicly examined as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as director or officer of the company.

(4.) The official receiver shall take part in the examination, and for that purpose may, if specially authorised by the Board of Trade in that behalf, employ a solicitor with or without counsel.

(5.) The liquidator where the official receiver is not the liquidator and any creditor or contributory of the company may also take part in the examination either personally or by solicitor or counsel.

(6.) The court may put such questions to the person examined as to the court may seem expedient.

(7.) The person examined shall be examined on oath, and it shall be his duty to answer all such questions as the court may put or allow to be put to him. The person examined shall at his own cost prior to such examination, be furnished with a copy of the official receiver's report, and shall also at his own cost be entitled to employ at such examination a solicitor with or without counsel, who shall be at liberty to put such questions to the person examined as the court may deem just for the purpose of enabling that person to explain or qualify any answers given by him. Provided always, that if such person is, in the opinion of the court, exculpated from any charges made or suggested against him, the court may allow him such costs as the court in its discretion may think fit. Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him. They shall also be open to the inspection of any creditor or contributory of the company at all reasonable times.

(8.) The court may, if it thinks fit, adjourn the examination from time to time.

(9.) A public examination under this section may, if the court so directs, and subject to general rules, be held before any judge of county courts, or before any officer of the Supreme Court, being an official referee, master, registrar in bankruptcy, or chief clerk, or before any district registrar of the High Court named for the purpose by the Lord Chancellor, or in the case of companies being wound up by a palatine court, before a registrar of that court, and the powers of the court under sub-sections six, seven, and eight of this section may (except as to costs) be exercised by the person before whom the examination is held.

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BANKRUPTCY ACT, 1883.

(46 & 47 VICT. C. 52.)

An Act to amend and consolidate the Law of Bankruptcy.

[25th August 1883.]

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17.—(1.) Where the court makes a receiving order it shall hold a public sitting, on a day to be appointed by the court, for the examination of the debtor, and the debtor shall attend thereat, and shall be examined as to his conduct, dealings, and property.

(2.) The examination shall be held as soon as conveniently may be after the expiration of the time for the submission of the debtor's statement of affairs.

(3.) The court may adjourn the examination from time to time.

(4.) Any creditor who has tendered a proof, or his representative authorised in writing, may question the debtor concerning his affairs and the causes of his failure.

(5.) The official receiver shall take part in the examination of the debtor; and for the purpose thereof, if specially authorised by the Board of Trade, may employ a solicitor with or without counsel.

(6.) If a trustee is appointed before the conclusion of the examination he may take part therein.

(7.) The court may put such questions to the debtor as it may think expedient.

(8.) The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the court may put or allow to be put to him. Such notes of the examination as the

court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times.

(9.) When the court is of opinion that the affairs of the debtor have been sufficiently investigated, it shall, by order, declare that his examination is concluded, but such order shall not be made until after the day appointed for the first meeting of creditors (*a*).

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27.—(For this section see *ante*, p. 98.)

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105.—(5.) Subject to general rules, the court may in any matter take the whole or any part of the evidence, either viva voce or by interrogatories, or upon affidavit, or by commission abroad.

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132.—(1.) A copy of the London Gazette containing any notice inserted therein in pursuance of this Act shall be evidence of the facts stated in the notice.

(2.) The production of a copy of the London Gazette containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date.

133.—(1.) A minute of proceedings at a meeting of creditors under this Act, signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof.

(2.) Until the contrary is proved, every meeting of creditors in respect of the proceedings whereof a minute has been so signed shall be deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed or had.

134. Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate made by any

(*a*) By s. 2 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), it is enacted—"(1) The notes taken of a debtor's public examination in pursuance of section seventeen of the principal Act shall be read over either to or by the debtor.

"(2) Where the debtor is a lunatic or suffers from any such mental or physical affliction or disability as in the opinion of the court makes him unfit to attend his public examination, the court may make an order dispensing with such examination, or directing that the debtor be examined on such terms, in such manner, and at such place as to the court seems expedient."

court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit, or document made or used in the course of any bankruptcy proceedings, or other proceedings had under this Act, shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever.

135. Subject to general rules, any affidavit to be used in a bankruptcy court may be sworn before any person authorised to administer oaths in the High Court, or in the Court of Chancery of the county palatine of Lancaster, or before any registrar of a bankruptcy court, or before any officer of a bankruptcy court authorised in writing on that behalf by the judge of the court, or, in the case of a person residing in Scotland or in Ireland, before a judge ordinary, magistrate or justice of the peace, or, in the case of a person who is out of the kingdom of Great Britain and Ireland, before a magistrate or justice of the peace or other person qualified to administer oaths in the country where he resides (he being certified to be a magistrate or justice of the peace, or qualified as aforesaid by a British minister or British consul, or by a notary public).

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

137. Every court having jurisdiction in bankruptcy under this Act shall have a seal describing the court in such manner as may be directed by order of the Lord Chancellor, and judicial notice shall be taken of the seal, and of the signature of the judge or registrar of any such court, in all legal proceedings.

138. A certificate of the Board of Trade that a person has been appointed trustee under this Act, shall be conclusive evidence of his appointment.

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140.—(1.) All documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed with the seal of the board, or to be signed by a secretary or assistant secretary of the board, or any person authorised in that behalf by the president of the board, shall be received in evidence, and deemed to be such orders or certificates without further proof unless the contrary is shown.

(2.) A certificate signed by the president of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade shall be conclusive evidence of the fact so certified.

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142. All notices and other documents for the service of which no special mode is directed may be sent by prepaid post letter to the last known address of the person to be served therewith.

143.—(1.) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court.

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THE BANKRUPTCY RULES, 1886 AND 1890.

17.—(1.) In the high court the senior bankruptcy registrar, and in a county court the registrar shall file a copy of each issue of the "London Gazette," and whenever the Gazette contains any advertisement relating to any matter under the Act in such court, he shall at the same time file with the proceedings in the matter a memorandum referring to and giving the date of such advertisement.

(2.) In the case of an advertisement in a local paper, the registrar shall in like manner file a copy of the paper and a memorandum (which shall be in the Form No. 175 in the Appendix) referring to and giving the date of such advertisement.

(3.) For this purpose one copy of each local paper, in which any advertisement relating to any matter under the Act in such court is inserted, shall be left with the registrar by the person inserting the advertisement.

(4.) The memorandum by the registrar shall be *primâ facie* evidence that the advertisement to which it refers was duly inserted in the issue of the Gazette or paper mentioned in it.

17A. Where in the exercise of their functions under the Acts or Rules, the Board of Trade or the official receiver require to inspect or use the file of proceedings in any matter, the registrar shall (unless the file is at the time required for use in court or by him) on request transmit the file of proceedings to the Board of Trade or official receiver, as the case may be.

61. A subpœna for the attendance of a witness shall be issued by the court at the instance of an official receiver, a trustee, a creditor, a debtor, or any applicant or respondent in any matter, with or without a clause requiring the production of books, deeds, papers, documents, and writings in his possession or control, and in such subpœna the names of three witnesses may be inserted.

66. The court may, in any matter where it shall appear necessary for the purposes of justice, make an order for the examination upon oath before the court or any officer of the court, or any other person, and at any place, of any witness or person, and may empower any party to any such matter to give such deposition in evidence therein on such terms (if any) as the court may direct.

69. The court may, in any matter, at any stage of the proceedings, order the attendance of any person for the purpose of producing any writings or other documents named in the order, which the court may think fit to be produced.

70. Any person wilfully disobeying any subpœna or order requiring his attendance for the purpose of being examined or producing any document shall be deemed guilty of contempt of court, and may be dealt with accordingly.

71. Any witness (other than the debtor) required to attend for the purpose of being examined, or of producing any document, shall be entitled to the like conduct money and payment for expenses and loss of time, as upon attendance at a trial in court.

72. Any party to any proceeding in court may, with the leave of the court, administer interrogatories to, or obtain discovery of documents from, any other party to such proceeding. Proceedings under this rule shall be regulated as nearly as may be by the Rules of the Supreme Court for the time being in force in relation to discovery and inspection. An application for leave under this rule may be made *ex parte*.

PREVENTION OF CRIMES ACT, 1871.

(34 & 35 VICT. c. 112.)

An Act for the more effectual Prevention of Crime.

[21st August 1871.]

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18. A previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved

with the person appearing in the record or extract of conviction to have been convicted.

A record or extract of a conviction shall in the case of an indictable offence consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction), and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and in the case of a summary conviction shall consist of a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned.

A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same.

A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom; and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof.

A fee not exceeding five shillings may be charged for a record of a conviction given in pursuance of this section.

The mode of proving a previous conviction authorised by this section shall be in addition to and not in exclusion of any other authorised mode of proving such conviction.

19. Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him.

Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen; provided that not less than seven days' notice in writing shall have been

given to the person accused that proof is intended to be given of such previous conviction ; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused.

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NATURALIZATION ACT, 1870.

(33 & 34 VICT. C. 14.)

An Act to amend the Law relating to the legal condition of Aliens and British Subjects. [12th May 1870.]

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12. The following regulations shall be made with respect to evidence under this Act :

(1.) Any declaration authorized to be made under this Act may be proved in any legal proceeding by the production of the original declaration, or of any copy thereof certified to be a true copy by one of her Majesty's principal Secretaries of State, or by any person authorized by regulations of one of her Majesty's principal Secretaries of State to give certified copies of such declaration, and the production of such declaration or copy shall be evidence of the person therein named as declarant having made the same at the date in the said declaration mentioned :

(2.) A certificate of naturalization may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of her Majesty's principal Secretaries of State, or by any person authorized by regulations of one of her Majesty's principal Secretaries of State to give certified copies of such certificate :

(3.) A certificate of re-admission to British nationality may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of her Majesty's principal Secretaries of State, or by any person authorized by regulations of one of her Majesty's principal Secretaries of State to give certified copies of such certificate :

(4.) Entries in any register authorized to be made in pursuance of this Act shall be proved by such copies and certified in such manner as may be directed by one of her

Majesty's principal Secretaries of State, and the copies of such entries shall be evidence of any matters by this Act or by any regulation of the said Secretary of State authorized to be inserted in the register:

(5.) The Documentary Evidence Act, 1868, shall apply to any regulation made by a Secretary of State, in pursuance of or for the purpose of carrying into effect any of the provisions of this Act.

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EXTRADITION ACT, 1870.

(33 & 34 VICT. c. 52.)

An Act for amending the Law relating to the Extradition of Criminals. [9th August 1870.]

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14. Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act.

15. Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this Act if authenticated in manner provided for the time being by law, or authenticated as follows:

(1.) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign state where the same was issued;

(2.) If the depositions or statements or the copies thereof purport to be certified under the hand of a judge, magistrate, or officer of the foreign state where the same were taken to be the original depositions or statements, or to be true copies thereof, as the case may require; and

(3.) If the certificate of or judicial document stating the fact of conviction purports to be certified by a judge, magistrate, or officer of the foreign state where the conviction took place; and

if in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness or by being sealed with the official seal of the minister of justice, or some other

minister of state: And all courts of justice, justices, and magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.

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EXTRADITION ACT, 1873.

(36 & 37 VICT. c. 60.)

An Act to amend the Extradition Act, 1870. [5th August 1873.]

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4. The provisions of the principal Act relating to depositions and statements on oath taken in a foreign state, and copies of such original depositions and statements, do and shall extend to affirmations taken in a foreign state, and copies of such affirmations.

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FRIENDLY SOCIETIES ACT, 1875.

(38 & 39 VICT. c. 60.)

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39. Every instrument or document, copy or extract of an instrument or document, bearing the seal or stamp of the central office shall be received in evidence without further proof, and every document purporting to be signed by the chief or any assistant registrar, or any inspector or public auditor or valuer under this Act, shall, in the absence of any evidence to the contrary, be received in evidence without proof of the signature.

INDUSTRIAL AND PROVIDENT SOCIETIES ACT, 1893.

(56 & 57 VICT. c. 39.)

An Act to consolidate and amend the Laws relating to Industrial and Provident Societies. [12th September 1893.]

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34. Any register or list of members or shares kept by any society shall be primâ facie evidence of any of the following particulars entered therein:

(a) The names, addresses, and occupations of the members, the number of shares held by them respectively, the

numbers of such shares, if they are distinguished by numbers, and the amount paid or agreed to be considered as paid on any such shares ;

(b) The date at which the name of any person, company, or society was entered in such register or list as a member ;

(c) The date at which any such person, company, or society ceased to be a member.

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75. Every copy of rules or other instrument or document, copy or extract of an instrument or document, bearing the seal or stamp of the central office, shall be received in evidence without further proof ; and every document purporting to be signed by the chief or any assistant registrar, or any inspector or public auditor under this Act, shall, in the absence of any evidence to the contrary, be received in evidence without proof of the signature.

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FUGITIVE OFFENDERS ACT, 1881.

(44 & 45 VICT. c. 69.)

An Act to amend the Law with respect to Fugitive Offenders in Her Majesty's Dominions, and for other purposes connected with the Trial of Offenders. [27th August 1881.]

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29. A magistrate may take depositions for the purposes of this Act, in the absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him.

Depositions (whether taken in the absence of the fugitive or otherwise) and copies thereof, and official certificates of or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under this Act.

Provided that nothing in this Act shall authorise the reception of any such depositions, copies, certificates, or documents in evidence against a person upon his trial for an offence.

Warrants and depositions, and copies thereof, and official certificates of or judicial documents stating facts, shall be deemed duly authenticated for the purposes of this Act if they are authenticated in manner provided for the time being by law, or if they purport to be signed by or authenticated by the signature of a judge, magistrate, or officer of the part of her

Majesty's dominions in which the same are issued, taken, or made; and are authenticated either by the oath of some witness, or by being sealed with the official seal of a Secretary of State, or with the public seal of a British possession, or with the official seal of a governor of a British possession, or of a colonial secretary, or of some secretary or minister administering a department of the government of a British possession.

And all courts and magistrates shall take judicial notice of every such seal as is in this section mentioned, and shall admit in evidence, without further proof, the documents authenticated by it.

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PARTNERSHIP ACT, 1890.

(53 & 54 VICT. c. 39.)

An Act to declare and amend the Law of Partnership.

[14th August 1890.]

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5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

6. An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners. Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

7. Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner.

8. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

14. (See *ante*, p. 223.)

15. An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

16. Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

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STAMP ACT, 1891.

(54 & 55 VICT. c. 39.)

An Act to consolidate the Enactments granting and relating to the Stamp Duties upon Instruments and certain other Enactments relating to Stamp Duties. [21st July 1891.]

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15.—(1.) Save where other express provision is in this Act made, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of ten pounds, and also by way of further penalty, where the unpaid duty exceeds ten pounds, of interest on such duty, at the rate of five pounds per centum per annum, from the day upon which the instrument was first executed up to the time when the amount of interest is equal to the unpaid duty.

(2.) In the case of such instruments hereinafter mentioned as are chargeable with ad valorem duty, the following provisions shall have effect:

(a) The instrument, unless it is written upon duly stamped material, shall be duly stamped with the proper ad valorem duty before the expiration of thirty days after it is first executed, or after it has been first received in the United Kingdom in case it is first executed at any place out of the United Kingdom, unless the opinion of the Commissioners with respect to the amount of duty with which the instrument is

chargeable, has, before such expiration, been required under the provisions of this Act:

(b) If the opinion of the Commissioners with respect to any such instrument has been required, the instrument shall be stamped in accordance with the assessment of the Commissioners within fourteen days after notice of the assessment:

(c) If any such instrument executed after the sixteenth day of May one thousand eight hundred and eighty-eight has not been or is not duly stamped in conformity with the foregoing provisions of this sub-section, the person in that behalf hereinafter specified shall incur a fine of ten pounds, and in addition to the penalty payable on stamping the instrument there shall be paid a further penalty equivalent to the stamp duty thereon, unless a reasonable excuse for the delay in stamping, or the omission to stamp, or the insufficiency of stamp, be afforded to the satisfaction of the Commissioners, or of the court, judge, arbitrator, or referee before whom it is produced:

(d) The instruments and persons to which the provisions of this sub-section are to apply are as follows:

Title of Instrument as described in the First Schedule to this Act.	Person liable to Penalty.
Bond, covenant, or instrument of any kind whatsoever.	The obligee, covenantee, or other person taking the security.
Conveyance on sale	The vendee or transferee.
Lease or tack	The lessee.
Mortgage, bond, debenture, covenant, and warrant of attorney to confess and enter up judgment.	The mortgagee or obligee; in the case of a transfer or reconveyance, the transferee, assignee, or disponee, or the person redeeming the security.
Settlement.....	The settlor.

(3.) Provided that save where other express provision is made by this Act in relation to any particular instrument:

(a) Any unstamped or insufficiently stamped instrument which has been first executed at any place out of the United Kingdom, may be stamped, at any time within thirty days after it has been first received in the United Kingdom, on payment of the unpaid duty only: and

(b) The Commissioners may, if they think fit, [*at any time within three months*] (*a*), after the first execution of any

(*a*) The words in italics are now repealed by 58 & 59 Vict. c. 6.

instrument, mitigate or remit any penalty payable on stamping.

(4.) The payment of any penalty payable on stamping is to be denoted on the instrument by a particular stamp.

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BETTING AND LOANS (INFANTS) ACT, 1892.

(55 VICT. c. 4.)

An Act to render Penal the inciting Infants to Betting or Wagering or to Borrowing Money. [29th March 1892.]

1.—(1.) If anyone, for the purpose of earning commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to make any bet or wager, or to enter into or take any share or interest in any betting or wagering transaction, or to apply to any person or at any place, with a view to obtaining information or advice for the purpose of any bet or wager, or for information as to any race, fight, game, sport, or other contingency upon which betting or wagering is generally carried on, he shall be guilty of a misdemeanor, and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

(2.) If any such circular, notice, advertisement, letter, telegram, or other document as in this section mentioned, names or refers to anyone as a person to whom any payment may be made, or from whom information may be obtained, for the purpose of or in relation to betting or wagering, the person so named or referred to shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he had not consented to be so named, and that he was not in any way a party to, and was wholly ignorant of, the sending of such document.

2.—(1.) If anyone, for the purpose of earning interest, commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites

or may reasonably be implied to invite the person receiving it to borrow money, or to enter into any transaction involving the borrowing of money, or to apply to any person or at any place with a view to obtaining information or advice as to borrowing money, he shall be guilty of a misdemeanor, and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

(2.) If any such document as above in this section mentioned sent to an infant purports to issue from any address named therein, or indicates any address as the place at which application is to be made with reference to the subject-matter of the document, and at that place there is carried on any business connected with loans, whether making or procuring loans or otherwise, every person who attends at such place for the purpose of taking part in or who takes part in or assists in the carrying on of such business shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he was not in any way a party to and was wholly ignorant of the sending of such document.

3. If any such circular, notice, advertisement, letter, telegram, or other document as in the preceding sections or either of them mentioned is sent to any person at any university, college, school, or other place of education, and such person is an infant, the person sending or causing the same to be sent shall be deemed to have known that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age.

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6. In any proceeding against any person for an offence under this Act such person and his wife or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case.

7. In the application of this Act to Scotland:

The word "infant" means and includes any minor or pupil:

The word "indictment" has the same meaning as in the Criminal Procedure (Scotland) Act, 1887:

The expression "summary conviction" means a conviction under the Summary Jurisdiction (Scotland) Acts.

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COLONIAL PROBATES ACT, 1892.

(55 VICT. c. 6.)

An Act to provide for the Recognition in the United Kingdom of Probates and Letters of Administration granted in British Possessions. [20th May 1892.]

1. Her Majesty the Queen may, on being satisfied that the legislature of any British possession has made adequate provision for the recognition in that possession of probates and letters of administration granted by the courts of the United Kingdom, direct by Order in Council that this Act shall, subject to any exceptions and modifications specified in the Order, apply to that possession, and thereupon, while the Order is in force, this Act shall apply accordingly.

2.—(1.) Where a court of probate in a British possession to which this Act applies has granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with, a court of probate in the United Kingdom, be sealed with the seal of that court, and, thereupon, shall be of the like force and effect, and have the same operation in the United Kingdom, as if granted by that court.

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6. In this Act—

The expression "court of probate" means any court or authority, by whatever name designated, having jurisdiction in matters of probate, and in Scotland means the sheriff court of the county of Edinburgh :

The expressions "probate" and "letters of administration" include confirmation in Scotland, and any instrument having in a British possession the same effect which under English law is given to probate and letters of administration respectively :

The expression "probate duty" includes any duty payable on the value of the estate and effects for which probate or letters of administration is or are granted :

The expression "British court in a foreign country" means any British court having jurisdiction out of the Queen's dominions in pursuance of an Order in Council, whether made under any Act or otherwise.

7. This Act may be cited as the Colonial Probates Act, 1892.

WITNESSES (PUBLIC INQUIRIES) PROTECTION ACT, 1892.

(55 & 56 VICT. c. 64.)

An Act for the better Protection of Witnesses giving Evidence before any Royal Commission or any Committee of either House of Parliament, or on other Public Inquiries.

[28th June, 1892.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In this Act the word "inquiry" shall mean any inquiry held under the authority of any royal commission or by any committee of either house of parliament, or pursuant to any statutory authority, whether the evidence at such inquiry is or is not given on oath, but shall not include any inquiry by any court of justice.

2. Every person who commits any of the following acts, that is to say, who threatens, or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure, any person for having given evidence upon any inquiry, or on account of the evidence which he has given upon any such inquiry, shall, unless such evidence was given in bad faith, be guilty of a misdemeanor, and be liable upon conviction thereof to a maximum penalty of one hundred pounds, or to a maximum imprisonment of three months.

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4. It shall be lawful for any court before which any person may be convicted of any offence under this Act, if it thinks fit, in addition to sentence or punishment by way of fine or imprisonment, to condemn such person to pay the whole or any part of the costs and expenses incurred in and about the prosecution and conviction for the offence of which he shall be convicted, and, upon the application of the complainant, and immediately after such conviction, to award to complainant any sum of money which it may think reasonable, having regard to all the circumstances of the case, by way of satisfaction or compensation for any loss of situation, wages, status, or other damnification or injury suffered by the complainant through or by means of the offence of which such person shall be so convicted, provided that where the case is tried before a jury, such jury shall determine what amount, if any, is to be paid by way of satisfaction or compensation.

5. The amount awarded for such satisfaction or compensation, together with such costs, to be taxed by the proper officer of the court, shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and be recoverable accordingly.

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7. Nothing in this Act contained shall in any way lessen or affect any power or privilege possessed by either house of parliament, or any power given by statute in the premises.

8. This Act may be cited as the Witnesses (Public Inquiries) Protection Act, 1892.

RULES OF THE SUPREME COURT, 1883.

ORDER XXX.

SUMMONS FOR DIRECTIONS.

1.—(a) Subject as hereinafter mentioned, in every action a summons for directions shall be taken out by the plaintiff returnable in not less than four days.

(b) Such summons shall be taken out after appearance and before the plaintiff takes any fresh step in the action other than application for an injunction, or for a receiver, or for summary judgment under Order XIV., or to enter judgment in default of defence under Order XXVII., Rule 2.

7. On the hearing of the summons, the court or a judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the court or judge may direct (*a*).

ORDER XXXVII.

I. EVIDENCE GENERALLY.

1. In the absence of any agreement in writing between the solicitors of all parties, and subject to these rules, the witnesses at the trial of any action or at any assessment of damages shall be examined *viva voce* and in open court, but the court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the

(*a*) The object of this Rule is to dispense, to a certain limited extent, with the technical rules of evidence (*Baerlein* v. *Chartered Mercantile Bank*, [1895] 2 Ch. 488).

affidavit of any witness may be read at the hearing or trial, on such conditions as the court or judge may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with be examined by interrogatories or otherwise before a commissioner or examiner; provided that, where it appears to the court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

2. In default actions *in rem*, and in references in admiralty actions, evidence may be given by affidavit.

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

4. Office copies of all writs, records, pleadings, and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters and between all persons or parties, to the same extent as the original would be admissible.

II. EXAMINATION OF WITNESSES.

5. The court or a judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the court or judge or any officer of the court, or any other person and at any place of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court or a judge may direct.

6. [*Provides the form of an order for a commission to examine witnesses.*]

6A. If in any case the court or a judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission. . . .

7. The court or a judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the purpose of producing any writings or other documents named in the order which the court or judge may think fit to be produced: Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial.

8. Any person wilfully disobeying any order requiring his attendance for the purpose of being examined or producing any document shall be deemed guilty of contempt of court, and may be dealt with accordingly.

9. Any person required to attend for the purpose of being examined or of producing any document, shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court.

10. Where any witness or person is ordered to be examined before any officer of the court, or before any person appointed for the purpose, the person taking the examination shall be furnished by the party on whose application the order was made with a copy of the writ and pleadings, if any, or with a copy of the documents necessary to inform the person taking the examination of the questions at issue between the parties.

11. The examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses shall be subject to cross-examination and re-examination.

12. The depositions taken before an officer of the court, or before any other person appointed to take the examination, shall be taken down in writing by or in the presence of the examiner, not ordinarily by question and answer, but so as to represent as nearly as may be the statement of the witness, and when completed shall be read over to the witness and signed by him in the presence of the parties, or such of them as may think fit to attend. If the witness shall refuse to sign the depositions, the examiner shall sign the same. The examiner may put down any particular question or answer if there should appear any special reason for doing so, and may put any question to the witness as to the meaning of any answer, or as to any matter arising in the course of the examination. Any questions which may be objected to may be taken down by the examiner in the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question.

13. If any person duly summoned by *subpœna* to attend for examination shall refuse to attend, or if, having attended, he shall refuse to be sworn or to answer any lawful question, a certificate of such refusal, signed by the examiner, shall be filed at the central office, and thereupon the party requiring the attendance of the witness may apply to the court or a judge *ex parte* or on notice for an order directing the witness to attend, or to be sworn, or to answer any question, as the case may be.

14. If any witness shall object to any question which may be put to him before an examiner, the question so put, and the objection of the witness thereto, shall be taken down by the examiner and transmitted by him to the central office to be there filed, and

the validity of the objection shall be decided by the court or a judge.

15. In any case under the two last preceding Rules, the court or a judge shall have power to order the witness to pay any costs occasioned by his refusal or objection.

16. When the examination of any witness before any examiner shall have been concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the central office, and there filed.

17. The person taking the examination of a witness under these Rules may, and if need be shall, make a special report to the court touching such examination, and the conduct or absence of any witness or other persons thereon, and the court or a judge may direct such proceedings and make such order as upon the report they or he may think just.

18. Except where by this Order otherwise provided, or directed by the court or a judge, no deposition shall be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the court or judge is satisfied that the deponent is dead, or beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence saving all just exceptions without proof of the signature to such certificate.

19. Any officer of the court, or other person directed to take the examination of any witness or person, may administer oaths.

20. Any party in any cause or matter may by *subpœna ad testificandum* or *duces tecum* require the attendance of any witness before an officer of the court, or other person appointed to take the examination, for the purpose of using his evidence upon any proceeding in the cause or matter in like manner as such witness would be bound to attend and be examined at the hearing or trial; and any party or witness having made an affidavit to be used or which shall be used on any proceeding in the cause or matter shall be bound on being served with such *subpœna* to attend before such officer or person for cross-examination.

21. Evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial.

22. The practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial shall extend and be applicable to evidence taken in any cause or matter at any stage.

23. The practice of the court with respect to evidence at a

trial, when applied to evidence to be taken before an officer of the court or other person in any cause or matter after the hearing or trial, shall be subject to any special directions which may be given in any case.

24. No affidavit or deposition filed or made before issue joined in any cause or matter shall without special leave of the court or a judge be received at the hearing or trial thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the court or a judge, notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf.

25. All evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter.

III. SUBPŒNA.

26 to 34 [*deal with the issuing, form, and service, of a subpœna*].

ORDER XXXVIII.

I. AFFIDAVITS AND DEPOSITIONS.

1. Upon any motion, petition, or summons, evidence may be given by affidavit; but the court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

2. Every affidavit shall be intituled in the cause or matter in which it is sworn; but in every case in which there are more than one plaintiff or defendant, it shall be sufficient to state the full name of the first plaintiff or defendant respectively, and that there are other plaintiffs or defendants, as the case may be; and the costs occasioned by any unnecessary prolixity in any such title shall be disallowed by the taxing officer.

3. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same (*a*).

4. Affidavits sworn in England shall be sworn before a judge, district registrar, commissioner to administer oaths, or officer empowered under these rules to administer oaths.

(*a*) See *ante*, p. 515.

5. Every commissioner to administer oaths shall express the time when and the place where he shall take any affidavit, or the acknowledgment of any deed, or recognizance; otherwise the same shall not be held authentic, nor be admitted to be filed or enrolled without the leave of the court or a judge; and every such commissioner shall express the time when, and the place where, he shall do any other act incident to his office.

6. All examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court, and also acknowledgments required for the purpose of enrolling any deed in the central office, may be sworn and taken in Scotland or Ireland or the Channel Islands, or in any colony, island, plantation, or place under the dominion of her Majesty in foreign parts, before any judge, court, notary public, or person lawfully authorised to administer oaths in such country, colony, island, plantation, or place respectively, or before any of her Majesty's consuls or vice-consuls in any foreign parts out of her Majesty's dominions; and the judges and other officers of the High Court shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, person, consul, or vice-consul, attached, appended, or subscribed to any such examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or to any other deed or document.

7. Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. Every affidavit shall be written or printed bookwise. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule.

8. Every affidavit shall state the description and true place of abode of the deponent.

9. In every affidavit made by two or more deponents the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents.

10. Every affidavit or other proof used in admiralty actions shall be filed in the admiralty registry: every affidavit used in probate actions shall be filed in the probate registry: every affidavit used on the Crown side of the Queen's Bench Division shall be filed in the Crown Office Department: every affidavit used in a cause or matter proceeding in a district registry shall be filed there: and every other affidavit used shall be filed in the central office. There shall be indorsed on every affidavit a note showing on whose behalf it is filed, and no affidavit shall be filed

or used without such note, unless the court or a judge shall otherwise direct.

11. The court or a judge may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client.

12. No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure, shall without leave of the court or a judge be read or made use of in any matter depending in court unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or, if taken at the central office, either by his initials or by the stamp of that office, nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it.

13. Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the court or a judge is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent.

14. The court or a judge may receive any affidavit sworn for the purpose of being used in any cause or matter, notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received.

15. In cases in which by the present practice an original affidavit is allowed to be used, it shall before it is used be stamped with a proper filing stamp, and shall at the time when it is used be delivered to and left with the proper officer in court or in chambers, who shall send it to be filed. An office copy of an affidavit may in all cases be used, the original affidavit having been previously filed, and the copy duly authenticated with the seal of the office.

16. No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself (*a*).

17. Any affidavit which would be insufficient if sworn before

(*a*) See now Commissioners for Oaths Act, 1889 (52 Vict. c. 10), s. 1.

the solicitor himself shall be insufficient if sworn before his clerk, or partner.

18. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used, unless by leave of the court or a judge.

19. Except by leave of the court or a judge no order made *ex parte* in court founded on any affidavit shall be of any force unless the affidavit on which the application was made was actually made before the order was applied for, and produced or filed at the time of making the motion.

19A. The consent of a new trustee to act shall be sufficiently evidenced by a written consent signed by him and verified by the signature of his solicitor. . . .

II. AFFIDAVITS AND EVIDENCE IN CHAMBERS.

20. The party intending to use any affidavit in support of any application made by him in chambers in the Chancery Division shall give notice to the other parties concerned of his intention in that behalf.

21. All affidavits which have been previously made and read in court upon any proceeding in a cause or matter may be used before the judge in chambers.

22. Every alteration in an account verified by affidavit to be left at chambers shall be marked with the initials of the commissioner or officer before whom the affidavit is sworn, and such alterations shall not be made by erasure.

23. Accounts, extracts from parish registers, particulars of creditors' debts, and other documents referred to by affidavit, shall not be annexed to the affidavit, or referred to in the affidavit as annexed, but shall be referred to as exhibits.

24. Every certificate on an exhibit referred to in an affidavit signed by the commissioner or officer before whom the affidavit is sworn shall be marked with the short title of the cause or matter.

III. TRIAL ON AFFIDAVIT.

25. Within fourteen days after a consent for taking evidence by affidavit as between the parties has been given, or within such times as the parties may agree upon, or the court or a judge *may* allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof.

26. The defendant, within fourteen days after delivery of such list, or within such time as the parties may agree upon, or the court or a judge may allow, shall file his affidavits and deliver *to* the plaintiff or his solicitor a list thereof.

27. Within seven days after the expiration of the last-mentioned fourteen days, or such other time as aforesaid, the plaintiff

shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof.

28. When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court or a judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the court or a judge. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production.

29. The party to whom such notice as is mentioned in the last preceding Rule is given shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined.

30. When the evidence under this Order is taken by affidavit, such evidence shall be printed, and the notice of trial shall be given at the same time after the close of the evidence as in other cases is by these Rules provided after the close of the pleadings: provided that other affidavits may be printed if all the parties interested consent thereto, or the court or a judge so order: provided also that this Rule shall not apply in the Probate, Divorce and Admiralty Division to default actions *in rem*, or references in actions, or actions for limitation of liability, unless the court or a judge shall otherwise order.

COUNTY COURT RULES, 1903.

ORDER XVI.

DISCOVERY AND INSPECTION.

1. Any party to any action or matter may, without filing an affidavit, by leave of the court (*a*), deliver interrogatories in writing for the examination of any one or more of the opposite parties; and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories

(*a*) By Order LV. "court" includes a judge or registrar exercising the powers of the court in chambers as well as in open court.

each of such parties is to answer: Provided that interrogatories which do not relate to any question in the action or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

2. If leave is granted, an order shall be drawn up by the registrar and served by the applicant on the party against whom the order is made. Such order shall be according to the form in the Appendix, and shall specify the number of days within which the interrogatories are to be delivered by the applicant, and also the time within which the affidavit in answer is to be filed.

3. On an application for leave to deliver interrogatories the particular interrogatories proposed to be delivered shall be submitted to the court. In deciding upon such application, the court shall take into account any offer which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents relating to the subject in question, or any of them; and shall also consider whether the application has been made too early in the proceedings in the action or matter, or too late to allow of the answers being used at the hearing; and leave shall be given as to such only of the interrogatories submitted as the court considers necessary either for disposing fairly of the action or matter, or for saving costs.

4. In adjusting the costs of the action or matter inquiry shall, at the instance of any party, be made into the propriety of exhibiting interrogatories; and if it is the opinion of the registrar on taxation, or of the judge, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

5. Interrogatories shall be according to the form in the Appendix, with such variations as circumstances may require.

6. If any party to an action or matter be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

7. Any objection to answer any one or more of several interrogatories, on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purpose of the action or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

8. Interrogatories shall be answered by affidavit according to the form in the Appendix, with such variations as circumstances may require. Such affidavit shall be filed and a copy thereof delivered to the party interrogating within the time named in the order giving leave to interrogate.

9. If any person interrogated omits to answer, or answers insufficiently, the party interrogating, after giving to such person two clear days' notice of the time and place at which he intends to apply, may apply to the court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer, or to answer further, either by affidavit or *viva voce* examination before the court, as the court may direct.

10. Any party to any action or matter may, without filing any affidavit, apply to the court for an order directing any other party to the action or matter to make discovery on oath of the documents which are or have been in his possession or power relating to any question therein. On the hearing of such application the court may either refuse or adjourn the same, if satisfied that such discovery is not necessary or not necessary at that stage of the action or matter, or make such order, either generally or limited to certain classes of documents, as the court may, in its discretion, think fit. Provided that discovery shall not be ordered when and so far as the court is of opinion that it is not necessary either for disposing fairly of the action or matter, or for saving costs. If an order is made it shall be drawn up by the registrar and served by the applicant on the party against whom the order is made. Such order shall be according to the form in the Appendix, and shall specify the time within which the affidavit in answer is to be filed.

11. The affidavit to be made by a party against whom such order as is mentioned in the last preceding Rule has been made shall specify which, if any, of the documents therein mentioned he objects to produce, and on what grounds, and it shall be according to the form in the Appendix, with such variations as circumstances may require. Such affidavit shall be filed, and a copy thereof delivered to the party who obtains the order within the time named in the order.

12. The court may, at any time during the pendency of any action or matter, order the production upon oath, by any party thereto, of such of the documents in his possession or power relating to any question in such action or matter as the court may direct; and the court may deal with such documents, when produced, in such manner as may be just.

13. Any party to an action or matter may at any time give notice in writing to any other party in whose particulars, notices, or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, and

to permit him to take copies thereof ; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or matter, unless he satisfies the court that such document relates only to his own title, he being a defendant to the action or matter, or that he had some other cause or excuse which the court deems sufficient for not complying with such notice ; in which case the court may allow the same to be put in evidence on such terms as to costs and otherwise as the court may think fit.

14. Notice to any party to produce any documents under the last preceding Rule shall be according to the form in the Appendix, with such variations as circumstances may require.

15. The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in Rule 11 of this Order, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of bankers' books or other books of account, or books in constant use for the purposes of any trade or business, or in case the party is not acting by a solicitor, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what grounds. Such notice shall be according to the form in the Appendix, with such variations as circumstances may require.

16.—(1) If any party served with notice under Rule 13 of this Order omits to give such notice of a time for inspection, or objects to give inspection, or offers inspection elsewhere than is provided by Rule 15, the court may, on the application of the party desiring it, make an order for inspection at such place and in such manner as the court may think fit : Provided that the order shall not be made when and so far as the court is of opinion that it is not necessary either for disposing fairly of the action or matter, or for saving costs.

(2) Any application to inspect documents, except such as are referred to in the particulars, notices, or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The court shall not make an order for inspection of such documents when and so far as the court is of opinion that it is not

necessary either for disposing fairly of the action or matter, or for saving costs.

17. In any pending action or matter an order upon the lord of a manor to allow limited inspection of the court-rolls may be made on the application of a copyhold tenant supported by an affidavit that he has applied for inspection, and that the same has been refused.

18. In any action against or by a sheriff or high bailiff or other officer discharging the like functions, in respect of any matters connected with the execution of his office, the court may, on the application of either party, order that the affidavit to be made in answer either to interrogatories or to an order for discovery shall be made by the officer actually concerned.

19.—(1) Where inspection of any business books is applied for, the court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations, or alterations. Provided that, notwithstanding that such copy has been supplied, the court may order inspection of the book from which the copy was made.

(2) Where on an application for an order for inspection privilege is claimed for any document, the court may inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The court may, on the application of any party to an action or matter at any time, and whether an affidavit of documents has or has not been already ordered or made, make an order requiring any other party to state by affidavit whether any specific documents, to be specified in the application, are or have at any time been in his possession or power; and if not then in his posssession, when he parted with the same, and what has become thereof. Such application shall be made on affidavit stating that in the belief of the deponent the party against whom the application is made has or has at some time had in his possession or power the documents specified in the application, and that they relate to the matters in question in the action or matter, or to some of them.

20. If a party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action or matter, or that for any other reason it is desirable that any issue or question in dispute in the action or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be

determined first, and reserve the question as to the discovery or inspection.

21. If any party fails to comply with an order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment.

22. In every action or matter the costs of discovery, by interrogatories or otherwise, shall, unless otherwise ordered by the court, be secured in the first instance as provided by Rule 23 of this Order, by the party seeking such discovery, and shall be allowed as part of his costs, where, and only where, such discovery appears to the judge at the trial, or, if there is no trial, to the registrar on taxation, to have been reasonably asked for.

23 and 24. [*Are as to amount of security to be paid into court and payment out of amount paid in.*]

ORDER XVIII.

EVIDENCE.

1. Except where otherwise provided by these rules, the evidence of witnesses on the trial of any action or hearing of any matter shall be taken orally on oath; and where by these rules evidence is required or permitted to be taken by affidavit, such evidence shall nevertheless be taken orally on oath if the court, on any application before or at the trial or hearing, so directs.

2. The judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the trial or hearing, on such conditions as he may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with be examined by interrogatories or otherwise before an examiner: Provided that, where it appears to the judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

3 and 4. [*Deal with the issue and service of summonses to witnesses.*]

5. Where a witness served with a summons containing a direction for the production of any documents at the trial does not produce the same, the judge may, upon admission or proof that the summons was served within a reasonable time, and that such documents are in the possession or power or under the control of the party so served, and that they relate to the matter then pending before him, make an order for their production by the witness, and may deal with them, when produced, and with

all costs occasioned by their non-production, as may be just: Provided that nothing herein shall prevent the receiving of secondary evidence where admissible.

6. Where a party desires to give in evidence any document, he may, not less than five clear days before the trial, give notice to any other party in the action or matter who is competent to make admissions requiring him to inspect and admit such document; and if such other party does not within three days after receiving such notice make such admission, any expense of proving the same at the trial shall be paid by him, whatever may be the result, unless the court otherwise orders; and no costs of proving any document shall be allowed unless such notice has been given, except in cases where, in the opinion of the judge at the trial, or the registrar on taxation, the omission to give such notice has been a saving of expense.

7. Notices to admit or to produce documents shall be according to the forms in the Appendix, with such variations as circumstances may require.

An affidavit of the party, or his solicitor, or of some person in the permanent and exclusive employ of either of them, of the service of any notice to admit or to produce, and of the time when it was served, with a copy of the notice to admit or to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

8. If a notice to admit or produce comprises documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

9. Where any documents which would, if duly proved, be admissible in evidence are produced to the court from proper custody they shall be read without further proof, if in the opinion of the court they appear genuine, and if no objection is taken thereto; and if the admission of any documents so produced is objected to, the court may adjourn the hearing for the proof of the documents, and the party objecting shall pay the costs caused by such objection, in case the documents shall afterwards be proved, unless the court otherwise orders.

10. Where an instrument which may be legally stamped after its execution is produced as evidence, and the same is unstamped or insufficiently stamped, it shall not be received in evidence until the party desirous of giving the instrument in evidence produces to the court the receipt of the registrar for the amount of the unpaid duty, and the penalty payable by law on stamping the same, and the sum of one pound.

11. Where a party desires to use at the trial an affidavit by any particular witness, or an affidavit as to particular facts as to which no order has been made under Rule 2 of this Order, he may, not less than four clear days before the trial, give a notice, with a copy of such affidavit annexed, to the party against whom

such affidavit is to be used; and unless such last-mentioned party shall two clear days at least before the trial give notice to the other party that he objects to the use of such affidavit, he shall be taken to have consented to the use thereof, unless the judge otherwise orders; and the judge may make such order as he may think fit as to the costs of or incidental to any such objection.

12. All documentary evidence taken at the trial of any action or matter may be used in any subsequent proceedings in the same action or matter.

13. Evidence taken subsequently to the trial or hearing of any action or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial or hearing.

14. The practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial shall extend and be applicable to evidence taken in any action or matter at any stage.

15. The practice of the court with respect to evidence at a trial, when applied to evidence to be taken before an officer of the court or other person in any action or matter after the trial or hearing, shall be subject to any special directions which may be given in any case.

16. Any party may, at the trial of an action or matter, use in evidence any one or more of the answers, or any part of an answer, of the opposite party to interrogatories, without putting in the others, or the whole of such answer: Provided that in such case the judge may look at the whole of the answers, and if he is of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in.

17. Affidavits and depositions shall be read as the evidence of the person by whom they are used.

EXAMINATIONS.

18. The court may in any action or matter, where it appears necessary for the purposes of justice, make an order for the examination upon oath before the court or any officer of the court, or any other person, and at any place in England or Wales, of any witness or person, and may empower any party to any such action or matter to give such deposition in evidence therein on such terms, if any, as the court may direct.

19. Where any witness or person mentioned in the last preceding rule resides out of the district of the court, the judge may appoint the registrar of the court in the district of which such witness or person resides to take the examination.

20. The court may in any action or matter, at any stage of

the proceedings, order the attendance of any person for the purpose of being examined or of producing to or before any examiner any writings or other documents which the court may think fit to be produced, and any person served with any such order shall be bound to attend accordingly: Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the trial. [*The rule goes on to provide the method of service.*]

21. Any person wilfully disobeying any order requiring his attendance for the purpose of being examined or producing any document to or before an examiner shall be deemed guilty of contempt of court, and may be dealt with accordingly.

22. Any person required to attend before an examiner for the purpose of being examined or of producing any document shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court.

23. [*Provides that the examiner is to be furnished with certain documents.*]

24. The examination shall take place in the presence of the parties, or their counsel or solicitors, or the agents of such solicitors, and the witnesses shall be subject to cross-examination and re-examination.

25. The depositions taken before an officer of a county court, or before any other person appointed to take the examination, shall be taken down in writing by or in the presence of the examiner, not ordinarily by question and answer, but so as to represent as nearly as may be the statements of the witness, and when completed shall be read over to the witness and signed by him in the presence of the parties, or such of them as may think fit to attend. If the witness refuses to sign the depositions, the examiner shall sign the same. The examiner may put down any particular question or answer if there appears to be any special reason for doing so, and may put any question to the witness as to the meaning of any answer, or as to any matter arising in the course of the examination. Any questions which are objected to shall be taken down by the examiner in the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question.

26. If any person duly summoned to attend for examination or to produce any document refuses to attend, or, if having attended, he refuses to be sworn or to answer any lawful question, or to produce such document, a certificate of such refusal, signed by the examiner, shall be filed with the registrar, and thereupon the party requiring the attendance of the witness may apply to the judge for an order directing the witness to attend, or to be

sworn, or to answer any question, or to produce such document, as the case may be.

27. If any witness objects to any question which may be put to him before an examiner, the question so put, and the objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the registrar to be filed, and the validity of the objection shall be decided by the judge.

28. In any case under the two last preceding rules, the judge may order the witness to pay any costs occasioned by his refusal or objection.

29. When the examination of any witness before any examiner has been concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the registrar to be filed.

30. The person taking the examination of a witness under these rules may, and if need be shall, make a special report to the court touching such examination and the conduct or absence of any witness or other person thereon; and the judge may direct such proceedings and make such order as upon the report he may think just.

31. Except where otherwise provided by this Order, or directed by the judge, no deposition shall be given in evidence at the trial of the action or matter without the consent of the party against whom the same may be offered, unless the judge is satisfied that the deponent is dead, or out of England and Wales, or unable from sickness or other infirmity to attend the trial, in any of which cases the depositions certified under the hand of the examiner shall be admissible in evidence, saving all just exceptions, without proof of the signature to such certificate.

32. Any officer of the court, or other person directed to take the examination of any witness or person, may administer oaths.

ORDER XIX.

AFFIDAVITS.

1. All affidavits shall be expressed in the first person and shall be drawn up in paragraphs and numbered.

2. All affidavits, other than those for which forms are given in the Appendix, shall state the deponent's occupation, quality, and place of residence, and also what facts or circumstances deposed to are within the deponent's own knowledge, and his means of knowledge, and what facts or circumstances deposed to are known to or believed by him by reason of information derived from other sources than his own knowledge, and what such sources are. The costs of every affidavit which unnecessarily sets forth matters of hearsay, or argumentative matter, or copies

of or extracts from documents, shall be paid by the party filing the same.

3. [*States how affidavits are to be intituled.*]

4. It shall be stated in a note at the foot of every affidavit filed on whose behalf it is so filed, and such note shall be copied on every office or other copy furnished to a party.

5. The costs of affidavits not in conformity with the preceding rules of this Order shall be disallowed on taxation, unless the court otherwise directs.

6. [*Makes provision as to the jurat where an affidavit is made by two or more deponents.*]

7. Before any affidavit is used it shall be filed in the office of the registrar; but this rule shall not hinder a judge from making an order in an urgent case upon the undertaking of the applicant to file any affidavit sworn before the making of such order, provided that such order shall not issue until such affidavit has been filed.

8. [*Provides that an affidavit shall not be filed if sworn before the party tendering the same or his solicitor, &c.*]

9. No affidavit or other document shall be filed or used in any action or matter, unless the court otherwise orders, which is blotted so as to obliterate any word, or which is illegibly written, or so altered as to cause it to be illegible, or in the body or jurat of which there is any interlineation, alteration, or erasure, unless the person before whom the same is sworn has duly initialled such interlineation or alteration, and in the case of an erasure has re-written and signed in the margin of the affidavit or document the words or figures appearing to be written on the erasure, or which is so imperfect upon the face thereof by reason of having blanks thereon or otherwise that it cannot easily be read or understood.

10. Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the court is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent.

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